16-56704

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHMET DOĞAN, individually and on behalf of his deceased son FURKAN DOĞAN; and HIKMET DOĞAN, individually and on behalf of her deceased son, FURKAN DOĞAN,
Plaintiffs-Appellants,
v.
EHUD BARAK,
Defendant-Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV 15-08130-ODW (GJSX)
HONORABLE OTIS D. WRIGHT II

BRIEF OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutions

Other Authorities

PRELIMINARY STATEMENT

This appeal asks the Court to do something no court has done in the nation's history. Appellants seek to hold Ehud Barak, Israel's former Minister of Defense, liable for his official actions in planning and overseeing an authorized military operation to enforce a maritime blockade of the Gaza Strip. The U.S. Government filed a suggestion of immunity for Mr. Barak in the district court, concluding that he is immune under common law foreign official immunity—a branch of common law sovereign immunity—because "[a]ll of [Appellants'] claims challenge actions undertaken by Barak in his former role as Israeli Minister of Defense." ER85. Following a century's worth of binding precedent, the district court agreed and dismissed the case. It held that it owes complete deference to the Executive Branch's determination and that, in any event, Mr. Barak is entitled to immunity under the common law because Appellants undisputedly challenge only his official acts. Appellants now ask the Court to countermand the Executive's determination that common law sovereign immunity applies, a literally unprecedented step.

The dismissal should be affirmed. Mr. Barak is immune, first and foremost, because the Executive has determined he is immune. The Supreme Court has held, with respect to official immunity and sovereign immunity generally, that if the Executive issues a suggestion of immunity, a court must "surrender[] its jurisdiction." *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010). And regardless

of the Executive's specific determination in this case, this Court can also affirm the district court's independent determination that Mr. Barak is immune, and avoid the issue of deference to the Executive altogether.

This Court should also reject Appellants' invitation to invent exceptions to official immunity. Appellants propose two: (1) that the Torture Victim Protection Act (TVPA) abrogates common law immunity; and (2) that immunity does not apply when a plaintiff alleges *jus cogens* violations of international law. Both claims are wrong. The TVPA is silent with respect to common law official immunity and therefore, under well-established rules of statutory construction, must be read to leave such immunity intact—a conclusion confirmed by Supreme Court decisions applying the same rules to recognize common law immunities under 42 U.S.C. § 1983, a statute of even greater breadth than the TVPA. The purported *jus cogens* exception is equally groundless. It has never existed under the common law, has been rejected as a matter of international law, and is foreclosed by Executive policy. Furthermore, its adoption would eviscerate immunity, embroil the Judiciary in adjudicating the legality of military operations by friend and foe, and expose U.S. officials to reciprocal treatment by foreign nations.

Substantive immunity law assigns responsibility for immunity determinations to the Executive because, as the branch most responsible for

conducting our foreign relations, it is equipped to determine whether wrongs "involving our relations with … foreign power[s]" are better resolved "through diplomatic negotiations" or "judicial proceedings." *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943). Appellants would have the Court assume that responsibility so that it can judge whether Mr. Barak is liable for tactical decisions of Israeli soldiers enforcing a maritime blockade of a territory run by a terrorist organization dedicated to Israel's destruction. They would have the Court take sides in a dispute between Israel and Turkey that was resolved only with the Executive Branch playing the role of neutral intermediary. With so sensitive an issue, at so sensitive a moment, in so sensitive an area of the world, Appellants ask for a revolution in the law of sovereign immunity. This Court should refuse that request.

JURISDICTIONAL STATEMENT

Because Mr. Barak is entitled to foreign official immunity, the district court correctly held that it lacks subject matter jurisdiction and dismissed this case under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The parties agree that this Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the district court was correct to conclude that defendant Ehud Barak is immune from suit where (i) he has been sued for his actions as Israel's

Minister of Defense, which the Government of Israel has confirmed to the U.S. State Department were official acts taken on Israel's behalf, and (ii) the U.S. Department of State has submitted a suggestion of immunity to the court.

STATEMENT OF THE CASE

I. Factual Background

A. The *Mavi Marmara* Interception and Its Aftermath

The events at issue in this case occurred against the backdrop of an armed conflict between the State of Israel and Hamas, a designated Foreign Terrorist Organization committed to Israel's destruction. *See* ER4; SER2.[1] In 2007, Hamas violently seized control of the Gaza Strip from the Palestinian Authority. ER4. In the ensuing years, Hamas used Gaza as a base of operations to dramatically increase its attacks on Israel's civilian population. ER4; *see also* SER7-8 (describing Hamas's launching of thousands of rocket and mortar attacks on Israeli population centers, as well as cross-border raids). In January 2009, Israel imposed a maritime blockade of Gaza to stem the flow of arms to Hamas and prevent further attacks. ER4; ER125 ¶ 18. Israel provided formal notice of the blockade through appropriate channels. *See* ER125 ¶¶ 20-21.

After the blockade was announced, the Free Gaza Movement, a Cypriot entity, and the Foundation for Human Rights and Freedom and Humanitarian

[1] "SER" refers to the Supplemental Excerpts of Record of Defendant-Appellee.

relief, a Turkish entity known by its Turkish initials, IHH, began to organize a flotilla of six ships to challenge the blockade.[2] ER126 ¶ 24. The organizers hoped that the flotilla would help build international opposition to Israel's efforts. ER4. Israel learned of the flotilla's plans in February 2010, and immediately began diplomatic efforts to avoid any confrontation at sea. ER5. In case those efforts failed, Israel also began planning to intercept the flotilla, *id.*; ER127-28 ¶¶ 27, 30-32, consistent with its obligation under international law to maintain an effective and impartial blockade, SER11.

Despite Israel's diplomatic efforts, the flotilla embarked in late May. Three of its six vessels departed from Turkey, including the Comoros-flagged *Mavi Marmara*. ER4; ER126 ¶ 25. On May 31, 2010, the Israeli navy intercepted the flotilla approximately 60 miles from the blockade. ER5. The navy issued four warnings to the flotilla that it was approaching restricted waters; that it could deliver any humanitarian supplies it might be carrying to the Israeli port of Ashdod, from where they would be delivered to Gaza over land; and that all legal measures would be taken to stop the flotilla from breaching the blockade. *Id.* When the *Mavi Marmara* ignored the warnings and repeatedly broadcast its plans to run the blockade, the navy decided to board. *Id.*

[2] By May 2010, Israel had determined that IHH had financial and organizational links to Hamas and other violent extremist organizations. SER21; SER39-40.

The Israel Defense Forces (IDF) initially tried to board the *Mavi Marmara* from speedboats, but were blocked by violent resistance from the ship's passengers. *Id.* The IDF then deployed soldiers from helicopters, and they too encountered a violent response. The initial soldiers to drop onto the ship were attacked with clubs, knives, axes, metal poles, and other weapons. *Id.* There are conflicting accounts of whether the activists on board also had or used firearms. *Id.* The ensuing efforts by the IDF to quell the violence resulted in the deaths of ten *Mavi Marmara* activists, and injuries to nine Israeli soldiers, several of whom were severely wounded. *See* ER5-6; SER10. Indeed, of the first five soldiers to board the vessel, three were captured and taken below deck, and the other two were shot. SER27-35.

Appellants' son, Furkan Doğan, was among the activists killed. ER123 ¶ 12. According to the complaint, he was shot in the head, face, back, leg, and foot. ER130 ¶ 39.

The *Mavi Marmara* incident caused a sharp deterioration in Israeli-Turkish relations. In the United States, the Senate passed a resolution condemning Hamas as a terrorist organization, condemning the flotilla's efforts to breach Israel's lawful blockade, and expressing strong support for Israel's actions. ER7; SER37-43. The House of Representatives also passed a series of bills and resolutions expressing similar views. ER7. The U.S. Government worked behind the scenes

to achieve a rapprochement between Israel and Turkey. ER7, 20. President Obama, Vice President Biden, and Secretary of State Kerry all were personally involved in the effort. ER7. In June 2016, Israel and Turkey reached an agreement under which Israel agreed to pay Turkey an *ex gratia* sum of $20 million to compensate the bereaved families, without admitting any wrongdoing, and Turkey agreed to end all criminal and civil claims against Israel and its personnel. *Id.*

B. Mr. Barak's Role as Minister of Defense

Appellee Ehud Barak has served Israel as Prime Minister, Minister of Defense, and Chief of Staff of the IDF. He is one of the most decorated soldiers in Israel's history, having participated during a 35-year military career in renowned anti-terrorist and hostage rescue operations. In 1992, the United States named Mr. Barak a commander in the Legion of Merit, one of the military's highest awards.

