No. 18-12728

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Eloy Rojas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Juan Patricio Quispe Mamani, Teófilo Baltazar Cerro, Juana Valencia de Carvajal, Hermógenes Bernabé Callizaya, Gonzalo Mamani Aguilar, Felicidad Rosa Huanca Quispe, Hernán Apaza Cutipa,

Plaintiffs-Appellants,

v.

Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante, José Carlos Sánchez Berzaín,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida
Case Nos. 1:08-cv-21063-JIC and 1:07-cv-22459-JIC

BRIEF FOR PLAINTIFFS-APPELLANTS

Judith Brown Chomsky
CENTER FOR CONSTITUTIONAL RIGHTS
Post Office Box 29726
Elkins Park, PA 19027
(215) 782-8367

Beth Stephens
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
Seventh Floor
New York, NY 10012
(212) 614-6431

James E. Tysse
Steven H. Schulman
Lide E. Paterno
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000
jtysse@akingump.com

Counsel for Plaintiffs-Appellants
(Counsel continued on inside cover)

Paul Hoffman
SCHONBRUN, SEPLOW,
HARRIS & HOFFMAN, LLP
200 Pier Avenue #226
Hermosa Beach, CA 90254
(310) 396-0731

Counsel for Plaintiffs-Appellants (continued)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for appellants certify that all parties to this appeal are natural persons, and thus no entity owns 10% or more of the stock of any party. Pursuant to Local Rule 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

Akerman LLP (counsel for appellants)

Akin Gump Strauss Hauer & Feld LLP (counsel for appellants)

Apaza Cutipa, Hernán (appellant)

Baltazar Cerro, Teófilo (appellant)

Barcia, Giselle (counsel for appellees)

Becker, Thomas (counsel for appellants)

Becker & Poliakoff, P.A. (counsel for appellees)

Berger, Evan B. (counsel for appellees)

Bernabé Callizaya, Hermógenes (appellant)

Center for Constitutional Rights (counsel for appellants)

Chomsky, Judith Brown (counsel for appellants)

Cohn, The Honorable James I. (Southern District of Florida)

Doniak, Christine (counsel for appellants)

Espejo Villalobos, Sonia (appellant)

Farbstein, Susan H. (counsel for appellants)

Fleurmont, Jean Ralph (counsel for appellees)

Giannini, Tyler Richard (counsel for appellants)

Gillenwater, James E. (counsel for appellees)

Hoffman, Paul L. (counsel for appellants)

Huanca Quispe, Felicidad Rosa (appellant)

International Human Rights Clinic, Harvard Law School (counsel for appellants)

Jordan, The Honorable Adalberto (then Southern District of Florida)

Mamani Aguilar, Gonzalo (appellant)

McAliley, Magistrate Judge Chris Marie (Southern District of Florida)

Moran, Erica Abshez (counsel for appellants)

Muñoz, Rubén H. (counsel for appellants)

Paterno, Lide (counsel for appellants)

Quispe Mamani, Juan Patricio (appellant)

Raber, Stephen D. (counsel for appellees)

Ramos Mamani, Etelvina (appellant)

Reyes, Ana C. (counsel for appellees)

Rojas Mamani, Eloy (appellant)

Salgado, Suzanne M. (counsel for appellees)

Sánchez Berzaín, José Carlos (appellee)

Sánchez de Lozada Sánchez Bustamante, Gonzalo Daniel (appellee)

Schulman, Steven H. (counsel for appellants)

Seltzer, Magistrate Judge Barry S. (Southern District of Florida)

Sharad, Saurabh (counsel for appellants)

Sorkin, Joseph L. (counsel for appellants)

Stephens, Beth (counsel for appellants)

Tabacinic, Ilana (counsel for appellants)

Tysse, James E. (counsel for appellants)

Valencia de Carvajal, Juana (appellant)

Weil, Jason (counsel for appellants)

Williams & Connolly LLP (counsel for appellees)

Woodson, Jennifer L. (counsel for appellants)

Respectfully submitted,

s/James E. Tysse

James E. Tysse
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000
jtysse@akingump.com

Counsel for Appellants

July 11, 2018

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This case, which has spanned over ten years and two interlocutory appeals (each of which included oral argument), involves an extensive factual record and complex legal issues, including the standard for liability under the Torture Victim Protection Act and for wrongful death under Bolivian law. Plaintiffs believe that this Court's decisional process will be significantly aided by oral argument. *See* FED. R. APP. P. 34(a)(2); 11TH CIR. R. 34-3(b).

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

* Authorities chiefly relied upon are marked with an asterisk.

STATUTES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. Plaintiffs filed a timely notice of appeal from the May 30, 2018 final judgment. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the jury's verdict should be reinstated because, viewing all the evidence and inferences in the light most favorable to Plaintiffs, there was a legally sufficient evidentiary basis for the jury's verdict that Defendants are liable under the Torture Victim Protection Act.

2. Whether Plaintiffs are entitled to a new trial on their wrongful-death claims on the grounds that the district court abused its discretion in (i) declining to give material instructions to the jury regarding the requisite state of mind for intentional wrongful death under Bolivian law and (ii) admitting into evidence highly prejudicial hearsay statements.

INTRODUCTION

This appeal concerns two high-ranking Bolivian officials who commanded forces that brutally killed at least 58 civilians and injured hundreds more over a three-week period in 2003. The eight decedents whose relatives brought this case were murdered in five separate locations on three different days, gunned down by Bolivian soldiers while in their homes, hiding, or fleeing. Although parts of Bolivia saw intense protests during this period, eyewitnesses testified that these eight victims were all unarmed, uninvolved in protests, and away from conflicts involving demonstrators when they were killed by Bolivian soldiers:

- in Warisata on September 20, eight-year-old Marlene Nancy Rojas Ramos was killed by a gunshot through the window of her home;
- in the Senkata area of El Alto on October 12, Lucio Santos Gandarillas Ayala was fatally shot as he attempted to seek refuge behind a kiosk;
- in the Río Seco area of El Alto on October 12, Teodosia Morales Mamani (and her unborn child), Marcelino Carvajal Lucero, and Roxana Apaza Cutipa were killed inside their families' homes;
- in Ánimas Valley on October 13, Arturo Mamani Mamani and Jacinto Bernabé Roque were killed while cowering in the straw near their families' crop parcels; and
- in Ovejuyo on October 13, Raúl Ramón Huanca Márquez was killed as he tried to seek cover outside a shop.

After six days of deliberation, the ten-member jury returned a unanimous verdict holding each Defendant liable for the deaths of all eight victims under the Torture Victim Protection Act ("TVPA").

The primary issue on appeal is whether the district court correctly vacated that verdict after trial. The district court held that no reasonable jury could conclude that these deaths were "deliberated"—and thus "extrajudicial killings"—under the TVPA. But the extensive evidence from 40-plus witnesses over three weeks of trial—including detailed eyewitness testimony from relatives, community leaders, and even former soldiers—supported the jury's reasonable conclusion that each victim died from the deliberated actions of Bolivian soldiers, some of whom were commanded to "shoot at anything that moved." That evidence easily satisfied the exceedingly deferential, verdict-preserving Rule 50 standard.

The district court concluded otherwise only by inverting the governing legal presumption and adopting a crabbed interpretation of the TVPA. Pointing to the "plausible" inferences in *Defendants'* favor, the court essentially required Plaintiffs to disprove Defendants' theory of the case. But every trial involves competing theories and interpretations of the facts—and it is up to the jury to decide which versions to accept. The court also erred in imposing a requirement that Plaintiffs prove each death resulted from a "preconceived plan" by Defendants to kill innocent civilians, though no such requirement can be found in the TVPA or even the court's jury instructions. And even if such a requirement existed, there was sufficient evidence, as the court itself recognized, to "permit the reasonable inference that the decedents' deaths resulted from the Bolivian military's implementation of a plan to

kill civilians." Its decision to nevertheless direct entry of judgment for Defendants requires reversal.

On top of its errors on the TVPA claim, the district court made two critical errors related to Plaintiffs' wrongful-death claims: it gave misleading instructions on the requisite state of mind under Bolivian law, and it reversed its prior decision to exclude highly prejudicial hearsay statements. Thus, in addition to reinstatement of the jury verdict on the TVPA claims, Plaintiffs are entitled to a new trial on their wrongful-death claims.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

A. Defendants' Rise To Power And Embrace Of Military Force.

Defendants are two former high-ranking Bolivian officials who presided over a brutal military campaign against Bolivian civilians in the fall of 2003 that resulted in serious injury to more than 400 civilians and the deaths of at least 58 others (including the eight whose relatives brought this lawsuit).

Defendant Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante ("Lozada") was President of Bolivia from 1993 to 1997 and again from 2002 to

---

[1] The following facts are taken from evidence before the jury, including deposition testimony that was played or read for the jury. *See* Vol:4-Doc:500. All citations are to docket entries in Case No. 1:07-cv-22459-JIC.

2003. The intervening administration attempted to privatize a municipal water system to attract foreign investment, but was forced to abandon that plan in the face of massive protests. Vol:4-Doc:482 at 91:15-22. To avoid a similar result, co-defendant José Carlos Sánchez Berzaín ("Berzaín"), whom Lozada later appointed as Defense Minister in his second term, declared to Lozada and other top party officials that when their party returned to office, "we will kill 50, a hundred, a thousand" civilians to avoid letting public dissent derail their economic agenda. *Id.* at 91:23-25.

Bolivia has a long history of public protests, especially among poor indigenous communities that demonstrate in order to participate in political dialogue. Vol:2-Doc:476 at 70:13-75:11. Shortly after retaking power in 2002, however, the Lozada government made clear that such protests would be met with overwhelming military force. The government issued a "Manual on the Use of Force" that defined "roadblocks, marches, [and] demonstrations" as subversive acts and authorized the use of military force against such "subversive elements." Vol:5-Doc:506-22 at 13-14. It also issued the "Republic Plan," a document directing government troops to "apply the Principles of Mass and Shock" to remove roadblocks and control civil disturbances. Vol:5-Doc:506-23. Defendants pursued these military-focused policies despite extensive debate and concern within the administration that deploying the military would lead to a "tragedy" and "generate

deaths." Vol:3-Doc:478 at 39:6-40:11, 54:13-56:21; Vol:4-Doc:482 at 35:2-14; Vol:4-Doc:483 at 44:6-12; Vol:5-Doc:500-7 at 78:17-81:25.

Berzaín showed his commitment to this new hardline approach in response to demonstrations in La Paz in February 2003, about seven months before the deaths at issue in this case. Vol:4-Doc:483 at 25:16-27:6. Confronted with concerns about civilian casualties, Berzaín told La Paz's mayor that "if there are five dead, it doesn't matter if it's 50 more, as long as we solve the problem." *Id.* at 26:22-27:2. A few months later, Lozada appointed Berzaín to be Minister of Defense. Vol:3-Doc:481 at 75:18-76:9.

B. The Lozada Government's Brutal Crackdown On Civilians.

On September 12, 2003, amid growing civilian protests, hunger strikes, and road blockades, the Lozada administration officially "launch[ed]" the Republic Plan. Vol:4-Doc:485 at 19:8-17, 25:4-14. Those widespread demonstrations were a response to economic policies the Lozada government had developed that were particularly unpopular among Bolivia's indigenous community. Vol:2-Doc:476 at 85:21-25; Vol:3-Doc:479 at 21:8-12, 25:15-19; Vol:4-Doc:483 at 31:24-32:16; Vol:5-Doc:500-7 at 30:11-32:25, 38:17-41:11.

The pattern of indiscriminate violence against civilians began on September 20. Community leaders in the town of Sorata, northwest of La Paz, had negotiated a resolution allowing the peaceful passage of tourists whose movement had been

restricted by demonstrations. Vol:2-Doc:476 at 87:23-88:20. Berzaín arrived by helicopter—ordered by, and in communication with, Lozada—and announced that he had been commanded to use the military to dismantle the demonstrations and transport the tourists. *Id.* at 90:16-22; Vol:3-Doc:481 at 95:25-96:1. He declared "[f]ucking Indians, I give the orders around here," "threatened the leaders that there was going to be persecution," and departed in a helicopter that fired at civilians as it ascended. Vol:2-Doc:476 at 91:6-9, 92:23-93:3, 95:1-2, 97:15-19. Negotiations that had been ongoing to resolve national protests ended as news of the military action spread. Vol:5-Doc:500-7 at 33:12-23, 35:5-8, 41:5-11.

After a soldier in a military convoy was killed by an unidentified shooter, Lozada and Berzaín directed the Commander in Chief of the Armed Forces "to mobilize and use the necessary force to restore public order and respect for the rule of law." Vol:5-Doc:506-3; Vol:4-Doc:497-3; *see also* Vol:4-Doc:485 at 88:10-90:16. Over the next several weeks, the military perpetrated a brutal, protracted campaign of violence against both demonstrating and non-demonstrating civilians across Bolivia—including shooting into homes and at unarmed and fleeing victims. Bolivian troops were deployed in "constant movement" with orders to "shoot at anything that moved" to "[e]nsur[e] that there were *** no [more] demonstrations." Vol:4-Doc:500-1 at 20:6-21:22, 26:11-21, 29:9-13. In many cases, the shootings went on for hours. *See, e.g.*, Vol:2-Doc:476 at 65:3-6.

Although the government coerced false testimonies of civilian gunfire, Vol:3-Doc:480 at 135:22-136:5, 142:20-23, 150:16-151:21; Vol:4-Doc:482 at 74:11-75:23, eyewitnesses to these harrowing events consistently reported seeing no armed civilians and no civilians who provoked the shootings, *see, e.g.*, Vol:5-Doc:500-4 at 20:12-17, 43:21-44:10; Vol:5-Doc:500-9 at 37:19-38:13; Vol:2-Doc:476 at 63:20-64:4; Vol:3-Doc:479 at 22:10-12, 75:12-15; Vol:3-Doc:480 at 56:12-20, 70:7-9, 132:9-14; Vol:4-Doc:482 at 65:17-19. Indeed, over this three-week period, two soldiers were killed from unknown shooters (and a third died when his own officer shot him after he refused an order to kill civilians)—as compared to nearly sixty civilian deaths. *See* Vol:4-Doc:489 at 39:21-40:6.

C. Decedents' Deaths.

1. Marlene Nancy Rojas Ramos

Eight-year-old Marlene Nancy Rojas Ramos was killed on September 20, 2003, along with other civilians, when Bolivian soldiers advanced into the village of Warisata, northwest of La Paz. Vol:2-Doc:476 at 56:14-23, 59:9-65:9. Marlene's father, Eloy, testified that, although "[t]here was nothing" happening near his home that day—"no protests" and no armed civilians in the vicinity, notwithstanding demonstrations in other parts of town—soldiers emerged from 15 military vehicles, "were all getting in position," and "started shooting with firearms." *Id.* at 59:24-25, 61:18-62:7. As the soldiers fired, "children, women, [and] men" fled to the hills

"like scared rabbits." *Id.* at 62:7-15. The soldiers pursued the fleeing civilians, shooting continuously at the houses and hills for at least eight hours, although no civilian fired a weapon during this time. *Id.* at 62:20-24, 63:20-64:4, 65:3-9. Shells littered the ground outside Eloy's home the following day, "all over the place." *Id.* at 63:20-64:12.

Marlene's mother, Etelvina, testified that Marlene was killed by a bullet when Marlene moved in front of a window. Vol:2-Doc:476 at 54:20-23, 57:15-16. After Etelvina heard the "boom boom" of the shot and realized her daughter had been hit, she saw soldiers in green camouflage uniforms outside her window. *Id.* at 54:18-55:19. Although a soldier had been shot earlier that day in the town square, the jury heard that the square is a "far" "20- to 25-minute walk" from Marlene's house. *Id.* at 59:11-14.

Edwin Aguilar Vargas, a Bolivian conscript, corroborated that his unit and other soldiers fired at unarmed civilians in Warisata that day. He testified that over 100 soldiers entered the area with lethal "war munitions," were prepared to fire "from the moment [they] entered the village," and were ordered to "shoot at anything that moved." Vol:4-Doc:500-1 at 21:9-22:20, 26:11-21, 29:9-13. Aguilar testified that he never saw armed civilians, *id.* at 36:23-37:10, and that he and some other conscripts refused officers' orders to shoot, *id.* at 25:4-26:9. Nevertheless, the "sergeants, sublieutenants and lieutenant" shot indiscriminately at "anything that

moved or screamed" over several hours, and camouflaged special forces "responded to the call" to shoot "back and forth" into homes. *Id.* at 34:9-16, 36:5-39:21.

2. Lucio Santos Gandarillas Ayala

Lucio Santos Gandarillas Ayala was shot in the Senkata area of El Alto on October 12. Luis Castaño Romero testified that, after a Bolivian soldier opened fire, the military chased and shot unarmed civilians as they fled, firing a "rain of bullets" upon them. Vol:5-Doc:500-4 at 20:6-17, 26:22-28:9, 29:21-32:14. After several minutes, Castaño witnessed five officers "positioning themselves to shoot" and "pointing at the civilians," and saw Lucio fatally shot as he "leaned o[ut]" from a street kiosk where he was attempting to seek refuge. *Id.* at 34:11-38:4, 41:3-15; *see also* Vol:3-Doc:479 at 10:2-6. Castaño's leg was shot (and later had to be amputated) while he tried to escape. Vol:5-Doc:500-4 at 13:5-14:2. He testified that he "never" saw an armed civilian "at any point" that day. *Id.* at 20:12-17, 43:21-44:10.

Aguilar, the Bolivian conscript, corroborated Castaño's testimony. Aguilar stated that his unit was deployed to Senkata on October 12 and that he was commanded to shoot at civilians. Vol:4-Doc:500-1 at 42:23-43:18, 50:6-22. When he and fellow conscripts refused to follow the orders, their officers "exchanged" Aguilar and his comrades with soldiers who were willing to, and did, shoot "bursts of weapon fire" at unarmed civilians. *Id.* at 50:23-53:8.

3. Roxana Apaza Cutipa, Marcelino Carvajal Lucero, and Teodosia Morales Mamani

Fathers Zabala and Soria Paz, Catholic priests with local parishes, testified that several civilians died after armed soldiers in military garb opened fire in the Río Seco area of El Alto on October 12. Vol:3-Doc:479 at 26:5-28:21; Vol:3-Doc:480 at 74:25-78:21. Both priests testified that they never saw a single armed civilian. Vol:3-Doc:479 at 22:10-12; Vol:3-Doc:480 at 70:7-9. These accounts were consistent with testimony by Ela Trinidad Ortega Tarifa, who witnessed soldiers lining the highway, dispersing in alleys, and shooting innocent civilians. Vol:3-Doc:481 at 37:8-38:4, 41:14-42:1, 53:24-55:17, 57:9-12. Ortega recounted that, after an officer shot a civilian, he ordered conscripts to fire as well, yelling, "Damn it. Shoot, shoot those people." *Id.* at 41:17-42:19. When the conscripts refused, the officer grabbed one of the conscript's guns and killed him with it. *Id.* at 51:4-52:15. Ortega was subsequently captured in an alley, where two conscripts pleaded with her to remain quiet because they had been given orders to kill civilians, which they did not want to follow. *Id.* at 57:4-8.

Roxana Apaza Cutipa was shot in the head that day when she went up to the patio of her home in Río Seco to observe the commotion. Vol:3-Doc:479 at 74:25-75:3, 102:19-103:1, 107:11-16. Roxana's brother testified that he saw his sister "falling to the ground" and "bleeding out" just after watching tanks and trucks on the main road as people on the street below were "fleeing from the oppression that

was there at that time, from the military." *Id.* at 74:15-75:3. He stated that he "absolutely" did not see any civilians "with any kind of weapon." *Id.* at 75:12-15.

Marcelino Carvajal Lucero was shot when he went to close a window inside his home in El Alto that same day. Vol:3-Doc:478 at 73:17-76:15. His wife testified that she witnessed "three military trucks with soldiers with the position on both sides and the other side the same, like ready to shoot," passing along the street. *Id.* at 74:2-19. Marcelino died from his wound shortly after arriving at the hospital. *Id.* at 76:3-19.

Teodosia Morales Mamani, who was pregnant at the time, was shot while visiting her sister's apartment in Río Seco. Vol:3-Doc:479 at 84:22-85:4, 92:9-93:25; Vol:3-Doc:478 at 87:10-19, 89:8-13, 91:1-2. Beatriz Apaza Morales, Teodosia's niece, testified that she witnessed a tank and "many soldiers" carrying weapons on the street, that people were running "as if they were very scared," and that soldiers aimed weapons at her and other civilians when they looked out windows. Vol:3-Doc:479 at 87:10-88:17. Apaza witnessed a man fall down in the street just before Teodosia entered the apartment "trembling," saying "[h]e killed him. He killed him." *Id.* at 89:19-90:2. Teodosia began to pray in the corner of the room next to the window and "very quick[ly]" was shot by a bullet that passed through the wall. *Id.* at 92:9-93:23. She and her unborn child died two days later. Vol:3-Doc:478 at 87:10-19, 89:8-91:2.