"At all times relevant to this lawsuit," Mr. Barak "was the Israeli Defense Minister," vested with "the authority to direct the Army and IDF forces." ER6; *see* ER122 ¶ 9. According to the complaint, on instructions from Israel's Prime Minister, Mr. Barak "directly participated in the planning of the IDF operation, was responsible for ordering the attack on the Gaza Freedom Flotilla, and had command responsibility over the IDF troops conducting the operation against the Flotilla and thereafter." ER127 ¶¶ 28, 30; *see* ER6. The complaint alleges that

"the Ministry of Defense held several meetings in April and May 2010 to prepare and plan the operation against the Flotilla" and that "the Minister of Defense, Defendant Barak, approved the overall format of the operation." ER128 ¶ 31. The complaint further alleges that the plans to stop the flotilla also were approved unanimously by Israel's top officials. ER128-29 ¶¶ 32-33. Plaintiffs do not allege that Mr. Barak acted in any respect in a private capacity, and beyond alleging that he had command responsibility as Minister of Defense, Appellants do not allege that he had any role in carrying out the operation.

II. Proceedings Below

Appellants are citizens and residents of Turkey. They brought this action against Mr. Barak in October 2015, asserting claims individually and as successors-in-interest to Furkan Doğan under the Alien Tort Statute (ATS), 28 U.S.C. § 1350; the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note; and the Anti-Terrorism Act, 18 U.S.C. § 2333. ER7-8. They alleged that what happened to Doğan on board the *Mavi Marmara* constitutes torture and extrajudicial killing,[3] and that Mr. Barak is personally liable.[4] They obtained

[3] As Mr. Barak urged below in the alternative, the facts alleged here do not amount to torture or extrajudicial killing. The district court did not reach that question, having determined that Mr. Barak is immune regardless of the labels used in the complaint.

[4] A separate suit relating to the flotilla's effort to breach the blockade, filed directly against the State of Israel, has been dismissed under the FSIA. *Schermerhorn v.*

transient jurisdiction over Mr. Barak, who resides in Israel, by tagging him with a summons when he was in Los Angeles for a speaking engagement.

Mr. Barak, through counsel retained by the State of Israel, moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim, arguing that Appellants' claims were barred by foreign official immunity, the political question doctrine, and the act of state doctrine, and that Appellants failed to state legally cognizable claims under the applicable statutes. ER3.

In connection with Mr. Barak's motion to dismiss, the Embassy of Israel submitted a diplomatic note to the U.S. State Department requesting that the U.S. Government file a suggestion of immunity (SOI) for Mr. Barak in the district court. ER118-19. Israel explained that "all of the actions of Mr. Barak at issue in the lawsuit were performed exclusively in his official capacity" as Minister of Defense and that the complaint thus seeks to hold Mr. Barak personally liable "for an authorized military action taken by the State of Israel." ER118. Because the lawsuit challenged the legality of "actions taken by the Government of the State of Israel by its agents," Israel concluded that it was "in essence a suit filed against the State of Israel itself," and noted that it "appears to be part of an orchestrated and politically motivated effort to invoke and abuse the judicial processes of other

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Israel, No. 16-cv-0049, 2017 WL 384282 (D.D.C. Jan. 25, 2017), *appeal docketed*, No. 17-7023 (D.C. Cir. Feb. 22, 2017).

nations, including of the United States, to achieve political ends antagonistic to the interests of the State of Israel." ER118-19.

The State Department determined that Mr. Barak is indeed immune. ER92-93. The Department's Legal Adviser explained that "acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate," a conclusion "reinforced when, as is the case here, the foreign government also asserts that the actions of its official were authorized acts taken in an official capacity." ER93. Having also considered "the overall impact of this matter on the foreign policy of the United States," the State Department concluded that the "military orders issued by Barak, which were authorized by Israel, are official acts for which he is immune from suit," observing that "Plaintiffs have provided no reason that would call [that conclusion] into question." *Id.* Based on the State Department's determination of immunity, the Department of Justice submitted an SOI in the district court, stating that Mr. Barak is immune because "Plaintiffs expressly challenge Barak's exercise of his official powers as the former Minister of Defense of Israel." ER84-86.

The district court granted Mr. Barak's motion to dismiss, holding that, under the Supreme Court's decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010), Mr. Barak was entitled to foreign official immunity on two independent bases. First,

the court held that it owed absolute deference to the Executive Branch's SOI for Mr. Barak. ER15. The court explained that the Supreme Court has repeatedly afforded absolute deference to the Executive's determinations regarding sovereign immunity and that such deference reflects the Executive's institutional responsibility and expertise for conducting the nation's foreign affairs. ER15-17. The court also noted that Appellants had cited no Supreme Court authority for their contrary position. ER17-18.

Second, the court concluded, as a matter of its independent judgment, that Mr. Barak is entitled to official immunity under the applicable common law. The court stated that Mr. Barak's alleged actions "are irrefutably 'official public acts'" and that "[c]ourts are near-uniform in granting immunity to foreign officials in such circumstances." ER19 (citing cases). Having made that determination, the court also observed that the "diplomatic firestorm following this incident" confirms that the dispute is best resolved "through diplomacy rather than in the courts," noting that "[i]t took the personal efforts of this country's President, Vice President, and Secretary of State to broker a resolution—which, notably, included the termination of all civil lawsuits and criminal prosecutions arising from the incident." ER20-21.

The court also rejected Appellants' arguments that Mr. Barak fell within an exception to foreign official immunity. The court first held that there was no

exception for claims alleging violations of *jus cogens* norms, a subset of customary international law rules that include prohibitions on torture and extrajudicial killing. ER21-23 & n.18. The court explained that it was not free to carve out exceptions the Executive had not recognized, and the Executive had not recognized an exception for *jus cogens* claims. ER22. Furthermore, the court reasoned that a *jus cogens* exception would "effectively eviscerate the immunity for *all* foreign officials" by merging the immunity inquiry with the merits inquiry, making both about whether an official committed a *jus cogens* violation. *Id.* Finally, the court rejected Appellants' alternative argument that the TVPA abrogated official immunity, concluding that neither the TVPA's text nor legislative history contains a clear statement that Congress intended to abrogate the common law immunity officials enjoy. ER23-26. Because the district court concluded that Mr. Barak is entitled to foreign official immunity, it did not reach his alternative grounds for dismissal.

STANDARD OF REVIEW

In reviewing a dismissal under Rule 12(b)(1), this Court reviews questions of law *de novo* and factual findings regarding jurisdictional issues for clear error. *Barapind v. Gov't of Republic of India*, 844 F.3d 824, 828-29 (9th Cir. 2016). The Court may affirm the district court's dismissal on any ground supported by the record. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

SUMMARY OF THE ARGUMENT

As the district court correctly held, Mr. Barak is entitled to official immunity on two bases recognized in *Samantar v. Yousuf*, 560 U.S. 305 (2010). He is immune first because the Executive has submitted a suggestion of immunity, which courts must treat as conclusive. And he is immune because the common law grants immunity where, as here, the acts complained of are indisputably official acts.

Appellants resist this conclusion on three principal grounds, all equally meritless. *First*, they contend that courts do not owe absolute deference to Executive suggestions of immunity, an argument that is foreclosed by *Samantar* and other binding precedents. This argument is also ultimately of little help to Appellants. The Executive's determination is at least owed substantial deference, and, in any event, its conclusion here that Mr. Barak is immune is simply a straightforward application of the underlying rule, which the district court independently found applicable, that foreign officials are immune from suit for their official acts.

Second, Appellants argue that the TVPA abrogates common law immunity. The TVPA, however, is silent regarding such immunity and thus must be read to preserve it. Appellants make no effort to square their position with the Supreme

Court's holding on precisely the same basis that § 1983 does not abrogate common law immunities.

Third, Appellants assert a *jus cogens* exception to common law immunity. No such exception, however, exists under common or international law or has been recognized by the Executive. And besides being legally foreclosed, a *jus cogens* exception would amount to bad policy, transmuting immunity into an easily sidestepped pleading obstacle, embroiling the Judiciary in litigation over military operations worldwide, and exposing U.S. officials to reciprocal treatment in foreign courts.

Because Appellants' efforts to circumvent Mr. Barak's immunity have no basis in law, this Court should affirm.

ARGUMENT

I. Mr. Barak Is Immune from Appellants' Claims Under Common Law Official Immunity

A. Whether This Court Defers to the Executive's SOI or Independently Applies Common Law Immunity Principles, Mr. Barak Is Immune

Mr. Barak is immune from the claims in this suit because those claims concededly seek to hold him liable solely for his official acts as Israel's Minister of Defense. Foreign officials, whether current or former, are immune under the common law for acts performed in their official capacity. *See Samantar*, 560 U.S. at 322; *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009); *accord Chuidian v.*

Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990), *abrogated on other grounds by Samantar*, 560 U.S. 305. Here, Appellants claim that Mr. Barak is liable for his role in the IDF's interception of the flotilla. *See* ER127-30 ¶¶ 28-34. Because Mr. Barak was involved in the IDF interception solely in his capacity as Minister of Defense, he is immune here.