4. Arturo Mamani Mamani and Jacinto Bernabé Roque

Arturo Mamani Mamani was killed after military trucks "full of soldiers" descended on the area near his home in Ánimas Valley, south of La Paz, on October 13, following an attack on a soldier by an unidentified shooter earlier that morning. Vol:3-Doc:480 at 32:12-25. His son, Gonzalo Mamani Aguilar, testified that after he and Arturo set out to tend to their potato field, he saw that many soldiers had "positioned themselves in a firing position" and were "shooting in every direction" at villagers in the hills, *id.* at 37:17-38:18, even though the villagers were not armed, *id.* at 56:12-20. Arturo and other villagers tried to cover themselves with straw to hide from the soldiers, *id.* at 38:21-23, and "every time the straw would move, [the soldiers] would fire," *id.* at 42:13-14. More than three hours after the convoys arrived, Gonzalo saw his father shot while cowering in the grass. *Id.* at 38:22-39:7, 40:19-20.

Gonzalo then hid behind Jacinto Bernabé Roque, an elderly man who was "laying" in the grass further down the hill, attempting to avoid the soldiers. *Id.* at 40:12-16, 41:12-15. After several minutes passed and the soldiers continued to fire, Jacinto was shot, his blood "splatter[ing]" on Gonzalo's face. *Id.* at 41:23-42:4. Gonzalo testified that he saw two other unarmed civilians hit by lethal gunfire, with 20 to 30 minutes and considerable distance separating each killing from the next. *Id.* at 42:16-44:1, 56:12-20.

Gonzalo's testimony was corroborated by other witnesses. Agustín Sirpa Ortiz recounted that as he and other civilians fled "further up the hill" to escape the soldiers that same day, the soldiers "continued to climb" in pursuit, shooting at the civilians. Vol:4-Doc:482 at 53:19-55:6. After he was captured when seeking medical attention for a wounded friend, Sirpa heard Bolivian military officials issue orders to shoot civilians, and heard soldiers carry out those orders. *Id.* at 57:25-58:10. Sirpa testified that he never saw any civilians firing weapons, *id.* at 65:17-19, though the military forced him to write a statement asserting otherwise after he was detained, tortured, and interrogated for hours, *id.* at 58:11-63:15, 74:11-75:23.

José Limber Flores Limachi, a Bolivian conscript whose unit was in Ánimas Valley that day, corroborated these accounts. Vol:3-Doc:480 at 129:23. He stated that military officials ordered soldiers to pursue and shoot civilians and forbade them from assisting civilians wounded by the bullets. *Id.* at 131:2-132:8. He also testified that the soldiers complied with the orders, shooting "a lot of shots," "shot by shot," for over 45 minutes, firing as they climbed the hills where civilians sought to hide. *Id.* at 131:9-132:3. Although a soldier had been wounded earlier in the morning by an unidentified shooter, Flores Limachi testified that he did not see any armed civilians at any point during the subsequent, long-sustained assault. *Id.* at 132:9-14. Like Sirpa, Flores Limachi also testified that the military forced him to make a false statement of civilian violence. *Id.* at 135:22-136:5, 142:20-23, 150:16-153:9.

5. Raúl Ramón Huanca Márquez

Raúl Ramón Huanca Márquez was murdered after elite soldiers from eastern Bolivia shot at civilians in Ovejuyo, east of La Paz, on October 13. Vol:5-Doc:500-9 at 24:15-25:12, 34:2-15. Juan Carlos Pari Cuti testified that the soldiers fired their guns at a rapid clip, "like this, 'dat dat dat,'" for around 20 minutes, despite the facts that Ovejuyo was "very peaceful," there were no roadblocks in the area at the time, no civilians were seen with weapons, and civilians were not attacking the military. *Id.* at 35:15-18, 37:19-38:14, 41:11-17, 45:5-24. When "there were not many people around" apart from the soldiers, Pari saw around 15 soldiers "shooting from above" at Raúl as he attempted to hide by a shop near Pari's home. *Id.* at 26:19-29:14, 33:4-10. Raúl, who was unarmed, fell dead immediately. *Id.* at 29:10-14, 37:8-18.

Pari's account was corroborated by other witnesses. Flores Limachi, the Bolivian conscript, stated that his unit was also in Ovejuyo that day and soldiers were ordered to, and did, shoot at unarmed civilians. Vol:3-Doc:480 at 133:3-17. Raúl's daughter testified that she found her sixty-year-old father's lifeless body where Pari saw him shot, "on the corner, [where] there's [a] little shop." Vol:3-Doc:479 at 119:17-22. Several other civilians died in and around Ovejuyo that day. *Id.* at 120:3-4.

D. Defendants' Role In Orchestrating The Military Campaign.

The jury heard about the integral role Defendants played in facilitating, if not personally orchestrating, this slaughter. As President and Captain General of the Armed Forces and Minister of Defense, respectively, Lozada and Berzaín controlled the military at all relevant times. Vol:4-Doc:500-2 at 35:2-4, 46:19-23, 154:4-25; Vol:5-Doc:500-6 at 80:5-18; Vol:5-Doc:506-11, arts. 8, 18, 20, 22, 25, 39; Vol:5-Doc:506-24, arts. 97, 210. In September 2003, Lozada directed the military to "mobilize and immediately use the force necessary to restore public order and respect for the rule of law in the region" in response to demonstrations, Vol:4-Doc:497-3; Vol:5-Doc:506-3; Vol:5-Doc:506-14; Vol:5-Doc:506-15; *see also* Vol:3-Doc:481 at 79:18-21, 80:2-9; Vol:5-Doc:500-6 at 30:3-8, and issued various tactical orders to implement that directive, *see, e.g.*, Vol:3-Doc:481 at 98:5-19 (ordered domestic deployment of military); Vol:2-Doc:476 at 89:8-90:22 (directed Berzaín to go to Sorata with military force to "extract[] the tourists" there); Vol:5-Doc:500-6 at 18:13-19, 46:6-10 (deployed elite forces to Sorata and Warisata); Vol:5-Doc:506-26 (ordering military to "restore order to the city of El Alto").

Berzaín likewise exercised strategic and tactical command. He oversaw the September 20 operation in Sorata, declaring his authority over the military deployed there, Vol:2-Doc:476 at 90:17-91:9, 97:17-18, communicating constantly by phone with Lozada from the field, Vol:4-Doc:485 at 87:20-88:6, and dictating a letter to

Lozada's chief of staff that Berzaín insisted was necessary to order the movement of the armed forces, *id.* at 89:19-90:16. Despite the resulting civilian casualties, Berzaín decided to deploy the military yet again the following month for the deadly Senkata operation, Vol:4-Doc:482 at 29:14-31:5, 35:4-37:10, and personally composed the letter signed by Lozada that he stressed was "very important, because the military were not going to move" without it, Vol:4-Doc:485 at 92:1-23; Vol:5-Doc:506-26. Indeed, the military did not "improvise" or act absent direct orders at any point during September and October 2003. Vol:4-Doc:485 at 19:8-14.

Defendants knew of innocent civilian deaths as early as September 20. Vol:3-Doc:481 at 101:2-13. Despite personally receiving regular reports of civilian casualties, *see id.* at 98:11-99:16, 101:2-13; Vol:4-Doc:485 at 154:7-14; Vol:5-Doc:500-6 at 92:15-21, 95:13-18, and despite widespread media accounts of the deaths, *see* Vol:5-Doc:500-7 at 142:12-15; Vol:3-Doc:479 at 73:5-11, Defendants took no action to stop the ongoing killings. On the contrary, at various points during the military operations, Defendants rejected peaceful alternatives, with Lozada declaring the "state never retreats," Vol:4-Doc:485 at 80:4-22, and Berzaín dismissing concerns by stating, "[w]ell, there have to be deaths, but also gasoline," Vol:4-Doc:482 at 35:2-14. Making clear that they were doing nothing to stop the violence, Defendants issued a "Supreme Decree," which authorized continued military operations to restore the "normal operation of the country's economic

activity," several weeks after the first innocent civilian deaths were reported. Vol:5-Doc:506-1 at 0001-0002 (stating that Berzaín's ministry "shall establish the mechanisms necessary for [the military operations'] execution"); *see also* Vol:3-Doc:481 at 108:10-20.

A horrified public reacted to news of the widespread killings of defenseless civilians by organizing hunger strikes and large-scale demonstrations, and by demanding Lozada's resignation. Vol:3-Doc:479 at 39:4-40:3; Vol:4-Doc:483 at 62:14-63:12. After his political support crumbled, Lozada was forced to resign on October 17, 2003, and immediately fled to the United States. Vol:4-Doc:485 at 93:4-94:8. Lozada and Berzaín have since taken safe haven as U.S. residents in Maryland and Florida, respectively. Vol:2-Doc:476 at 9:9-17.

II. PROCEDURAL HISTORY

Plaintiffs brought separate suits against each Defendant in 2007 that were consolidated in the Southern District of Florida. The Bolivian government thereafter waived Defendants' immunity, Vol:1-Doc:85-4 at 5, and the U.S. Department of State accepted Bolivia's waiver, Vol:1-Doc:107.

Plaintiffs' consolidated first amended complaint, filed in 2008, included claims against Defendants under the TVPA, the Alien Tort Statute ("ATS"), and state law. Vol:1-Doc:77. The district court dismissed without prejudice Plaintiffs' TVPA and state-law claims for failure to exhaust available Bolivian remedies, but allowed

Plaintiffs' ATS claims to proceed. On interlocutory appeal, this Court held that the first amended complaint failed to state claims under the ATS alone under the Supreme Court's intervening decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See Mamani v. Berzaín*, 654 F.3d 1148, 1153-1156 (11th Cir. 2011).

After exhausting their remedies in Bolivia, Plaintiffs filed a second amended complaint in 2013, which, as relevant here, raised substantially more detailed claims of extrajudicial killings under the TVPA and wrongful deaths under state law. Vol:1-Doc:174. The district court denied Defendants' motion to dismiss the TVPA claims and retained supplemental jurisdiction over Plaintiffs' state-law wrongful-death claims. This Court affirmed the district court's holding that Plaintiffs had satisfied the TVPA's exhaustion requirement and declined to address any other issue. *Mamani v. Berzaín*, 825 F.3d 1304 (11th Cir. 2016), *cert. denied*, *Lozada Sanchez Bustamante v. Mamani*, 137 S. Ct. 1579 (2017).