Under the common law, the courts have long approached immunity questions in two steps. At the first step, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department," and "[i]f the request was granted, the district court surrendered its jurisdiction." *Samantar*, 560 U.S. at 311. At the second step, if the sovereign did not request a State Department determination, or if the State Department did not act upon the sovereign's request, the court "had authority to decide for itself whether all the requisites for such immunity existed." *Id.* The court would grant immunity if it determined that "the ground of immunity is one which it is the established policy of the State Department to recognize." *Id.* at 312 (alteration omitted).

Here, as the district court correctly held, ER15-19, Mr. Barak is immune both under the State Department's express suggestion of immunity in this case and under the general rule that officials are immune for their official acts. First, the Executive Branch's SOI is dispositive. ER77-93. In *Samantar*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) codified the immunity of

foreign states but not of foreign officials, and so left intact the State Department's historical "role in determinations regarding individual official immunity." 560 U.S. at 323. That role, for well over a century, was to issue "binding determinations" of immunity that compelled the courts to surrender jurisdiction. *Chuidian*, 912 F.2d at 1100; *see Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004).[5] The Executive's SOI in this case was just such a "binding determination[],"requiring the district court to recognize Mr. Barak's immunity and dismiss the suit. *See, e.g.*, *Matar*, 563 F.3d at 14 (adopting Executive's suggestion that a former Israeli official accused of war crimes was entitled to common law official immunity).

Second, Mr. Barak is entitled to immunity even without the SOI. In the absence of a suggestion of immunity in a particular case, a court must independently apply the "established policy of the State Department" to determine whether a defendant is immune. *Samantar*, 560 U.S. at 312 (alteration omitted).

[5] Indeed, every court of appeals to consider the issue has recognized that before the FSIA, "courts practiced consistent deference to the Executive branch" regarding determinations of sovereign immunity. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 705 (9th Cir. 1992); *see Matar*, 563 F.3d at 13; *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (per curiam); *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974); *Ye v. Zemin*, 383 F.3d 620, 624 (7th Cir. 2004); *Habyarimana v. Kagame*, 696 F.3d 1029, 1032-33 (10th Cir. 2012); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *Manoharan v. Rajapaksa*, 711 F.3d 178, 179 (D.C. Cir. 2013) (per curiam).

The Department's established policy is that foreign officials are immune for their official acts. *See, e.g.*, ER84-85; SER57; SER120. Here, Appellants challenge only Mr. Barak's "irrefutably 'official public acts.'" ER19. Their own complaint acknowledges that every act at issue was performed by Mr. Barak "in his position as Minister of Defense," ER127-28 ¶¶ 28-29, at the direction of the Prime Minister, ER128 ¶ 30, on behalf of the Government of Israel, ER130 ¶ 37. Israel, moreover, has confirmed that these were indeed all sovereign acts. ER118. Because Appellants "have in no instance alleged acts that were either personal or private in nature," *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008), Mr. Barak is entitled to official immunity from their claims. Thus, even if this Court does not agree that it must defer absolutely to the SOI, it should affirm Mr. Barak's immunity.[6]

Indeed, because this case involves a straightforward application of the rule that foreign officials are immune for their official acts, this Court need not decide

[6] The district court's opinion made certain, limited factual findings relating to the aftermath of the *Mavi Marmara* incident. A court may properly find facts in deciding a Rule 12(b)(1) motion, *see Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015), and in any event the court relied only on material that was incorporated by reference in the complaint or was properly subject to judicial notice. Appellants' assertion that the district court erred in citing extrinsic evidence, Br. 54-56, is wrong for these reasons, and, moreover, any error would be harmless because the district court did not rely on its factual findings in determining that Mr. Barak is immune, ER18-20; *see* Fed. R. App. P. 52.

what level of deference the SOI ought to receive. Appellants do not contest that, under the State Department's established policy, Mr. Barak is entitled to immunity, with or without an SOI. As explained below, *infra* at 42-43, that undisputed conclusion, by itself, resolves not only the threshold question of Mr. Barak's immunity, but also Appellants' mistaken claim that there is a *jus cogens* exception to immunity that is applicable here.

Furthermore, even if it were not entitled to absolute deference, the Executive's SOI for Mr. Barak clearly bolsters the district court's independent determination. As Appellants acknowledge, Br. 40, this Court routinely gives "serious weight" to the Executive's views on matters affecting foreign relations. *See, e.g.*, *Mujica v. AirScan Inc.*, 771 F.3d 580, 610 (9th Cir. 2014). Such deference reflects the President's "vast share of responsibility for the conduct of our foreign relations," *Altmann*, 541 U.S. at 702 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003)), and the Executive's corresponding advantages in expertise and resources in that arena, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

This case involves precisely the sort of circumstances in which the Executive's foreign relations responsibility and expertise deserve the most respect. Whether extraordinary circumstances in some hypothetical future case could in theory justify ignoring a suggestion of immunity, no such circumstances are

present here. Instead, working through normal processes, the Executive applied its established rule that "acts of defendant foreign officials who are sued for exercising the powers of their office" are immune, considered "the overall impact of this matter on the foreign policy of the United States," and concluded that Mr. Barak "enjoys immunity from suit with respect to this action." ER93. Furthermore, this case on its face involves complex multilateral relationships on a delicate issue in an important area of the world. Appellants acknowledge none of this in asking the Court to take the unprecedented step of allowing a suit to proceed despite a suggestion of immunity from the Executive. Appellants cite no case in the nation's history in which a court has done so, and we are aware of none.

In short, the Court need not resolve the precise degree of deference owed to the Executive's SOI in order to hold that Mr. Barak is immune from Appellants' claims. If, however, the Court does address this question, Mr. Barak submits that, as explained below, the answer is clear: SOIs receive absolute deference.

B. Contrary to Appellants' Argument, this Court Should Follow the Executive's Determination that Mr. Barak Is Immune

1. Courts Owe Equal Deference to Both Status- and Conduct-Based Immunities

Contrary to both Supreme Court and Ninth Circuit precedent, Appellants argue that the district court was not required to follow the Executive's SOI for Mr. Barak. Br. 32-42. They contend that, under the common law, courts are bound by

the Executive's determinations only with respect to status-based immunities, such as head-of-state immunity, and not with respect to the conduct-based immunities that foreign officials enjoy. That is so, Appellants argue, because status-based immunities implicate the Executive's duty under the Constitution's Reception Clause to "receive ambassadors and other public ministers," U.S. Const. art. II, § 3, whereas conduct-based immunities turn only on whether the defendant acted within the scope of her official duties. Br. 36-37. But this argument—which, Athena-like, emerged fully formed from a recent Fourth Circuit decision despite never having been so much as hinted at in the previous two centuries of case law—is inconsistent with both Supreme Court precedents and the history of sovereign immunity, and should therefore be rejected.

First, the Supreme Court's precedents foreclose Appellants' position. Most recently, in *Samantar*, the Court stated that the two-step procedure "for resolving a foreign state's claim of sovereign immunity" applied equally "when a foreign official asserted immunity." 560 U.S. at 311-12. In describing that procedure, *Samantar* drew no distinction between status- and conduct-based immunities, and instead made clear that for both, the same rule applies: If the Executive suggests immunity, "the district court surrender[s] its jurisdiction." *Id.* at 311. While Appellants say that *Samantar* should be read narrowly because the two foreign-official precedents on which the Court relied only involved status-based

immunities, Br. 35, that is false: Both involved consular officials whose immunity extended only to acts "performed in the course of [their] official duties." *Waltier v. Thomson*, 189 F. Supp. 319, 320 (S.D.N.Y. 1960); *accord Heaney v. Gov't of Spain*, 445 F.2d 501, 505 (2d Cir. 1971). Thus, *Samantar*'s framework, derived from these and similar cases, sweeps in immunity determinations that turn on whether the acts at issue were official ones. Because that conduct-based question is the question in this case, *Samantar*'s two-step inquiry—and its rule of deference to the Executive's SOI—governs.

Earlier Supreme Court cases likewise refute the notion that absolute deference is based on the Reception Clause. In a series of immunity cases, the Supreme Court held that courts are "required" to defer to suggestions of immunity. *E.g.*, *Peru*, 318 U.S. at 588.[7] Those decisions did not rely on or reference the Reception Clause, and had nothing to do with recognition. The guiding question in those cases, which dealt with foreign state-owned ships, was whether the ship was "devoted to the public use, and … employed in carrying on the operations of the government." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 37 (1945).[8] That

[7] *See also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is … not for the courts to deny an immunity which our government has seen fit to allow…."); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (similar).

[8] *See also The Navemar*, 303 U.S. at 76 (denying immunity to a Spanish-owned ship that was not "employed in public service"); *Peru*, 318 U.S. at 587-88 (vessel

question—very like the question whether a foreign official was acting in an official capacity—has nothing to do with the Reception Clause, yet the Court held in the vessel cases that courts must "accept and follow" suggestions of immunity. *Id.* at 36.

Furthermore, the vessel cases ground this deference requirement not in the Reception Clause but in the fact that the Executive Branch is "charged with the conduct of our foreign affairs" and is thus best positioned to determine whether recognizing sovereign immunity in a given case is in the nation's interests. *Peru*, 318 U.S. at 588; *see Hoffman*, 324 U.S. at 36 (explaining that courts defer to avoid "embarrassing" the Executive's efforts to "secur[e] the protection of our national interests and their recognition by other nations"). As the Court observed in *Peru*, "the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune," lest they "embarrass the executive arm of the [U.S.] government in conducting foreign relations." 318 U.S. at 588.

These reasons apply with equal force in cases concerning officials. A U.S. court passing judgment on the acts of one of a foreign state's highest ministers,

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is immune if owned by foreign state and of a "character entitling it to ... immunity")

whose government claims those acts as its own, would "challenge [the] dignity" of that state as surely as seizing its vessel would, and would likewise risk embarrassing the U.S. government in its conduct of foreign affairs. Put another way, regardless of whether status- or conduct-based immunities are involved, the Executive holds an advantage over the Judiciary in judging how a case affects the nation's interests, and is entitled to deference on that basis. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001) (observing that "how [a] case affects the interests of the United States … is an inherently political judgment, one that courts … are not competent to make"), *aff'd on other grounds*, 538 U.S. 468 (2003); *see also Ye v. Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) ("The determination to grant (or not grant) immunity can have significant implications for this country's relationship with other nations. A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state.").

Second, the evolution of the doctrine of foreign sovereign immunity confirms that absolute deference is not grounded in the Reception Clause. In 1952, in the so-called "Tate Letter," the State Department renounced a policy of absolute sovereign immunity in favor of a restrictive approach, under which the "private acts of a sovereign—commercial activities being the primary example—were not entitled to immunity." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699,

705 (9th Cir. 1992); *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-87 (1983). This development introduced a variable into the immunity equation—whether the acts at issue were public or private—unrelated to the sovereign's status and thus not involving any exercise of the Executive's recognition power.

Nevertheless, the development "had little, if any, impact on federal courts' approach to immunity analyses." *Altmann*, 541 U.S. at 690. "As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and courts continued to abide by that Department's suggestions of immunity." *Id.* (alteration omitted); *see Siderman*, 965 F.2d at 705. The fact that courts deferred absolutely to the State Department on the question of whether an act was or was not commercial belies Appellants' claim that only immunity determinations constituting a direct exercise of the Executive's Reception Clause power receive absolute deference.

Appellants ask this Court to ignore this history and line of binding precedents and adopt instead the less-deferential view recently taken by the Fourth Circuit in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012). *Yousuf*, which followed the Supreme Court's remand in *Samantar*, held that the Executive is owed "absolute deference" with respect to status-based immunities, but that for official immunity, the Executive's views carry only "substantial," not controlling,

weight. *Id.* at 733. But *Yousuf*'s distinction between "absolute deference" and "substantial weight" did no work in determining the outcome of the case because the Fourth Circuit agreed with the Executive that the defendant was not immune. *Id.* at 777-78; *see* Brief for the United States as Amicus Curiae, *Samantar v. Yousuf*, No. 13-1361, 2015 WL 412283, at *11-12, *23 (U.S. Jan. 30, 2015) (opposing certiorari because, although the Fourth Circuit's reasoning was wrong, the result was correct, and the Supreme Court reviews "judgments, not opinions"). Appellants thus ask this Court to apply *Yousuf*'s reasoning to do something that even *Yousuf* did not do, and which no court has ever done: overrule an Executive suggestion of immunity to allow claims to proceed that the Executive believes should be barred.

This Court should not do that. The Supreme Court's repeated command of absolute deference binds this Court, and *Yousuf*'s idiosyncratic approach is not consistent with that command. Indeed, the *Yousuf* opinion is not even consistent with its own logic. *Yousuf* gave only "substantial weight" to the Executive's determinations for conduct-based immunities because, it reasoned, such immunities "do not involve any act of recognition for which the Executive Branch is exclusively empowered." 699 F.3d at 773. But just four pages later, *Yousuf* noted that the State Department had made a suggestion of *non*-immunity for Samantar—a high-ranking official of Somalia before that state's government

collapsed—precisely because he was "a former official of a state with *no currently recognized government*" and therefore no recognized government existed to assert immunity for him. *Id.* at 777 (emphasis added).

Thus, on its own terms, *Yousuf*'s analysis is wrong. Like status-based immunities, official immunity in fact "involves a formal act of recognition[] that is a quintessentially executive function for which absolute deference is proper."[9] *Id.* at 772. So even if the Reception Clause were the sole font of the Executive's authority to make immunity determinations—and it is not—*Yousuf* itself demonstrates that questions of recognition are central to those determinations even when they involve conduct-based immunities.

This point is reinforced by the Supreme Court's recent decision in *Zivotofsky v. Kerry*, which held that the President has the exclusive "power to recognize foreign nations and governments" under both the Reception Clause and "[t]he text and structure of the Constitution" more generally. 135 S. Ct. 2076, 2085-86 (2015). The Court observed that "functional considerations" explain why this power resides in the Executive alone. *Id.* at 2086. Among other things, "[f]oreign countries need to know, before entering into diplomatic relations or commerce

[9] If the Court is nevertheless inclined to follow *Yousuf*, Mr. Barak respectfully suggests that it should first call for the views of the State Department on this issue. *See, e.g.*, *Cooper v. Tokyo Elec. Power Co.*, No. 15-56424, 2017 WL 2676775, at *4 (9th Cir. June 22, 2017).

with the United States … whether their officials will be immune from suit in federal court," and "[t]hese assurances cannot be equivocal." *Id.* *Zivotofsky* thus strongly suggests that immunity determinations should be left in the control of the Executive. The sharing of responsibility between the Judicial and Executive Branches that the Fourth Circuit proposed in *Yousuf* is inconsistent with *Zivotofsky*'s recognition that the country needs "one voice" in foreign affairs. *Id.*

For all these reasons, the Court should not adopt *Yousuf*'s newly invented immunity framework. Rather, as the Supreme Court has required, and as the weight of Court of Appeals authority holds, *see supra* at 16 n.5, this Court should follow the Executive's SOI for Mr. Barak and affirm the district court's dismissal.

2. Given the Need for Secrecy in Foreign Affairs, Courts Defer Even When the Executive Does Not Explain Its Position

Citing no authority, Appellants also argue that the Executive's SOI for Mr. Barak is not entitled to deference because it does not set forth the foreign policy implications of the case. Br. 42-43. Appellants cite no authority because every court to consider the question has held that the Executive is not required to justify its determination. For example, in *Spacil v. Crowe*, the State Department suggested immunity for a Cuban vessel without providing either "the plaintiffs []or this Court with the basis for its decision." 489 F.2d 614, 619 (5th Cir. 1974). Nevertheless, the Fifth Circuit deferred to the SOI, explaining that "[f]or more than 160 years American courts have consistently applied the doctrine of sovereign

immunity when requested to do so by the executive branch" and "have done so with no further review of the executive's determination." *Id.* at 617.

The Second Circuit reached a similar conclusion in *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971), holding that "where the State Department has given a formal recommendation, … the courts need not reach questions" of whether activity is properly classified as public or commercial. And in *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (per curiam), the Fourth Circuit likewise concluded that "the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry" because "the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion." *See also Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 343 (E.D.N.Y. 2013) (according complete deference to SOI that did not explain its foreign policy rationale), *aff'd*, 577 F. App'x 22 (2d Cir. 2014); *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 249, 251 (D.D.C. 2011) (same); SER118-22 (*Rosenberg* SOI); SER128-35 (*Drummond* SOI).

As Judge Wisdom explained in *Spacil*, "compelling reasons" justify deferring to the Executive "without question." 489 F.2d at 619. For one thing, the Judiciary is not institutionally equipped to second-guess the Executive. "The

executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary," and "in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Id.* Also, the executive may have good cause for withholding its reasoning. "It cannot be disputed that some legitimate diplomatic maneuvers demand total secrecy," and a requirement that the executive disclose its reasons "might itself create a serious risk of interference with foreign relations." *Id.* at 620; *see Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948) (recognizing that the Executive must keep some matters related to foreign affairs secret from courts and that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"). Here, the sensitivities of handling complex relations with key allies are precisely the sort of circumstances in which secrecy is to be expected.