On remand, the district court denied Defendants' motion for summary judgment, concluding that Plaintiffs "presented sufficient evidence to raise a jury question as to whether decedents' deaths were extrajudicial killings under the TVPA." Vol:2-Doc:408 at 40. In the same order, the court excluded five State Department cables Defendants proffered because they were "clearly based not on the preparer's personal observations, but on the statements of others," and thus did not fall within Rule 803(8), the public-records hearsay exception. *Id.* at 36.

The trial began on March 8, 2018. Over the next three weeks, the jury considered over 175 exhibits and heard from over 40 witnesses. At the close of Plaintiffs' case, Defendants moved for judgment as a matter of law, but the court reserved judgment. Vol:4-Doc:484 at 32:23-33:3.

After Plaintiffs rested, and over their objection, the court reversed its prior decision regarding the State Department cables, now concluding (without explanation) that three of those cables and several others were admissible under the public-records hearsay exception. Vol:4-Doc:487 at 114:13-17. Relying in part on that new evidence, Defendants renewed their motion for judgment as a matter of law, but the court again reserved judgment. Vol:4-Doc:488 at 169:16-20.

The case went to the jury on March 26, 2018. For the TVPA claims, the court instructed the jury that Plaintiffs had to prove by a preponderance of evidence that decedents' deaths constituted extrajudicial killings by Bolivian soldiers and that Defendants were secondarily liable for those deaths under either a command-responsibility, agency, or conspiracy theory. Vol:2-Doc:455 at 8-22. The instruction regarding what constitutes an "extrajudicial killing" mirrored Defendants' proposed version. *Compare id.* at 8-10, *with* Vol:2-Doc:415 at 16-18.

Regarding Plaintiffs' wrongful-death claims, the court instructed the jury that, under Bolivian law, Plaintiffs had to prove by a preponderance of evidence "[t]he willful and intentional killing of the relative by a Bolivian soldier" and that

Defendants "willfully used one or more Bolivian soldiers as an instrument to intentionally kill the Plaintiff's relative." Vol:2-Doc:455 at 23. The court again adopted Defendants' proposed instruction, denying Plaintiffs' request to include language clarifying the requisite mental state under Bolivian law, based on the only foreign-law declaration submitted. Vol:4-Doc:487 at 103:20-104:7.

The ten-person jury deliberated for six days. On April 3, 2018, the jury returned a unanimous verdict for Plaintiffs on the TVPA claims. Vol:2-Doc:474. With respect to each Defendant, the jury made two discrete findings on the 34-page verdict form: first, that each decedent's "death was an extrajudicial killing by a Bolivian soldier"; and second, that each Defendant was "liable for the extrajudicial killing *** because he had command responsibility over the Bolivian soldier who committed the extrajudicial killing." *Id.* The jury awarded compensatory damages to each Plaintiff, totaling $10 million. *Id.* It did not find Defendants liable under the alternative "conspiracy" or "agency" theories of TVPA liability, and it also returned a verdict in favor of Defendants on the wrongful-death claims. *Id.*

On May 30, 2018, the district court granted Defendants' renewed motion for judgment as a matter of law and vacated the jury's verdict. Vol:5-Doc:514. The court held that Plaintiffs had failed to offer evidence from which a reasonable jury could conclude that Bolivian soldiers committed extrajudicial killings. It held that in order to prove that the killings were deliberated, Plaintiffs had "to adduce

evidence" of a "preconceived plan to kill civilians" by Defendants. *Id.* at 17. Although Plaintiffs presented evidence "permit[ting] the reasonable inference that the decedents' deaths resulted from the Bolivian military's *implementation* of a plan to kill civilians," *id.* at 9, the court determined that Plaintiffs had insufficiently proven "that a plan existed in the first place," *id.* at 15—and the absence of that evidence "[p]recludes TVPA [l]iability," *id.* at 17. The court thus declined to address whether there was sufficient "evidence to support command responsibility liability for the killings." *Id.* at 12 n.10.

STANDARD OF REVIEW

This Court reviews a grant of a defendant's renewed motion for judgment as a matter of law *de novo*, applying the same standard as the district court. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997). That standard "is heavily weighted in favor of preserving the jury's verdict." *Pensacola Motor Sales Inc. v. Eastern Shore Toyota, LLC*, 684 F.3d 1211, 1226 (11th Cir. 2012). The Court must "consider all the evidence, and the inferences drawn therefrom, in the light most favorable to" Plaintiffs. *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1360 (11th Cir. 2010). The Court may not "make credibility determinations or weigh the evidence," and it "must disregard all evidence favorable to [Defendants] that the jury [was] not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000). Judgment as a matter of law

is appropriate "only if the facts and inferences point overwhelmingly in favor of [Defendants], such that reasonable people could not arrive at a contrary verdict." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1312 (11th Cir. 2013). If, based on a preponderance of the evidence, "there was any legally sufficient basis for a reasonable jury to find in favor of the nonmoving party," the jury's verdict must stand. *Advanced Bodycare*, 615 F.3d at 1360.

This Court reviews a refusal to give a requested jury instruction for abuse of discretion, *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1333 (11th Cir. 2011), and determinations of foreign law *de novo*, *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018). "[G]enerally *** evidentiary rulings are reviewed for abuse of discretion," but "questions of law underlying evidentiary rulings are reviewed *de novo*." *Lamonica*, 711 F.3d at 1317.

SUMMARY OF THE ARGUMENT

I. The district court's judgment as a matter of law in favor of Defendants should be reversed and the jury verdict reinstated. That unanimous preponderance-of-the-evidence verdict is supported by sufficient—indeed, overwhelming—evidence that these civilians were victims of "extrajudicial killings" by Bolivian soldiers who acted with deliberation when, following direct orders, they fatally shot the eight defenseless victims.

In concluding that no reasonable jury could rule for Plaintiffs, the district court misapplied the legal standard, asking whether Defendants' theory of the case was "plausible" or whether Plaintiffs had refuted the competing inferences that favored Defendants. The district court also disregarded eyewitness and other evidence demonstrating that the soldiers intentionally shot at unarmed, defenseless civilians under direct orders, not to mention overwhelming circumstantial evidence that each killing was carried out in a deliberated fashion.

The district court erred again in requiring Plaintiffs to prove that the killings were committed according to a "preconceived plan." That is not a requirement of a TVPA claim, as correctly reflected in the jury instruction. Neither the record as it existed at summary judgment, nor the first interlocutory appeal in this case (which analyzed Plaintiffs' claims under a different cause of action and an earlier, pre-*Iqbal* version of the complaint) required Plaintiffs to prove a "plan" at trial.

Regardless, even if a "plan" were required, there was ample evidence—both direct and circumstantial—of such a plan with regard to each Defendant on which the jury reasonably could have relied. That the court failed to analyze the liability of each Defendant separately is further grounds for reversal.

II. Plaintiffs are entitled to a new trial on their wrongful-death claims for two reasons. First, the district court abused its discretion in refusing to offer Plaintiffs' proposed jury instruction clarifying the requisite state of mind under

Bolivian law, which was based on the only foreign-law authority submitted to the district court. That error prejudiced Plaintiffs by causing the jury to demand a substantially higher mental state than what Bolivian law requires.

Second, the court erred in reversing its earlier decision and permitting Defendants to introduce various U.S. State Department cables. Those cables, which were rife with multiple levels of hearsay, did not qualify for the public-records hearsay exception because they were neither based on the preparers' firsthand observations nor bore indicia of trustworthiness. Their admission was also highly prejudicial to Plaintiffs, as indicated by Defendants' counsel's characterization of them in closing as the "most important piece of evidence in th[e] case."

ARGUMENT

I. THE JURY'S VERDICT THAT DEFENDANTS VIOLATED THE TVPA SHOULD BE REINSTATED

A. Overwhelming Evidence Demonstrated That Decedents Were Victims Of Extrajudicial Killings By Bolivian Soldiers.

1. The TVPA Defines "Extrajudicial Killings" As State-Sponsored, Deliberated Killings Not Authorized By Legal Process.

Congress enacted the TVPA to "protect[] *** human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing," *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347 (11th Cir. 2011) (quoting Pub. L. No. 102-256, 106 Stat. 73 (Jan. 3, 1992) (*see* Addendum, *infra*)), and to "prevent[] the United States from becoming a safe

harbor" for those who commit such crimes, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014); *see* S. Rep. No. 102-249, at 3 (1991) (TVPA ensures that "torturers and death squads *** no longer have a safe haven in the United States").

As relevant here, the statute creates a cause of action against any person "who, under actual or apparent authority, or color of law, of any foreign nation, subjects another individual to *** extrajudicial killing." 28 U.S.C. § 1350 note. An "extrajudicial killing" is a deliberated killing "not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* Accordingly, the jury was instructed that an "extrajudicial killing" has three elements: (1) the death was the result of a "deliberated killing" by a Bolivian soldier; (2) the soldier was acting under the actual or apparent authority, or color of law, of Bolivia; and (3) the killing was not previously authorized by a valid judgment. Vol:2-Doc:455 at 9-10.

Because Defendants did not challenge the latter two elements of this test, only the first element—whether these were "deliberated" killings by a Bolivian soldier—is at issue in this appeal. In the context of reviewing an ATS claim for extrajudicial killing, this Court has recognized that a "deliberated killing" may not be accidental or negligent, but rather must be "undertaken with studied consideration and purpose." *Mamani*, 654 F.3d at 1155; *see Owens v. Republic of Sudan*, 174 F. Supp.

3d 242, 263 (D.D.C. 2016) (A "deliberated killing" "is simply one undertaken with careful consideration, not on a sudden impulse."), *aff'd*, 864 F.3d 751 (D.C. Cir. 2017).