3. Appellants' Remaining Arguments Against Deference Fail

Appellants' remaining arguments against absolute deference are equally unavailing. First, Appellants cite two cases in which a court did not follow the Executive's immunity determination. Br. 33 & n.8. In one, *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562 (1926), the Supreme Court acted contrary to State Department policy in recognizing immunity for merchant vessels owned by foreign

sovereigns. Appellants fail to mention, however, that the Supreme Court in *Hoffman* expressed disapproval that *Berizzi* had "not followed" the "salutary principle" of deferring to Executive determinations regarding immunity. 324 U.S. at 35 n.1. *Hoffman* did not explicitly overrule *Berizzi* because it "ha[d] no occasion to consider" the precise questions that case presented, but *Hoffman*'s statement that courts must not "allow an immunity on new grounds which the government has not seen fit to recognize" clearly abrogated *Berizzi*'s main premise. *Id.* at 35-36 & n.1. In any event, *Berizzi* could at most stand for the proposition that a court can allow an immunity the Executive would deny. The opposite proposition, that a court could impose liability despite an Executive suggestion of immunity, has far graver implications for comity. No case—neither *Berizzi* nor any other—has ever done that, and *Hoffman*, *Peru*, and *Samantar* forbid it.

The other case Appellants cite is a district court decision, which, even if it were not distinguishable, could not override Supreme Court precedent. In *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797-98 (N.D. Cal. 1987), the court rejected the government's suggestion that head-of-state immunity protected the Philippine solicitor general, reasoning that "he [was] neither a sovereign nor a foreign minister, the two traditional bases" for such immunity. But *Marcos* actually did defer to the State Department's SOI, only on different grounds. *Id.* at

799 (granting the official diplomatic immunity "[o]ut of respect for the foreign policy decisions of the Executive Branch"). Thus, at most, *Marcos* stands for the principle that the Executive Branch cannot arbitrarily expand the class of persons eligible for a certain category of immunity. And that principle has no bearing here because there is no dispute that Mr. Barak is a foreign official and is therefore eligible for foreign official immunity.

Finally, Appellants contend that the Ninth Circuit has "consistently declined to give binding effect to the foreign policy views of the Executive Branch." Br. 40. But the cases they cite hardly help their cause. In two of the cases, this Court deferred to the Executive's views and dismissed, *see Mujica*, 771 F.3d at 610-11; *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007); and in the third, the court emphasized that "[t]he State Department explicitly did *not* request that we dismiss this suit," *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1206 & n.14 (9th Cir. 2007).[10] Furthermore, these cases involved the political question and act of state doctrines, not the "*sui generis* context" of sovereign immunity. *Altmann*, 541 U.S. at 696. The Supreme Court has required absolute deference in the sovereign immunity context, but not in those other contexts, for the obvious reason that

[10] That portion of the decision, moreover, is not precedential, not having been adopted by a subsequent en banc decision. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008).

subjecting a state to liability is a greater affront to sovereignty, and thus a greater diplomatic danger, than adjudicating a matter between private parties that might have second-order diplomatic effects.[11]

C. Appellants Cannot Circumvent Official Immunity by Suing Mr. Barak Personally

Appellants also argue that Mr. Barak does not meet the common law requirements for official immunity because Appellants do not seek "to enforce a rule of law against the state [of Israel]," but rather to hold Mr. Barak liable "in his individual capacity" for "damages only from his own pocket." Br. 25-26 (quoting Restatement (Second) of Foreign Relations Law § 66(f) (1965)). But Appellants conflate enforcing a *rule of law* with enforcing a *judgment*. Adjudicating whether Mr. Barak's official acts on Israel's behalf violated international law will inescapably require a "judicial evaluation of the propriety of [Israel's] conduct"—the very result, "with the attendant risks of embarrassment at the highest diplomatic levels," that the doctrine of sovereign immunity is meant to avoid.

[11] For similar reasons, Appellants' argument that the Constitution does not confer exclusive authority over foreign affairs on the Executive is beside the point. Br. 31-32 (discussing *Zivotofsky*, 135 S. Ct. 2076 and *Medellin v. Texas*, 552 U.S. 491 (2008)). The district court did not hold, and Mr. Barak has never argued, that the basis for deference is the Executive's supposed unilateral authority over foreign affairs. Rather, the requirement of deference rests on a much narrower claim: that under the substantive common law of sovereign immunity, the Supreme Court has required deference.

Heaney, 445 F.2d at 504. Indeed, Israel itself has stated that it regards this lawsuit as "challeng[ing] the legality under international and United States law of actions taken by the Government of the State of Israel by its agents" and as "in essence a suit filed against the State of Israel itself." ER118. Thus, as both this and other courts have recognized, "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.3d at 1101; *accord Belhas*, 515 F.3d at 1284 (holding that "[t]o allow a suit against [Ya'alon] is to allow a suit against Israel itself," even though Ya'alon was sued in his personal capacity).

The Restatement (Second), cited by Appellants, also refutes their argument. To illustrate when foreign official immunity applies, the Restatement explains that if "X, an official of the defense ministry of state A, enters into a contract in state B with Y for the purchase of supplies for the armed forces of A," and Y later "brings suit in B against X *as an individual*" over an alleged breach of contract, "X is entitled to the immunity of A." Restatement (Second) of Foreign Relations Law § 66(f) cmt. b, ill. 2 (1965) (emphasis added). The Restatement thus makes clear that pursuing personal liability does not circumvent official immunity.

Finally, the judgment in *Samantar* confirms that Appellants are mistaken. There, the Supreme Court remanded the case for a determination of whether common law immunity applied, even though it was undisputed that the official had

been sued "in his personal capacity" for "damages from his own pockets." *Samantar*, 560 U.S. at 325-26. If pursuing personal liability were enough to avoid immunity, the Court would have simply held that Samantar was not entitled to official immunity.

* * *

In sum, Appellants ask the Court to ignore not just *Samantar*, but a near-century of decisions from the Supreme Court and Courts of Appeals holding that the Executive's immunity determinations are entitled to absolute deference, regardless of whether those determinations involve status- or conduct-based immunities, and regardless of whether the Executive explains its reasoning. Those decisions make this a straightforward case: Israel "request[ed] a 'suggestion of immunity' from the State Department"; "the request was granted"; therefore, the district correctly "surrendered its jurisdiction." *Samantar*, 560 U.S. at 311.

II. The TVPA Does Not Abrogate Common Law Official Immunity

A. Because the TVPA Is Silent Regarding Common Law Official Immunity, It Must Be Read To Preserve that Immunity

Appellants next attempt to circumvent Mr. Barak's immunity by claiming that the TVPA abrogated common law official immunity for claims brought under the statute, Br. 13-16, but that argument is equally unavailing. Both fundamental principles of statutory construction and Supreme Court precedents make clear that the TVPA leaves official immunity intact.

It is a well-established principle of statutory construction that statutes that "invade the common law" must be "read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). "[S]ilence does not suffice." *Matar*, 563 F.3d at 14; *see Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983) (requiring "clear and explicit" language to find a repeal of the common law).

Here, the TVPA is completely silent regarding common law immunities, and Appellants accordingly identify no directly germane statutory language. They rely instead on the fact that the TVPA applies to any "individual who, under actual or apparent authority, or color of law, of any foreign nation," commits the proscribed acts, 28 U.S.C. § 1350 note § 2(a), and so on its face encompasses foreign officials. Appellants contend that this language must abrogate the common law because otherwise the statute would not reach as many cases as its text would suggest. But the fact that the common law would limit a statute's reach proves nothing. After all, the question of abrogation arises *only* when a statute, on its face, "invade[s]" the common law. If the fact of invasion were conclusive, as Appellants essentially

contend, the presumption would do no work.[12] But the effect of the presumption here is clear: Because the TVPA does not speak directly to the availability of common law immunities, it leaves those immunities in place.

Appellants' argument also conflicts with the Supreme Court's decisions recognizing common-law immunities under 42 U.S.C. § 1983, which imposes liability on "*[e]very person*" who, under color of law, deprives another of his or her constitutional rights (emphasis added). "Although the statute on its face admits of no immunities," the Supreme Court has explained, "we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). Thus, the Court has held that § 1983 does not abrogate common-law judicial immunity or qualified immunity, reasoning that although the statute "makes liable 'every person' who under color of law deprives another person of his civil rights," the "legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554, 557 (1967). The Supreme Court,

[12] Appellants' argument that the TVPA must abrogate foreign official immunity because foreign officials fall within its broad definition of potential defendants also proves too much. By Appellants' logic, the TVPA would also abrogate head-of-state and diplomatic immunity, as both heads of state and diplomats clearly may be "individual[s] who, under actual or apparent authority, or color of law, of any foreign nation" commit torture or extrajudicial killing. 28 U.S.C. §1350 note §2(a). Yet Appellants concede that the TVPA preserves those immunities. Br. 16-17.

in other words, has rejected the identical argument Appellants make here, holding that common law immunities survive even when the statute on its face applies to the individuals claiming the immunities. *See Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013) (per curiam).

Appellants make barely any effort to reconcile their argument with the holdings of *Pierson* and *Malley*. They instead cite several cases holding that the Age Discrimination in Employment Act (ADEA) abrogated state sovereign immunity by "specifically includ[ing] state governments among the class of defendants who may be sued." Br. 24. But there are two major problems with this analogy. *First*, the "most analogous statute" to the TVPA is § 1983—not the ADEA—and § 1983 does not abrogate common law immunities despite applying, on its face, to "every individual." *Manoharan*, 711 F.3d at 180. *Second*, unlike the ADEA, the TVPA does *not* "specifically include[]" foreign officials "among the class of defendants who may be sued." Rather, like § 1983, it defines a much broader class of persons who may be liable—any "individual" who commits torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation," 28 U.S.C. § 1350 note § 2(a)—and that class, on its face, simply includes but is not limited to foreign officials. Thus, unlike the ADEA, the

TVPA does not "speak *directly* to the question addressed by the common law."[13] *Texas*, 507 U.S. at 534 (emphasis added).

B. The TVPA's Legislative History Confirms that Congress Intended To Preserve Foreign Official Immunity

Appellants also contend that the TVPA's legislative history supports their position, arguing that it evinces an intent to preserve only sovereign immunity for states, and diplomatic and head-of-state immunity for individuals. Br. 16-21. That argument fails at the threshold, however, because legislative history cannot provide the required clear statement; that must come from the "statute" itself. *Texas*, 507 U.S. at 534; *see also Kollias v. D & G Marine Maint.*, 29 F.3d 67, 73 (2d Cir. 1994) (stating that a clear statement rule is not satisfied by "reference to legislative history and other extrinsic indicia of congressional intent").

And even if legislative history could provide a clear statement, the TVPA's does not. To the contrary, it suggests that Congress understood that foreign officials *would* be able "[t]o avoid liability by invoking the FSIA" when they could "prove an agency relationship to a state." S. Rep. No. 102-249, at 8 (1991). Congress certainly expected that officials normally would be unable to make this

[13] Appellants' attempt to infer abrogation from differences between the TVPA and Anti-Terrorism Act, Br. 14, fails for similar reasons. A negative inference from a different statute addressing a different matter is far short of the "clear and explicit" language needed to find abrogation. *Norfolk Redev. & Hous. Auth.*, 464 U.S. at 35.

showing "[b]ecause all states are officially opposed to torture." *Id.* But in circumstances where an official *does* establish such an agency relationship, as Mr. Barak does here, Congress clearly expected immunity to apply—although *Samantar* has since clarified that the immunity is grounded in the common law, not the FSIA. *See* 560 U.S. at 325.

Appellants' own arguments in fact undermine their contention that the TVPA's legislative history supports the abrogation of immunity. They contend that the TVPA was enacted "to codify the cause of action for torture [under the ATS] … recognized in *Filartiga* [*v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)]," Br. 15, but they never argue that the *ATS* abrogated common law immunities. Thus, on Appellants' own terms, Congress would have needed to expand, not simply codify, *Filartiga* for the TVPA to abrogate official immunity. But nothing in the TVPA's legislative history evinces an intent to expand *Filartiga* in this manner, confirming that the TVPA, like the ATS, leaves immunity in place.

C. Foreign Official Immunity Does Not Nullify the TVPA

The TVPA's legislative history also undermines Appellants' claim that recognizing foreign official immunity would render the TVPA a dead letter. Br. 28. As Appellants acknowledge, Congress expected that states would generally disavow conduct that violates the TVPA because no state officially condones such actions. Br. 17-19; *see* S. Rep. No. 102-249, at 2, 8; H.R. Rep. No. 102-367, at 2-3

(1991). Thus, in most cases states would not request immunity for officials who violated the TVPA, and courts therefore would not recognize immunity for them.

This Circuit's precedents provide a case in point. In *Hilao v. Marcos*, a case involving claims of torture and extrajudicial killing against deposed Philippine dictator Ferdinand Marcos and his family, the Philippines expressly denied that Marcos's conduct had been performed in an official capacity and urged that the lawsuits be allowed to proceed. 25 F.3d 1467, 1472 (9th Cir. 1994). Similarly, in *Filartiga*, the seminal case recognizing a cause of action for torture under the ATS, the court noted that the conduct of the defendant, a former Paraguayan police official, was "wholly unratified by that nation's government." 630 F.2d at 889; *see also Doe v. Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (stating that China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations caused or permitted by [the defendants]"). Although these cases began before the TVPA's enactment—as noted, the TVPA was enacted to codify *Filartiga* itself—they typify a class of cases in which litigation is allowed to proceed because the state declines to invoke immunity. Such cases demonstrate that foreign official immunity does not nullify the TVPA.

Finally, Appellants invoke the *Youngstown* framework and argue that the "TVPA places this case in the third *Youngstown* category, where Executive power is at its weakest." Br. 31. This argument, however, is question begging. It

assumes the very conclusion Appellants must prove: that the TVPA abrogates official immunity. If, on the other hand, the TVPA does not abrogate it, then the SOI is consistent with the statute, and this case belongs in *Youngstown* category one, where Executive authority is at its zenith. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Thus, *Youngstown* adds nothing to the analysis of whether the TVPA abrogates common law official immunity.

Rather, the fundamental question remains whether the TVPA speaks directly to Congress's intent to abrogate official immunity, and because the answer to that question is "no," the TVPA must be read to leave official immunity intact. Mr. Barak's case, in short, involves circumstances "anticipated by those who enacted the TVPA[,] in which the state 'admit[s] some knowledge or authorization of relevant acts,'" the Executive agrees immunity is appropriate, and official immunity therefore applies. *Belhas*, 515 F.3d at 1284 (second alteration in original) (quoting 138 Cong. Rec. S2667-04, S2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter)).

III. There Is No *Jus Cogens* Exception to Sovereign Immunity, and Recognizing One Would Be Legally Mistaken and Prudentially Unwise

A. Courts Must Defer to the Executive's View that There Is No *Jus Cogens* Exception to Sovereign Immunity

Appellants finally attempt to overcome Mr. Barak's immunity by arguing that sovereign immunity is unavailable for claims alleging putative violations of *jus cogens*. Br. 46-53. The district court correctly held that no such exception exists. Not only is Appellants' argument doctrinally wrong under both U.S. and international law—as confirmed by a recent decision of the International Court of Justice—but it would embroil the Judiciary in adjudicating military actions around the world and expose U.S. officials to reciprocal liability abroad. Furthermore, as this case illustrates, it would eviscerate immunity to allow a plaintiff to keep a former official bound up in litigation by attaching a "*jus cogens*" label to facts, like these, that do not amount to a *jus cogens* violation.

As a legal matter, Appellants' argument is foreclosed by Supreme Court precedent. *Samantar* recognized that courts owe deference not only to Executive determinations in particular cases but also to the Executive's judgment about the scope of immunity in general. Because "[i]t is … not for the courts to deny an immunity which our government has seen fit to allow," *Hoffman*, 324 U.S. at 35, the critical question in evaluating the validity of a *jus cogens* exception is whether "it is the established policy of the State Department to recognize" immunity in

such cases, *Samantar*, 560 U.S. at 312 (alteration omitted). Here, the Executive's established policy is clear and undisputed: there is no *jus cogens* exception to official immunity. *See* ER86 (SOI for Mr. Barak stating that the Executive has not recognized a *jus cogens* exception); *see also* SER82 ("[A] *jus cogens* exception … would also be out of step with customary international law."). That policy, as the Second and Seventh Circuits have recognized, is conclusive. *See Matar*, 563 F.3d at 14; *Ye*, 383 F.3d at 625. Simply put, "[a] claim premised on a violation of *jus cogens* does not withstand foreign sovereign immunity." *Matar*, 563 F.3d at 15.

Appellants do not explain how to reconcile a *jus cogens* exception with the Supreme Court's opinion in *Samantar*. Instead, they rely on the Fourth Circuit's decision in *Yousuf*, which recognized a *jus cogens* exception based on a supposed "increasing trend in international law to abrogate foreign official immunity for individuals who commit acts … that violate *jus cogens* norms." 699 F.3d at 776. *Yousuf*'s principal error was that, like Appellants, the Fourth Circuit made no effort to explain how its departure from the Executive's policy regarding immunity for *jus cogens* violations was consistent with *Samantar*. But *Yousuf* significantly erred in another respect as well: the "increasing trend in international law" that it invoked does not exist.