Although a killing must be "deliberated," it does not require specific intent to kill a specific person. *Owens*, 174 F. Supp. 3d at 263. Rather, many courts have recognized that the purposeful killing of innocent civilians by soldiers or paramilitary actors under orders, including through "indiscriminate brutality," constitutes "extrajudicial killing" under the TVPA and related statutes. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 16-18 (D.D.C. 1998) ("[C]ourts have suggested, in the context of command responsibility, that a course of indiscriminate brutality, known to result in deaths, rises to the level of 'extrajudicial killings.'") (citing cases); *see, e.g.*, *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming judgment that former head of Salvadorian security forces was liable for individual officers' extrajudicial killings); *Shoham v. Islamic Republic of Iran*, No. 12-cv-508, 2017 WL 2399454, at *12-13 (D.D.C. June 1, 2017) (death caused by Fatah members throwing rocks at passing Israeli cars "was undoubtedly an 'extrajudicial killing'"); *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2014 WL 4898210, at *13 (S.D. Fla. Sept. 30, 2014) (plaintiff stated claim of extrajudicial killing when defendant's subordinates, acting as paramilitary troops, shot victim consistent with pattern of other shootings); *Yousuf v. Samantar*, No. 1:04-cv-1260,

2012 WL 3730617 (E.D. Va. Aug. 28, 2012) (commander liable for extrajudicial killings committed pursuant to a violent military campaign); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 267, 275 (S.D.N.Y. 2002) (holding that killings committed by mobs loyal to the President's political party "easily" satisfied the TVPA's standard for extrajudicial killing); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1242, 1248 (S.D. Fla. 1997) (Cuban air force committed extrajudicial killing when, "without warning, reason, or provocation, [it] blasted *** defenseless planes out of the sky").

In addition to permitting claims against the direct perpetrators themselves, "Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]," under which a military commander or superior official may be held liable if he knew or should have known that his subordinates were committing extrajudicial killings. *Doe v. Drummond*, 782 F.3d 576, 609 (11th Cir. 2015) (quoting *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002)). This theory has long been accepted for TVPA claims in this Circuit: Because "the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation," *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005), it permits a jury to find "a commander liable for acts of his subordinates, even where the commander did not order those acts." *Ford*, 289 F.3d at 1286; *see* S. Rep. No. 102-249, at *9

("[A] higher official need not have personally performed or ordered the abuses in order to be held liable" under the Act.).[2]

That theory—that Bolivian soldiers committed extrajudicial killings, and that Defendants were liable under the command-responsibility doctrine—is the one the jury accepted. Vol:2-Doc:474.

2. The Jury Reasonably Concluded That Bolivian Soldiers Killed Decedents With Studied Consideration And Purpose.

Drawing language nearly verbatim from *Mamani*, 654 F.3d at 1155, the district court instructed the jury that a "deliberated killing"

> is one that is undertaken with studied consideration and purpose. A deliberated killing is not one that is the result of accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others), individual motivations (personal reasons) not linked to Defendants, or precipitate shootings during an ongoing civil uprising.

Vol:2-Doc:455 at 9.

Under that straightforward instruction, this should have been an easy case. As recounted in detail above, the jury heard direct eyewitness testimony (including from the soldiers themselves) that Bolivian soldiers were directly ordered to, and did,

---

[2] Although the district court declined to reach this issue, Vol:5-Doc:514 at 12 n.10, the jury properly concluded that Defendants were liable under the "command-responsibility" doctrine, given the abundant evidence that each Defendant exercised control over the soldiers, knew or should have known that the soldiers were committing extrajudicial killings, and wholly failed to prevent or punish those crimes. *See Ford*, 289 F.3d at 1286-1288; *see also* pp. 16-18, *supra*.

deliberately shoot at unarmed civilians. In fact, the undisputed evidence before the jury was that all eight unarmed decedents were either at home, hiding, or fleeing when they were killed. *See* pp. 8-15, *supra*.

A reasonable jury could easily have concluded that the soldiers acted with deliberation—*i.e.*, studied consideration and purpose—when they fired the fatal shots. For instance, one soldier testified that he was ordered "to shoot at anything that moved," and that when he and other soldiers refused, they were replaced by soldiers who obeyed. Vol:4-Doc:500-1 at 29:9-13, 50:23-53:8. He was even ordered to shoot civilians who *posed no threat* "below the belt"—and the jury learned that two of the decedents "bled out and died" after being shot in the leg. *Id.* at 77:17-19; Vol:5-Doc:489 at 170:11-22. Another soldier testified that military officials ordered soldiers to pursue and shoot civilians, and forbade them from assisting any civilians wounded by the bullets, even though he never saw armed civilians at any point during the soldiers' long-sustained assault. Vol:3-Doc:480 at 131:2-132:14.

Other eyewitnesses were in accord. One testified that she saw an officer shoot a civilian, then order younger conscripts to fire as well, yelling, "Damn it. Shoot, shoot those people." Vol:3-Doc:481 at 42:18-19. When the conscripts refused, the officer grabbed one of the conscript's guns and murdered him with it. *Id.* at 51:4-52:15. Two conscripts urged her to hide because they were under orders to shoot civilians that they did not want to follow. Vol:3-Doc:481 at 57:4-8. Another

eyewitness recounted how he watched five soldiers shoot at Lucio while Lucio was unarmed and trying to hide. Vol:5-Doc:500-4 at 34:11-38:4, 41:3-15. A third detailed the harrowing hours spent cowering on a hillside while soldiers pinned him and others down with live fire, before eventually watching as four unarmed civilians were shot and killed nearby. Vol:3-Doc:480 at 32:12-56:20, 38:22-39:7; 42:16-44:1, 56:12-20.

Beyond this sample of the eyewitness testimony, the jury also heard extensive evidence of a coordinated military campaign from which they could infer that these civilian deaths were deliberated. The testimony across five locations and three days portrayed a similar pattern of violence: Soldiers in uniform entered the area with lethal weapons, took up firing positions, received orders to shoot civilians, and deliberately fired indiscriminately into windows and at unarmed, fleeing civilians over prolonged periods. The jury heard evidence of the lopsided death toll—58 civilian deaths (and hundreds wounded), compared to three soldier deaths (two killed by unidentified shooters, one by his own superior)—from which they could infer that the use of force far exceeded the threat. And the jury heard evidence that the soldiers were ordered to take these actions despite fierce dissent within the government, including warnings that such actions would lead to "tragedy" and "generate deaths." Vol:3-Doc:478 at 56:12-17; Vol:4-Doc:482 at 35:2-14; Vol:5-Doc:500-7 at 78:17-81:25.

All of this evidence (and much more) of the soldiers' clear and calculated intent to shoot indiscriminately at unarmed civilians establishes that, viewing the evidence in the light most favorable to Plaintiffs and disregarding conflicting evidence that the jury was not required to credit, a reasonable jury could conclude that each killing by a Bolivian soldier was more likely than not "deliberated" within the meaning of the TVPA. Even if the soldiers "did not know whom exactly they would kill and could not be certain that any specific individual would die," the jury reasonably inferred that these soldiers deliberately fired deadly shots with measured awareness that they would mortally wound civilians who posed no risk of danger. *Owens*, 174 F. Supp. 3d at 263.

It is true that Defendants' *theory* was that the deaths were accidental, justifiable, or the result of precipitate shootings during an ongoing civil uprising, rather than deliberated. *See, e.g.*, Vol:4-Doc:489 at 91:12-21 ("Now [Plaintiffs' counsel] told you this morning, *** that there were no armed civilians, none as far as the eye could see. *** Of course they were armed. Of course."). But the evidence—both as to the actions and orders of individual soldiers, and as to the pattern of the overall military campaign—was to the contrary. Notwithstanding Defendants' evidence of prior events in other locations, the jury consistently heard testimony that *only* Bolivian soldiers fired in proximity of where and when these eight decedents were shot, and that these soldiers had no justification for shooting at

civilians at those times and places. The jury was entitled to (and obviously did) believe Plaintiffs' evidence and reject Defendants' evidence and theories. Because "there was [a] legally sufficient basis for a reasonable jury to find in favor of the nonmoving party," the jury verdict should have stood. *Advanced Bodycare*, 615 F.3d at 1360.

B. The District Court Misapplied The Legal Standard.

In vacating the jury verdict, the district court essentially inverted the governing legal standard, transforming it from one "heavily weighted in favor of preserving the jury's verdict," *Pensacola Motor Sales*, 684 F.3d at 1226, to one that effectively required Plaintiffs to disprove *Defendants'* theory.

Specifically, the court vacated the jury's verdict because, notwithstanding undisputed evidence in *Plaintiffs'* favor, the court found *Defendants'* evidence "establishes a plausible reason for the military's presence and its use of some degree of force in each shooting location"—and therefore Plaintiffs had failed to offer evidence "from which *no* reasonable inference can be drawn *other than* deliberate killings." Vol:5-Doc:514 at 19 (emphasis added). That gets things exactly backwards: Under Rule 50, the proper question was whether, viewing the facts and inferences in Plaintiffs' favor, "there was any legally sufficient basis" to find for *Plaintiffs*. *Advanced Bodycare*, 615 F.3d at 1360. Whether Defendants' evidence "establishes a plausible" alternative theory is irrelevant; the district court was bound

to "disregard all evidence favorable to [Defendants] that the jury [was] not required to believe." *Reeves*, 530 U.S. at 151. Nor were Plaintiffs required to refute Defendants' "plausible" alternative theories. *See Lamonica*, 711 F.3d at 1312.

Although the district court purported to rely on what it called "unrebutted evidence" of "crises at each of the locations where decedents were shot," Vol:5-Doc:514 at 18, 21, in reality that evidence was hotly contested.[3] As noted, Plaintiffs' evidence revealed that there were *no* civilian attacks and *no* armed civilians at the times and places where the eight decedents were shot. *See* pp. 8-15, *supra*. The jury also heard that the military coerced witnesses into making false statements to fabricate proof of supposed crises. *See* Vol:3-Doc:480 at 135:22-136:5, 142:20-23, 150:16-153:9; Vol:4-Doc:482 at 74:11-75:23. A reasonable jury was entitled to believe Plaintiffs' evidence.

---

[3] For instance, contrary to the court's reference to "an ambush in Warisata" on the military-escorted tourist caravan, the jury heard from an American travelling on the caravan that, notwithstanding confrontations between the military and demonstrators that day, the caravan passed through Warisata "safely" and he "did not see or hear any gunshots in Warisata when [it] went through the town." Vol:2-Doc:477 at 53:19-54:14. As already explained, other evidence showed that the attacks the court cited were not in spatial and/or temporal proximity to where decedents were killed. *See, e.g.*, Vol:2-Doc:476 at 52:11-20, 59:11-62:10, 65:1-6 (Marlene killed in home 20-to-25-minute distance from where soldier was shot earlier by unidentified shooter); Vol:5-Doc:500-9 at 24:15-18, 38:5-22, 46:22-24 (no civilian attack in Ovejuyo, where Raúl was killed in the afternoon on October 13, a 30-minute distance from where a solider was shot in the Southern Zone of La Paz early that morning).