As evidence of that trend, the Fourth Circuit cited only one civil case: an Italian action from 2004 involving claims against Germany arising from the Nazis'

conduct during World War II. *See id.* But one case, of course, does not a trend make, especially where, as here, the case was an outlier that numerous subsequent cases had rejected, even by the time *Yousuf* was decided. *See* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 240-41 (citing subsequent cases from Australia, New Zealand, the United Kingdom, and Canada). Indeed, the International Court of Justice later specifically ruled that the Italian court's decision was against the weight of authority and was wrong. *See Jurisdictional Immunities of the State (Ger. v. Italy)*, Judgment ("*Jurisdictional Immunities* Judgment"), 2012 I.C.J. Rep. 99 ¶¶ 91, 96 (Feb. 3) (gathering cases and concluding that, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict").[14] The European Court of Human Rights has likewise affirmed that there is no *jus cogens* exception under international law in civil proceedings against state

[14] The court noted that the "argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of" the United Kingdom, Canada, Poland, Slovenia, New Zealand and Greece, and by the European Court of Human Rights; and concluded that a French case relied on by the proponents of the exception had merely left open the possibility of such an exception in a case where the question was not presented, without deciding that such an exception exists. *Jurisdictional Immunities* Judgment, 2012 I.C.J. Rep. 99 ¶ 96 (citing cases).

officials. *See Jones v. United Kingdom*, App. Nos. 34356/06, 40528/06, slip op. ¶¶ 198, 214-15 (Eur. Ct. H.R. Feb. 6, 2014), https://tinyurl.com/ybd8a2c7 (holding that a grant of immunity to state officials accused of torture "reflected generally recognised rules of public international law"). And a *jus cogens* exception is absent from the UN Convention on Jurisdictional Immunities of States and Their Property, to which 28 states are signatories.[15] *See* Bradley & Helfer, *supra*, at 243-46; United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, ch. 3, http://bit.ly/2tXZyWt. In short, state practice, international courts, and multilateral conventions overwhelmingly hold that there is no *jus cogens* exception to foreign official immunity.

Appellants also erroneously argue that this Court has held that *jus cogens* violations necessarily "are acts falling beyond the lawful scope of a foreign official's authority" and therefore can never be subject to official immunity. Br. 46-50. In fact, this Court has never recognized such a rule in the immunity context. In *Trajano v. Marcos*, a suit alleging torture and extrajudicial killing by Ferdinand Marcos's daughter, this Court found that the daughter's acts were "beyond the scope of her [official] authority" because "she ha[d] admitted acting

[15] Although the convention has yet to enter into force and neither Israel nor the United States is a member, its provisions nevertheless can be said to reflect state practice.

on her own authority," not because *jus cogens* violations are inherently never official. 978 F.2d 493, 497-98 (9th Cir. 1992). And in *Hilao*, the Court again eschewed any *per se* rule, concluding that Marcos exceeded the scope of his authority by ordering torture and summary executions because his actions were "for personal profit" and "lack[ed] a basis in law" and because the Philippine Minister of Justice had submitted a letter stating that Marcos's actions were "clearly in violation of existing law." 25 F.3d at 1471-72.

Trajano and *Hilao* thus rested on case-specific determinations that the Marcoses' actions were unauthorized under Philippine law. *See Qi*, 349 F. Supp. 2d at 1283 ("In [*Trajano* and *Hilao*], the question of whether the official acted within the scope of his authority and pursuant to an 'official mandate' turned on an analysis of the official's powers under the domestic law of the foreign state …."). Here, by contrast, Appellants do not allege that Mr. Barak exceeded his authority as Minister of Defense or violated Israeli law. To the contrary, they allege that Mr. Barak acted on instructions from the Prime Minister, pursuant to his authority as Minister of Defense under Israeli law, and with the unanimous approval of the entire inner cabinet. ER127-29 ¶¶ 28-32. Furthermore, unlike the Philippines, the State of Israel has confirmed that "all of the actions of Mr. Barak at issue in the lawsuit were performed exclusively in his official capacity as Israel's Minister of Defense." ER118. Thus, none of the factors *Trajano* and *Marcos* found relevant is

present here, and there is no basis for finding that Mr. Barak exceeded the scope of his authority.

B. A *Jus Cogens* Exception Would Eviscerate Immunity, Strain Judicial Resources, and Expose U.S. Officials to Reciprocal Liability

The Executive Branch's steadfast refusal to recognize a *jus cogens* exception to foreign-official immunity rests upon sound practical considerations that both Appellants and *Yousuf* ignore.

First, a *jus cogens* exception would gut sovereign immunity. As Judge Williams explained in *Belhas*, another politically entangled suit against a high-ranking Israeli official, such an exception would

> merge[] the merits of the underlying claim with the issue of immunity: if [the official's] actions *were* torture and extrajudicial killing, then they were necessarily unauthorized and he has no claim to immunity; if they *were not* torture and extrajudicial killing, he would enjoy immunity. Thus immunity could be determined only at the moment of resolution on the merits, at which point it would commonly be irrelevant.

515 F.3d at 1292 (Williams, J., concurring). Indeed, this fusion of the jurisdiction and merits inquiries would frustrate the very purposes of sovereign immunity. For the defendant, "[t]he entitlement is an immunity from suit rather than a mere defense to liability; it is effectively lost if a case is erroneously permitted to go to trial." *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam). And for the United States, "condition[ing] a

foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct" would entail "risks of embarrassment at the highest diplomatic levels." *Heaney*, 445 F.2d at 504. This court should not allow plaintiffs to vitiate sovereign immunity through "artful pleading." *Chuidian*, 912 F.2d at 1102.

Second, as the district court recognized, a *jus cogens* exception would flood the courts of this circuit with litigation over military operations worldwide because "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing." ER26. Not only would this Court "assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong," *Belhas*, 515 F.3d at 1287, but, as here, the "vast extension of … jurisdiction" would also sweep in allies engaged in conflicts across the globe, often alongside the United States, *id.* at 1292 (Williams, J., concurring). Appellants assert that these concerns are unfounded because the TVPA "excludes from the definition of extrajudicial killing 'any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.'" Br. 21 (quoting 28 U.S.C. § 1350 note § 3(a)). But this argument simply predicts that not every defendant will be found liable, conceding that courts' dockets and entanglement in foreign affairs would expand

as feared. It is thus entirely unresponsive to the concern that a *jus cogens* exception would place "an enormous strain not only upon our courts but … upon our country's diplomatic relations with any number of foreign nations." *Belhas*, 515 F.3d at 1287.

Finally, a *jus cogens* exception would risk reciprocal treatment of U.S. officials abroad. In *Boos v. Barry*, the Supreme Court made an observation about diplomats that is true of government officials more broadly:

> [I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials.

485 U.S. 312, 323-24 (1988) (citation omitted). If the United States begins to subject foreign officials to lawsuits, other nations will do likewise to American officials. *See* SER75. This is not an abstract concern. As a former State Department Legal Adviser has warned, "the United States continues to engage in controversial military and intelligence operations around the world, and former Secretary of Defense Robert Gates and former Director of the Central Intelligence Agency Leon Panetta have already been threatened with suits in foreign countries for drone attacks." John B. Bellinger III, *The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the*

Legal Adviser to Official Acts Immunities, 44 Vand. J. Transnat'l L. 819, 834 (2011). Therefore, "[o]nce the United States agrees to lift immunity for foreign government officials, it begins to craft state practice that could expose U.S. officials to suits abroad." *Id.*

Indeed, it is precisely to avoid "embarrassing [the Executive] in securing the protection of our national interests and their recognition by other nations" that the Supreme Court has held that courts must follow the Executive's lead regarding sovereign immunity. *Hoffman*, 324 U.S. at 36. Allowing Appellants' claims to proceed would represent a radical departure from that rule. It would disregard not only the Executive's determination regarding this specific case, but also the Executive's long-standing policy on the appropriate scope of official immunity and the sensitive, expert judgments regarding the national interest underlying that policy. This Court should reject Appellants' invitation to embark on such an unlawful and hazardous course.

IV. Appellants' Claims Are also Barred by the Political Question and Act of State Doctrines

A. Appellants' Claims Present Non-Justiciable Political Questions

This Court can also affirm on the ground that the political question doctrine bars Appellants' claims. Fundamentally, Appellants' claims would have the Court second-guess tactical military decisions and pass judgment on a military operation. That military operation, moreover, led to a diplomatic crisis between Israel and

Turkey, two important American allies, that was resolved only after the U.S. President, Vice President, and Secretary of State intervened. As this and other courts have consistently held, such claims present nonjusticiable political questions and must be dismissed.

In *Baker v. Carr*, the Supreme Court explained that a claim presents a political question if it involves:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). To find a political question, the Court "need only conclude that one factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). "Disputes involving foreign relations … are quintessential sources of political questions." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841 (D.C. Cir. 2010) (en banc). This case is paradigmatic. Appellants' claims ask the Court to interfere in matters committed to the political branches, for which no judicially manageable standards exist, and about which both political branches have taken positions at odds with the view Appellants urge the Court to adopt.