Ultimately, the district court faulted Plaintiffs' evidence because, in its view, "competing inferences could conceivably be drawn regarding intent," whereas in other TVPA cases (outside the Rule 50 context) "there was no [other] possible inference to be drawn." Vol:5-Doc:514 at 21. That conclusion is untenable. It was manifestly "the function of the jury as the traditional finder of facts, and not the court, to resolve the conflict between *** competing inferences." *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988). The district court's judgment cannot be reconciled with the standard requiring it to review competing inferences "in the light most favorable to [Plaintiffs]." *Advanced Bodycare*, 615 F.3d at 1360.

C. The District Court Erroneously Demanded Proof Of A "Preconceived Plan" To Kill Civilians.

The district court also misconstrued the TVPA itself, concluding that "the absence of evidence of a plan to kill civilians [p]recludes TVPA [l]iability." Vol:5-Doc:514 at 17. The existence of a "plan," however, is not an element of liability under the Act. The district court concluded otherwise by confusing primary and secondary liability, misreading this Court's precedent, and improperly fixating on its prior summary judgment decision.

1. The TVPA does not require proof of a "plan to kill civilians" by Defendants in order to show an "extrajudicial killing." The court's instructions to the jury—based on language proposed by Defendants—required no such showing. Vol:2-

Doc:455 at 8-10. Instead, the jury was properly tasked with determining whether each decedent's "death was an extrajudicial killing *by a Bolivian soldier*." Vol:2-Doc:474 (emphasis added). After six days of deliberations, the jury made two findings: that Bolivian soldiers had committed extrajudicial killings, and that each Defendant was liable because of his "command responsibility over the Bolivian soldier who committed the extrajudicial killing." *Id.* Nothing more was required.

The district court determined that, because *Defendants'* "evidence establishes a plausible reason for the military's presence and its use of some degree of force in each shooting location," Plaintiffs could not prove that each Bolivian soldier acted with the requisite deliberation absent proof of "Defendants' alleged preconceived plan to kill civilians." Vol:5-Doc:514 at 17, 19. But that conclusion makes sense only if the *lone* reasonable inference the jury could draw from the evidence was that the killings were accidental or justified—which would require ignoring the abundant evidence of considered, deliberated action by soldiers recounted above, including their orders to "shoot at anything that moved." Vol:4-Doc:500-1 at 26:11-25. That conclusion also conflates the predicate question of whether an "extrajudicial killing by a Bolivian soldier" occurred with the distinct question of whether either Defendant was liable for that killing under the TVPA. *See* Vol:2-Doc:455 at 8 (jury must find "(1) that relative died as a result of an extrajudicial killing by a member

of the Bolivian military, and (2) the Defendant is legally liable for the death under a theory of command responsibility, conspiracy, and/or agency").

It is true that, as Plaintiffs urged below, proof that a soldier's killing is carried out according to an overarching "plan" is "*[o]ne* way to show that a killing is deliberated." Vol:2-Doc:414 at 29 (emphasis added). But it is not the only way, as indicated by the fact that neither the jury instructions nor the verdict form required such a finding. Vol:2-Doc:455 at 8-10; Vol:2-Doc:474. The district court thus erred in demanding, *after* the jury returned its verdict, evidence that "Defendants chose the path of military intervention out of a desire to intentionally kill unarmed civilians." Vol:5-Doc:514 at 24. Under the command-responsibility doctrine the jury accepted, the relevant inquiry was the purpose of the *Bolivian soldiers* who shot Plaintiffs' relatives, not the "cho[ice]" and "desire" of Defendants. *See Ford*, 289 F.3d at 1286 (commander may be liable "even where the commander did not order those acts").

In effect, the court blurred the line between the command-responsibility doctrine, which has a "knew or should have known" standard, *Ford*, 289 F.3d at 1288, and conspiracy, which required proof that Defendants formed a "plan" with the Bolivian soldiers to deliberately kill innocent civilians, "knowing of at least one of the goals of the conspiracy and intending to help accomplish it," Vol:2-Doc:455 at 16-19. Even the jury instructions, however, recognized that "[e]ach of these is a

separate theory of liability." *Id.* at 11 (advising that "[y]ou only need to find in a Plaintiff's favor on one of these *** theories"). Unlike the jury, which faithfully followed that instruction by finding Defendants liable under command responsibility but not conspiracy, the district court erred in essentially importing the "agreement" and "intent" requirements of conspiracy into the predicate question of whether an extrajudicial killing occurred in the first place.

2. The district court apparently believed that its reading was compelled by this Court's prior opinion in *Mamani*. *See, e.g.*, Vol:5-Doc:514 at 19 ("Plaintiffs' failure to adduce [evidence of Defendants' preconceived plan] lands them back where they were seven years ago, when the Eleventh Circuit found legally insufficient their allegations of indiscriminate shootings in multiple locations."). But the district court misinterpreted *Mamani*—a decision that, if anything, supports Plaintiffs.

To begin, *Mamani* did not concern an interpretation of the TVPA, but rather whether Plaintiffs had pleaded facts sufficient to state claims under the ATS. *See Mamani*, 654 F.3d at 1151 n.1 (emphasizing that TVPA claims were "not at issue in th[at] limited interlocutory appeal"). It stressed that "the federal courts must act as vigilant doorkeepers and exercise great caution when deciding either to recognize new causes of action under the ATS or to broaden existing causes of action."

Mamani, 654 F.3d at 1152; *see id.* at 1155 n.9 (Supreme Court has "warned not to create or broaden a cause of action" under ATS when law "unclear").

To be sure, *Mamani* looked to the TVPA "for guidance" when interpreting what might constitute an "extrajudicial killing" under the ATS. 654 F.3d at 1154. But it noted that the meaning of "extrajudicial killing" may be broader under the TVPA than the ATS, as "[n]either Congress nor the Supreme Court has urged us to read the TVPA as narrowly as we have been directed to read the [ATS] generally." *Id.* at 1154 & n.7 (quoting *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1252 (11th Cir. 2005)); *see Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008) (explaining that the meaning of "extrajudicial killing" under the TVPA is not coextensive with the meaning under the ATS). And in any event, the jury instruction given below mirrored *Mamani*'s guidance nearly verbatim, as noted above.

Beyond that, the pre-*Iqbal* first amended complaint from 2008—which, among other things, included no "factual allegations" that soldiers were given specific orders to shoot at unarmed civilians ("anything that moved"), and no indication that the allegations regarding decedents' deaths were supported by direct eyewitness testimony—painted a very different picture than the detailed record ultimately developed at trial. The court was thus wrong to assume that *Mamani*'s observations regarding long-since-amended pleadings trumped the trial evidence,

necessitating that Plaintiffs fill an evidentiary "gap" with evidence of a "preconceived plan." Vol:5-Doc:514 at 17.

If anything, *Mamani* supports Plaintiffs, not Defendants. The decision notes that, while Plaintiffs' first amended complaint was "too conclusory" as pleaded to support a theory of secondary ATS liability against the Defendants, even that "conclusory" complaint "may possibly include factual allegations that seem consistent with ATS liability for extrajudicial killing for someone: for example, *the shooters*." *Mamani*, 654 F.3d at 1155 n.8 (emphasis added). That theory—that the shooters committed extrajudicial killings, and that Defendants were liable under the command-responsibility doctrine—is the one pleaded with detailed supporting factual allegations in Plaintiffs' second amended complaint, and the one the jury ultimately accepted at trial.

3. The district court also expressed concern that the evidence at trial did not match the evidence it expected from the summary judgment briefing. *See* Vol:5-Doc:514 at 17 (suggesting that a "preconceived plan to kill civilians" was "central to [Plaintiffs'] case theory for the past five years of this litigation and to this Court's Summary Judgment Order"); *see also id.* at 19, 25.

That reasoning, too, was error. Once a jury hears a case and returns a verdict, the only question relevant under Rule 50 is whether the plaintiff "present[ed] evidence that would permit a reasonable jury to find in the plaintiff's favor." *Bogle*

v. Orange Cty. Bd. of Cty. Comm'rs, 162 F.3d 653, 659 (11th Cir. 1998). For good reason: As any litigation runs its course, "the record changes, which is to say *** the evidence and the inferences that may be drawn from it change," as discovery unfolds, witnesses testify, and parties' competing theories of the case evolve in response to each other. *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1283 (11th Cir. 2005); *cf. FN Herstal SA v. Clyde Armory Inc.*, 838 F.3d 1071, 1089 (11th Cir. 2016) ("pretrial order supersedes the pleadings"). Thus, "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011). It follows that a "prior holding with respect to summary judgment would not control the district court's ruling on a motion for a judgment as a matter of law." *King v. Volunteers of Am., N. Ala., Inc.*, 614 F. App'x 449, 453 (11th Cir. 2015) (citing *Jackson*, 405 F.3d at 1283-1284).

It is true that, as explained in the next section, Plaintiffs *did* argue that the killings reflected the implementation of a preconceived plan by each Defendant, and in fact presented more than sufficient evidence for a reasonable jury to so find. But the relevant point for present purposes is that, regardless of whether a "plan" existed, a reasonable jury unmistakably had a "legally sufficient evidentiary basis" at trial for finding Defendants liable, regardless of the state of the record at the summary judgment stage. *Advanced Bodycare,* 615 F.3d at 1360.

D. Ample Evidence Demonstrated That, In Any Event, Defendants Had A Preconceived Plan To Kill Innocent Civilians.

Regardless, even if the TVPA required proof that decedents' deaths were the result of Defendants' "plan to kill civilians," Plaintiffs presented more than sufficient evidence of such a plan for a reasonable jury to rule in their favor. Indeed, the jury may well have accepted that theory. The district court erred in inexplicably discounting the evidence (both direct and circumstantial) of such a plan, and failed to perform the Rule 50 analysis separately for each Defendant.

1. The District Court Wrongly Discounted Compelling Circumstantial Evidence Of A "Plan."

As an initial matter, in evaluating the evidence of a "plan," the district court erred in improperly discounting probative circumstantial evidence. The court acknowledged that Plaintiffs presented sufficient evidence to "permit the reasonable inference that the decedents' deaths resulted from the Bolivian military's *implementation* of a plan to kill civilians." Vol:5-Doc:514 at 9; *see also id.* at 8 n.6, 15, 20. Yet, without citing any authority, the district court faulted Plaintiffs for failing to "present any evidence that such a plan actually *existed*." *Id.* at 9; *see also id.* at 8 n.6, 15, 20. Not only is that conclusion wrong (*see* pp. 44-49, *infra*), it contravenes the court's own (proper) instruction to the jury not to "be concerned about whether the evidence is direct or circumstantial" because "there's no legal difference in the weight you may give to either." Vol:2-Doc:455 at 3.

The court's jury instruction, rather than its Rule 50 judgment, was correct. It has long been established that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 n.17 (1957)). That is why this Court has repeatedly held, in a variety of contexts, that circumstantial evidence alone may establish a plan's existence. *See, e.g.*, *United States v. Arbane*, 446 F.3d 1223, 1228 (11th Cir. 2006) (explaining, in sufficiency-of-evidence case, that "[t]he government may prove the existence of an agreement [for purposes of a drug conspiracy] by circumstantial evidence through inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme"); *SEC v. Ginsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004) (holding that insider-trading scheme may be proved by "direct or circumstantial evidence" and "[c]ircumstantial evidence has no less weight than direct evidence"); *United States v. Knowles*, 66 F.3d 1146, 1155 (11th Cir. 1995) ("[T]he existence of a conspiracy may [be], and often is, *** proved by circumstantial evidence, such as inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.").

In short, evidence that a plan was *implemented* is also evidence that it *existed*. Thus, the district court's explicit acknowledgment that the evidence "permit[s] the reasonable inference that the decedents' deaths resulted from the Bolivian military's

implementation of a plan to kill civilians," Vol:5-Doc:514 at 9, requires reversal of the Rule 50 judgment by itself.

2. The Jury Heard Both Direct And Circumstantial Evidence Of Berzaín's Plan To Kill Civilians.

The court's insistence on direct evidence is all the more confounding because the jury *did* hear "direct" evidence of a plan to use military force to kill innocent civilians in order to quash public demonstrations. Specifically, Victor Hugo Canelas, a former member of Lozada's cabinet, testified that Berzaín described just such a "plan" at a meeting of top-level party officials shortly before Lozada's second term as president. Vol:4-Doc:482 at 91:1-93:15. During the meeting, Canelas explained that the prior administration had capitulated to protesters' demands after the use of "untrained troops" failed to effectively repress the demonstrations. *Id.* at 91:15-18, 92:22. Berzaín responded that what happened to the prior administration was "not going to happen to us" because "[w]hat we're going to use are elite troops, troops from [an eastern region of the country], and we will kill 50, a hundred, a thousand." *Id.* at 91:19-25, 93:14-15. The jury later heard evidence that the military deployed those elite troops from eastern Bolivia in and around Warisata, El Alto, and Ovejuyo, where several of the decedents were killed. *See, e.g.*, Vol:3-Doc:480 at 75:13-16; Vol:3-Doc:481 at 27:11-28:3; Vol:4-Doc:500-1 at 38:3-22; Vol:4-Doc:500-2 at 134:17-25; Vol:5-Doc:500-6 at 23:16-22, 46:6-10; Vol:5-Doc:500-9 at 40:19-25, 43:8-44:4.

The jury also heard that, a few months after Berzaín took office, he dismissed the mayor of La Paz's warning (after five civilian deaths) that a hardline military response to mounting opposition to the government's economic agenda would likely result in additional civilian casualties, replying, "Mayor, if there are five dead, it doesn't matter if it's 50 more, as long as we solve the problem." Vol:4-Doc:483 at 26:22-27:2. Similarly, Berzaín responded to concerns that deploying the military to escort gas tankers "could generate deaths" by stating, "[w]ell, there have to be deaths, but also gasoline." Vol:4-Doc:482 at 35:2-14. These statements by Berzaín were consistent with the "line of force" he advocated for dealing with protests, according to firsthand testimony of other government officials who advocated for a peaceful solution. Vol:4-Doc:483 at 44:4-21; *see also* Vol:5-Doc:500-7 at 78:17-22, 79:14-18; Vol:2-Doc:476 at 90:16-91:10, 97:17-19.

Berzaín's statements were corroborated by the facts on the ground. The month after Berzaín was appointed Minister of Defense, the military launched the Republic Plan, which directed soldiers to "apply the Principles of Mass and Shock" to remove roadblocks and control civil disturbances. Vol:5-Doc:506-23 at 39-0001. High-ranking military officers testified that the Republic Plan was known throughout "[e]very single unit" of "the entire Army," Vol:5-Doc:500-6 at 110:12-17, and at all times during this relevant period, troops acted strictly pursuant to the high-level commands they received, Vol:4-Doc:485 at 19:8-14; *see also* Vol:4-

Doc:500-1 at 77:10-12 ("Even to go into the bathroom and other places, we had to receive orders."). The jury also considered extensive evidence indicating that Berzaín rejected peaceful options for resolving public demonstrations and personally directed the armed military operations of September and October 2003, despite warnings of likely civilian killings. Vol:2-Doc:476 at 90:17-91:9, 97:17-19; Vol:3-Doc:481 at 108:10-20; Vol:4-Doc:482 at 29:14-16, 30:23-31:5, 32:2-4, 35:4-8; Vol:4-Doc:485 at 89:19-90:16, 92:1-23.

In light of all this testimony and other evidence, it would have been more than reasonable for the jury to conclude—to the extent it was even required to do so—that Berzaín had a "plan" to use armed troops to confront and kill civilians as a means to prevent protests from frustrating the economic policies of Lozada's government. Nevertheless, the district court either ignored this evidence or discounted it as circumstantial. The court even discounted Canelas's direct, eyewitness testimony regarding Berzaín's plan to "kill 50, a hundred, a thousand" people on the perplexing ground that it had excluded as too speculative Canelas's *additional* testimony suggesting that Lozada had given "some sort of approval" to Berzaín's plan. *See* Vol:5-Doc:514 at 10 & n.8, 14, 22-23. But as noted, the secondary liability theory the jury accepted was *not* conspiracy, which conceivably could have required a meeting of the minds between Defendants. Instead, the predicate question under the command-responsibility doctrine is whether decedents' deaths were "extrajudicial

killings" by Bolivian soldiers—and surely Berzaín's statement is evidence that he, at least, planned for such killings to occur.

In other words, it was irrelevant whether Lozada "agreed" to Berzaín's plan, as Berzaín could be held independently liable for developing that plan on his own. Because the district court did not analyze the evidence as to each Defendant separately—or even acknowledge that that was a relevant inquiry—at a minimum, the court's judgment must be reversed with respect to Berzaín.

3. A Reasonable Jury Could Also Have Concluded That Lozada Agreed To, Or Knew Of And Failed To Prevent, Berzaín's Plan To Kill Civilians.

With respect to Lozada's liability, there was ample evidence to allow the jury to infer that Lozada—Berzaín's immediate superior—agreed to, or at least knew of and failed to prevent, Berzaín's plan to kill civilians.

First, although (as noted) the district court excluded as too speculative the testimony that Lozada expressed "some sort of approval" of Berzaín's plan to use military force to kill a thousand civilians, Vol:5-Doc:514 at 10 n.8, it was nevertheless reasonable for the jury to infer Lozada's assent to Berzaín's plan merely from his failure to denounce it, Vol:4-Doc:482 at 92:1-4. That is especially true given that Lozada was the head of the party presiding over the meeting at his own house. *See* RESTATEMENT (THIRD) OF AGENCY § 1.03 cmt b ("Silence may constitute a manifestation [of assent] when, in light of all the circumstances, a reasonable

person would express dissent to the inference that other persons will draw from silence."). A reasonable jury also could infer Lozada's approval of Berzaín's plan from the fact that Lozada soon promoted Berzaín to the exact position, Minister of Defense, where he could best carry it out.

Second, the evidence showed that Lozada took actions consistent with a plan to kill civilians. Shortly after coming to power, his government defined "roadblocks, marches, [and] demonstrations" as subversive acts and directed troops to "apply the Principles of Mass and Shock" to control civil disturbances. Vol:5-Doc:506-22 at 13-14; Vol:5-Doc:506-23. Lozada sent a letter to the Commander in Chief of the Armed Forces on September 20, 2003—the day the first decedent was killed—specifically instructing the Commander to "mobilize and immediately use the force necessary to restore public order and respect for the rule of law in the region" to advance the government's agenda. Vol:4-Doc:497-3; Vol:5-Doc:506-3; *see also* Vol:5-Doc:506-14; Vol:5-Doc:506-15. He later declared a national emergency and directed the Armed Forces to safeguard the "normal operation of the country's economic activities." Vol:5-Doc:506-1 at 0001-0002; *see also* Vol:3-Doc:481 at 108:10-20. Moreover, the jury considered substantial evidence that Lozada issued tactical orders relating to the deadly military campaigns of September and October 2013, including the use of elite troops to counter demonstrations. *See, e.g.*, Vol:3-Doc:481 at 98:5-19 (ordered domestic deployment of military); Vol:2-Doc:476 at

90:20-22 (ordered Berzaín to go to Sorata); Vol:5-Doc:500-6 at 18:13-19, 46:6-10 (authorized deployment of special forces present in Sorata and Warisata); Vol:4-Doc:485 at 80:1-22 (rejected alternative to Warisata operation, proclaiming that "the state never retreats"). He took all of these actions despite mounting reports that unarmed civilians had been killed by the military, including an eight-year-old girl killed in her own home. All of this evidence together allowed the jury reasonably to infer that Lozada had a plan to kill civilians in order to quell public demonstrations.

Third, and in any event, the jury's "command responsibility" verdict means that Plaintiffs only needed to show that Lozada "*knew or should have known*, owing to the circumstances at the time," of his subordinates' plan to use lethal military force. *Ford*, 289 F.3d at 1286-1288 (emphasis added). Thus, regardless of whether Lozada explicitly approved of Berzaín's plan, Canelas's testimony provides direct support for the fact that Lozada *knew* of it. The voluminous circumstantial evidence cited above further supports Lozada's constructive knowledge of Berzaín's plan. Accordingly, even if a "plan" was required, the jury's verdict should be reinstated with regard to Lozada as well.

II. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL WITH RESPECT TO THEIR WRONGFUL-DEATH CLAIMS

In addition to their TVPA claims, Plaintiffs asserted state-law claims for wrongful death against each Defendant that were governed by Bolivian law. The

district court committed two errors with respect to these claims, each of which independently requires a new trial.