Appellants' claims are nonjusticiable under the first *Baker* category because they require the Court to interfere with the "conduct of the foreign relations of our government," which "is committed by the Constitution to the executive and legislative branches." *Corrie*, 503 F.3d at 982 (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)) (alteration omitted). Appellants' claims would require the Court to pass judgment on Israeli national security policies and practices related to the existence and enforcement of the maritime blockade, the international law standards applicable to the conflict between Israel and Hamas, and the rules of engagement governing Israeli soldiers. They would also require the Court to take sides in a diplomatic controversy between Turkey and Israel of such sensitivity and importance to the United States that the country's highest officials personally worked to achieve a rapprochement based partly on Turkey's abandoning all legal claims against Israel. These are all quintessentially political judgments committed to the political branches, not the Judiciary.

Appellants' claims are also nonjusticiable under the second *Baker* factor. Appellants purport to "simply challenge the legality of a single use of force incident by the IDF," Dkt. 37, at 17, but adjudicating that incident would be anything but simple.[16] It would require determining not just what occurred aboard

[16] Appellants' effort to have the Court take a blinkered view of their claims, and ignore the difficult issues that resolving them would inevitably entail, is foreclosed by this Court's decision in *Corrie*, 503 F.3d at 984 ("Plaintiffs may purport to look

the *Mavi Marmara*, but also (among other things) the international law standards applicable to the conflict between Israel and Hamas, the sufficiency of the warnings the Israeli navy provided the flotilla, the adequacy of the IDF's rules of engagement and equipment, and the risks of alternative courses of action, both to the soldiers aboard the *Mavi Marmara* and to the blockade more broadly. As the Supreme Court has recognized, the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," outside judicial "competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Thus, courts "lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life."[17] *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

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no further than Caterpillar itself, but resolving their suit will necessarily require us to look beyond the lone defendant in this case and toward the foreign policy interest and judgments of the United States government itself."); *see also Schneider*, 412 F.3d at 197 ("[R]ecasting foreign policy and national security questions in tort terms does not provide standards for making or reviewing foreign policy judgments.").

[17] Furthermore, even if such standards could be discovered, their application would almost surely require testimony from current and former Israeli officials with knowledge of the IDF's practices, policies, and decisionmaking processes, further entangling the Judiciary in questions regarding foreign official immunity and comity.

Indeed, other courts of appeals have consistently held that they lack manageable standards to evaluate tactical military decisions. For example, in a recent decision holding that the political question doctrine barred a claim against the U.S. Navy for accidentally killing a fisherman during a counter-piracy mission, the Fourth Circuit explained that it is "just not equipped to second-guess … small-bore tactical decisions" regarding "what kind of warnings were given, the type of ordnance used, the sort of weapons deployed, the range of fire selected, and the pattern, timing, and escalation of the firing." *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 178, 180-81 (4th Cir. 2015). The court also held that it is equally "ill-suited to evaluate more strategic considerations," including "the extent of the disruption to commercial shipping caused by any single ship or by Somali-based piracy generally." *Id.* at 181; *see also Aktepe*, 105 F.3d 1404 (observing that "[d]ecisions relative to training result from a complex, subtle balancing of many technical and military considerations, including the trade-off between safety and greater combat effectiveness," and concluding that "courts lack standards with which to assess whether reasonable care was taken" in striking this balance"). As the D.C. Circuit has observed, decisions regarding the wisdom of military action are "delicate, complex, and involve large elements of prophecy," and are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *El-Shifa*, 607 F.3d at 845.

Finally, Appellants' claims are barred by the fourth and sixth *Baker* factors as well. As in *Corrie*, this case has the "potential for causing international embarrassment" by "undermin[ing] foreign policy decisions in the sensitive context of the Israeli-Palestinian conflict." 503 F.3d at 984. In response to events aboard the *Mavi Marmara*, both houses of Congress passed resolutions strongly supporting Israel, and the Executive Branch worked directly to improve Turkish-Israeli relations. *Supra* at 6-7. The political branches, in other words, did not condemn Israel's actions or declare them illegal. Yet Appellants' claims would require the Court to revisit those determinations and possibly, as Appellants hope, reach the opposite conclusions. This Court should refuse. As the Court has recognized, "[i]t is not the role of the courts to indirectly indict Israel for violating international law…. Any such policy condemning the Israeli government must first emanate from the political branches." *Corrie*, 503 F.3d at 984 (alteration omitted).

Appellants' claims also would undermine the agreement the U.S. Government helped broker to restore Turkish-Israeli relations. As part of that agreement, Turkey agreed not to attribute legal or other liability to Israel or its agents in relation to the flotilla incident, and Israel paid an *ex gratia* sum of $20 million to compensate the bereaved families. ER7. Appellants' claims are an end run around that agreement and, if allowed to proceed, will embarrass the Executive

and undermine its ability to credibly conduct the nation's foreign policy. *Cf. Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 756-57 (9th Cir. 2011) (en banc) (recognizing that the potential for a lawsuit to have a "serious adverse impact on [a] peace process" provides a "basis for a fear of interference by the courts in the conduct of foreign affairs"), *vacated on other grounds*, 133 S. Ct. 1995 (2013).

B. The Act of State Doctrine Forbids a U.S. Court from Passing on the Legality of the Official Acts of the State of Israel

Even if Mr. Barak were not immune from suit, and even if this case were justiciable, the act of state doctrine requires dismissal. Under that doctrine, a court will dismiss when "the outcome of the case turns upon … the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990). Appellants complain that a foreign military used excessive force during a naval operation that occurred thousands of miles from U.S. territory, conducted in the course of an armed conflict to which the United States is not a party. The act of state doctrine forbids a U.S. court from deciding whether such purely foreign official acts by an independent sovereign nation were legal. *See Liu v. Republic of China*, 892 F.2d 1419, 1432-33 (9th Cir. 1989) (holding that the doctrine applies when the state acts "*qua state*").

The act of state doctrine promotes "international comity," and "avoid[s] … embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick*, 493 U.S. at 408. It "reflects the prudential concern that the courts, if

they question the validity of sovereign acts taken by sovereign states, may be interfering with the conduct of American foreign policy by the Executive and Congress." *Siderman*, 965 F.2d at 707.

The act of state doctrine forbids this Court from adjudicating this case because doing so would call into question the lawfulness of official Israeli actions and policies. The situation here is similar to *Underhill v. Hernandez*, 168 U.S. 250 (1897), where the Court rejected a tort claim of false imprisonment asserted against a foreign military commander because "the acts of the defendant were the acts of [a foreign] government" and so were "not properly the subject of adjudication in the courts of another government." *Id.* at 252, 254. Just so here. Appellants ask this Court to decide whether Israel's acts in connection with the *Mavi Marmara* were legal or tortious, but the act of state doctrine does not allow that.[18]

A "touchstone or crucial element" of the doctrine is the "potential for interference with our foreign relations." *Liu*, 892 F.2d at 1432. Some matters

[18] Although formulations of the act of state doctrine often describe it as applying to acts of a foreign government within the government's own territory, this Court rejected such a narrow territorial limitation in *In re Philippine National Bank*, 397 F.3d 768, 773-74 (9th Cir. 2005), holding that the Court would not question the validity of a Philippine judgment even though it touched assets located in Singapore. As the Court held, the Philippines' "interest in the [enforcement of its law does not] end at its borders." *Id.* Similarly here, Israel has an interest in protecting its national security by enforcing its maritime blockade, notwithstanding that such enforcement necessarily took place outside Israel's borders.

require the United States to "speak with one voice" in foreign relations. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981). And "some aspects of international law touch much more sharply on national nerves than do others." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). For the reasons discussed above, the issues in this case require respect for the considered views of the political branches and could not touch "more sharply on national nerves." *Id.* As was the case in *Sabbatino*, it is "difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id*. at 430. The act of state doctrine thus requires dismissal of this action.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

DATED: July 19, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees hereby state that they do not know of any related cases pending in this Court.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(g) AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g) and Ninth Circuit Rule 32-1, I certify that the attached Brief of Defendant-Appellee complies with FRAP 32(a)(5)-(6) and Ninth Circuit Rule 32-1(a), as it is in 14-point proportionally spaced Times New Roman font, and contains 13,909 words, exclusive of the portions of the brief excepted by Rule 32(f), as counted by the word processing program used by counsel. Pursuant to Ninth Circuit Rule 32-1(e), a signed Form 8 also accompanies the attached brief.

/s/ *Douglas A. Axel*
DOUGLAS A. AXEL

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 19, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DOUGLAS A. AXEL

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Signature of Attorney or Unrepresented Litigant [s/ Douglas A. Axel] Date [Jul 19, 2017]

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