A. The Misleading Jury Instructions On The Wrongful-Death Claims Prejudiced Plaintiffs.

Defendants proposed a jury instruction requiring the jury to find a "willful and intentional killing of [each] relative by a Bolivian soldier." Vol:2-Doc:415 at 26. Because "willful and intentional" was not defined, Plaintiffs proposed a competing instruction to clarify that, under Bolivian law, a Plaintiff can meet that standard with proof that "a Defendant knows that death is a probable result of his action, whether or not the Defendant wanted to cause that particular death." Vol:2-Doc:414 at 31. That proposed instruction was based on a Federal Rule of Civil Procedure 44.1 foreign-law declaration—the only such report before the district court—by an expert on Bolivian law. *See id.*; Vol:2-Doc:375-69 ¶¶ 41-46, 76. Without the proffered instruction, Plaintiffs argued, the jury might incorrectly conclude that "willful and intentional" required a higher standard of intent than Bolivian law actually requires. Vol:4-Doc:487 at 100:9-18. The court nevertheless rejected Plaintiffs' requested language and adopted Defendants' instruction wholesale. Vol:2-Doc:455 at 23; Vol:4-Doc:487 at 104:3-7.

The court's refusal to give the requested instruction was an abuse of discretion, which occurs "when (1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to

give the instruction resulted in prejudicial harm to the requesting party." *Burchfield*, 636 F.3d at 1333-1334.

First, the language Plaintiffs requested correctly stated the law. *See Animal Sci. Prods.*, 138 S. Ct. at 1873 (determination of foreign law is question of law reviewed *de novo*). The expert's report explained that article 14 of the Bolivian Criminal Code sets forth the state of mind applicable to civil claims for wrongful death, which requires only that the perpetrator knows and accepts the possibility that a killing will occur as a result of his action, yet still commits it. Vol:2-Doc:375-69 ¶¶ 41, 43, 46. Because Defendants did not introduce any contrary authority, the district court had no basis to conclude that the proffered standard was inaccurate. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1165 (11th Cir. 2009) ("Normally, an un-rebutted affidavit from an attorney on foreign law would be sufficient to establish the substance of that law.").

Second, Plaintiffs' instruction indisputably dealt with an issue properly before the jury, *i.e.*, the relevant standard of intent governing Plaintiffs' wrongful-death claims. Vol:2-Doc:455 at 23; Vol:2-Doc:415 at 26; Vol:2-Doc:414 at 31.

Third, the district court's refusal prejudiced Plaintiffs. Where a specific legal phrase is "not familiar to jurors," using that phrase in instructions, absent explanation, "create[s] a distinct risk of confusing the jury." *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999); *see, e.g.*, *Rand v. Nat'l Fin. Ins.*

Co., 304 F.3d 1049, 1052 (11th Cir. 2002) (remanding for new trial based on "confusing and erroneous" instruction that misled jury about scope of knowledge plaintiff must prove defendant had).

Absent the clarifying language Plaintiffs sought, the instructions improperly implied that the jury had to conclude that the soldiers acted with specific intent to kill Plaintiffs' relatives, when the jury was only required to conclude that the soldiers and Defendants took action knowing "that death [wa]s a probable consequence of [their] actions[.]" Vol:4-Doc:487 at 100:9-18. Given the jury's separate determination that the soldiers' killings were "deliberated" under the TVPA, its finding that those killings were not "willful *and* intentional" under Bolivian law implies that it understood the latter phrase to impose an intent standard higher than the one Bolivian law actually requires. *Cf. Willful*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious, evil*, or *corrupt*."). Because that is the same confusion that Plaintiffs' jury instruction sought to avoid, Plaintiffs are entitled to a new trial on these claims. *See Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 979 F.2d 823, 827 (11th Cir. 1992) ("[T]he possibility that the jury may have employed the wrong criterion of liability to exonerate the defendants requires a new trial.").

B. The District Court Admitted Highly Prejudicial Hearsay Statements.

Over Plaintiffs' objections, the district court admitted hearsay cables from diplomatic officers at the U.S. embassy rife with highly prejudicial second-level hearsay. *See* Vol:4-Doc:497-28 to Vol:4-Doc:497-35. That error, too, requires a new trial. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1276 (11th Cir. 2008) (evidentiary rulings overturned if "the moving party establishes a substantial prejudicial effect").

It is undisputed that the cables are out-of-court statements that were offered "to prove the truth of the matter asserted" therein. FED. R. EVID. 801(c)(2) (defining "hearsay"). At summary judgment, the district court properly rejected Defendants' argument that such evidence was admissible under the public-records exception in Federal Rule of Evidence 803(8), reasoning that the cables are "clearly based not on the preparer's personal observations, but on the statements of others." Vol:2-Doc:408 at 32-36. The court reversed its decision at trial, however, ruling that the cables could be admitted pursuant to the public-records exception. Vol:4-Doc:487 at 114:13-115:1. That unexplained (and inexplicable) decision was erroneous.

As relevant here, the public-records exception permits the introduction of a record of a public office under two conditions: (1) it describes "a matter observed while under a legal duty to report," FED. R. EVID. 803(8)(A)(ii); and (2) "the opponent does not show that the source of information or other circumstances

indicate a lack of trustworthiness," *id.* at 803(8)(B). Because information in the public report must be "based upon the knowledge or observations of the preparer of the report, as opposed to a mere collection of statements from a witness," it is "well established" that only trustworthy statements in a public report "which result from the officer's *own observations and knowledge* may be admitted," while "statements made by third persons under no business duty to report may not." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009) (emphasis added). Even when the report does not "explicitly paraphrase the words of others," if "the only conceivable explanation" for how the information was obtained was by "listening to the statement of others," the statement is admissible only if it qualifies for a separate hearsay exception. *United States v. Ransfer*, 749 F.3d 914, 925 (11th Cir. 2014).

The district court should not have admitted the cables, which consisted of substantial information based not on what the preparer "observed," but instead on what unidentified third parties supplied. The cables repeatedly refer to what "reportedly" or "apparently" happened in the days around decedents' deaths, communicate "unconfirmed rumors," and convey opinions from "several [anonymous] intelligence sources" (and other unspecified sources). *See, e.g.*, Vol:4-Doc:497-28 at 1089.3, 1089.4; Vol:4-Doc:497-29 at 1090.3; Vol:4-Doc:497-30 at 1091.3, 1091.4; Vol:4-Doc:497-31 at 1092.1, 1092.2. The secondhand quality of the information is underscored by the fact that the cables refer to incidents that

purportedly occurred well outside of La Paz, where the U.S. embassy is located. S*ee, e.g.*, Vol:4-Doc:497-28, Vol:4-Doc:497-29 (summarizing "Notes from Around the Country").

The cables should have been excluded for the independent reason that "the source of information [and] other circumstances indicate a lack of trustworthiness." FED. R. EVID. 803(8)(B); *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988) (explaining that the "trustworthiness inquiry" is Rule 803(8)'s "primary safeguard against the admission of unreliable evidence, and *** applies to all elements of the report"). Beyond the unreliability already inherent in multiple layers of hearsay, the total anonymity of the sources of the opinions contained in these documents render the statements particularly untrustworthy. That is especially so given the testimony at trial that the Bolivian government coerced false statements to exonerate the Bolivian military of responsibility for the violence—and the possibility that the cables relied on similar misinformation from Bolivian government sources. Vol:3-Doc:480 at 135:22-136:5, 142:20-23, 150:16-152:16, 153:7-9; Vol:4-Doc:482 at 74:11-75:23.

The improperly admitted statements were also highly prejudicial. Defendants used them to support the key, controversial themes of their defense: that Defendants' deployment of the military was a justified response to civilian protests and the deaths were the accidental result of misdirected fire. Indeed, Defendants relied centrally

on this evidence at closing argument, attaching the imprimatur of the U.S. government to their theory. Vol:4-Doc:489 at 89:13 (beginning discussion of evidence by stating, "[l]et's start with the US State Department cable"). Defendants' counsel continued:

> When you have violent, armed civilians bringing dynamite and guns to bear, what happens? The State Department was telling the people in DC—and this [cable] is telling you—what happens is that there's a danger of misdirected fire coming through windows or walls. *That is the most important piece of evidence in this case, ladies and gentlemen,* because what you're going to see *** is *** mainly no evidence that [decedents] were killed intentionally.

Id. at 122:21-123:5 (emphasis added). The jury eventually returned a verdict for Defendants on the wrongful-death claims, finding no "willful and intentional killing of the relative[s] by a Bolivian soldier." Vol:2-Doc:455 at 23; *see also* Vol:2-Doc:474.

Having argued that the State Department cables are the "most important piece of evidence in this case" regarding whether Bolivian soldiers intentionally killed these specific decedents, Defendants cannot now deny that the wrongful introduction of the cables was highly prejudicial. Because this evidence "may well have carried the day" on the wrongful-death claims, the jury's verdict on those claims must be vacated. *Angelucci v. Government Emps. Ins. Co.*, 412 F. App'x 206, 210-211 (11th Cir. 2011) (per curiam) (remanding for new trial where "substantial prejudice"

resulted after defendant "signif[ied] the importance" of improperly admitted evidence at closing).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below, enter judgment on the jury's verdict on Plaintiffs' TVPA claims, and remand the case to the district court for a new trial on Plaintiffs' wrongful-death claims.

Dated: October 5, 2018

Respectfully submitted,

/s/James E. Tysse

James E. Tysse
Steven H. Schulman
Lide E. Paterno
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 887-4000
jtysse@akingump.com

Judith Brown Chomsky
CENTER FOR CONSTITUTIONAL RIGHTS
Post Office Box 29726
Elkins Park, PA 19027
(215) 782-8367

Beth Stephens
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
Seventh Floor
New York, NY 10012
(212) 614-6431

Paul Hoffman
SCHONBRUN, SEPLOW, HARRIS & HOFFMAN, LLP
200 Pier Avenue #226
Hermosa Beach, CA 90254
(310) 396-0731

Counsel for Plaintiffs-Appellants

ADDENDUM

UNITED STATES PUBLIC LAWS
102nd Congress - Second Session
Convening January 3, 1992
PL 102–256 (HR 2092)
March 12, 1992
TORTURE VICTIM PROTECTION ACT OF 1991

An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial

guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

CERTIFICATE OF COMPLIANCE

On behalf of Plaintiffs-Appellants, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the attached motion is proportionally spaced, has a typeface of 14 points or more, and contains 12,997 words.

Dated: October 5, 2018

s/ James E. Tysse

James E. Tysse

CERTIFICATE OF SERVICE

I, James E. Tysse, counsel for Appellants and a member of the Bar of this Court, certify that on October 5, 2018, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

s/ James E. Tysse

James E. Tysse