No. 16-56704

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHMET DOĞAN, individually and on behalf of his deceased son FURKAN DOĞAN; and HIKMET DOĞAN, individually and on behalf of her deceased son, FURKAN DOĞAN,

Plaintiffs-Appellants,

vs.

EHUD BARAK,

Defendant-Appellee.

On Appeal From the Judgment of the United States District Court
For the Central District of California
Case No. CV 15-08130-ODW (GJSx)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

This lawsuit tests our commitment to the equal application of the law. In 2010 soldiers of a foreign government shot four times and then executed an unarmed United States citizen while that young man was on a civilian ship delivering humanitarian supplies. His parents, Plaintiffs Ahmet and Hikmet Doğan, have filed suit against the former foreign government official responsible for this extrajudicial killing. They have alleged valid claims under the Torture Victim Protection Act, Alien Tort Statute, and Anti-Terrorism Act. If the Defendant in this case had come from another country, such as Syria, Sudan, or North Korea, Plaintiffs' lawsuit would be proceeding apace.

But the soldiers were members of the Israeli Defense Force and the responsible foreign government official is Defendant Ehud Barak, then the Israeli Minister of Defense. At Israel's request, the U.S. State Department demanded absolute immunity for Mr. Barak and asked the district court to dismiss all of the claims against him on that basis. The district court deemed itself bound by this request and dismissed Plaintiffs' claims, adding that it would have reached the same result pursuant to its own analysis.

The overriding question presented by this appeal is whether a former foreign government official is absolutely immune for the torture and extrajudicial killing of a U.S. citizen. The answer is no. At the outset, the courts do not owe absolute

deference to the Executive's decision on all issues of immunity. Immunity does not extend to former foreign government officials for *jus cogens* violations committed while in office. The summary execution of an unarmed U.S. civilian unquestionably violates the Torture Victims Protection Act and other federal laws. The ruling in this case should be the same regardless of the country from which the defendant was a former government official.

The district court erred in dismissing all of Mr. and Mrs. Doğan's claims at the pleading stage. This Court should vacate the judgment and reinstate all of their claims against Mr. Barak.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1350 (Alien Tort Claims Act and Torture Victim Protection Act), and 18 U.S.C. § 2333(a) (Anti-Terrorism Act). On October 13, 2016, the district court entered a final order and judgment dismissing all of Plaintiffs' claims with prejudice on the basis of foreign sovereign immunity. ER003-027, ER001-002. On November 11, 2016, Plaintiffs timely filed their appeal. ER028-057. *See* Fed.R.App.P. 4(a)(1)(A). This Court has jurisdiction of this appeal of a final judgment granting a motion to dismiss all claims with prejudice under 28 U.S.C. § 1291. *Syed v. M-I, LLC*, 846 F.3d 1034, 1040 (9th Cir. 2017). Evidentiary errors are reviewed for abuse of discretion and mandate reversal where they were

"manifestly erroneous and prejudicial." *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007).

ISSUES PRESENTED FOR REVIEW

The district court found that it was required to defer to the State Department's Suggestion of Immunity for Ehud Barak and that in any event it would have independently granted immunity for Mr. Barak. The questions presented are:

1. Must the district court grant absolute deference to the State Department's Suggestion of Immunity for a former foreign government official?
2. Is the State Department's Suggestion of Immunity entitled to "serious weight" where it contains no discussion of the foreign policy consequences of the case, consists only of legal analysis on separate issues, and makes legal arguments inconsistent with the State Department's prior positions?
3. Is a former foreign government official immune under the common law from any civil liability for *jus cogens* violations arising from the acts of planning, commanding, and failing to prevent the torture and extrajudicial killing of a U.S. citizen?
4. Did the district court err by admitting extrinsic evidence in a facial jurisdictional attack, and then relying on this evidence to conduct its own freewheeling foreign policy analysis as a basis for granting immunity?

STATEMENT OF THE CASE

A. The Torture and Killing of Furkan Doğan

Furkan Doğan was born in Troy, New York. ER123 ¶12. He was just 18-years-old at the time of his death. *Id.* ¶12.

On May 27, 2010, Mr. Doğan joined the Gaza Freedom Flotilla, a group of six unarmed civilian vessels carrying more than 700 civilian passengers and humanitarian supplies for delivery to the citizens of Gaza. ER121 ¶2. The Flotilla was organized by various humanitarian organizations, including a Turkish humanitarian organization recognized for its charitable work and commonly known by its Turkish initials, IHH. ER126 ¶24. Turkish port authorities conducted rigorous security checks of each vessel, including the inspection of all items taken aboard and body searches of all passengers. ER127 ¶26. These security checks ensured that all members of the Flotilla were unarmed and that no weapons were on board the vessels. *Id.*

On May 31, 2010, Israeli Defense Forces ("IDF") intercepted and attacked the Flotilla while it was sailing in international waters. ER121 ¶2. At that time Mr. Doğan was a passenger aboard the ship called the Mavi Marmara. ER130-131 ¶39. As the attack began that night, Mr. Doğan was on the Mavi Marmara's top deck. *Id.* ¶39. He was shot by Israeli forces boarding the vessel. *Id.*

IDF soldiers killed nine civilian passengers that night; a tenth later died from

injuries suffered in the attack. ER130, ER005-006. Mr. Doğan was shot to death at point blank range. ER121, ER 130-131. The IDF shot multiple other passengers in the head at close range, including one passenger who was shot between the eyes while attempting to photograph IDF soldiers on the Mavi Marmara's top deck. ER130-131 ¶39. The IDF shot several other passengers to death while they attempted to render aid to other injured passengers. ER131. One passenger was shot three times, once in back of the head while bent over in a submissive position assisting another passenger who had been injured in the attack. *Id.*

Mr. Doğan's death was prolonged and painful. ER130-131. The IDF shot him five times. *Id.* The first four shots struck him in the head, back, left leg, and left foot. *Id.* After those shots, Mr. Doğan was lying on his back on the deck, "in a conscious, or semi-conscious state for some time." *Id.* IDF soldiers walked up to Mr. Doğan and then fired a shotgun in his face, killing him. *Id.*

Following the attack, several international bodies, including in particular the United Nations and the Office of the Prosecutor of the International Criminal Court, examined the attack and addressed the severity of Mr. Doğan's killing. ER128, ER131-132, ER132-133, ER135. They concluded that the killing of Mr. Doğan and other Mavi Marmara passengers likely constituted war crimes against civilians. ER131, ER132-133, ER 133. Defendant publicly accepted responsibility for the attack. ER134.

B. The Case Below

Mr. Doğan's mother and father filed this action on October 16, 2015, alleging claims under the Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 note; the Alien Tort Claims Act, 28 U.S.C. § 1350; and the Anti-Terrorism Act, 18 U.S.C. §§ 2331 *et seq*. Plaintiffs brought each claim against Defendant Ehud Barak, a former Israeli government official, in his personal and individual capacity. Plaintiffs sought to hold Defendant personally liable for actions undertaken while he served as the Israeli Minister of Defense and held responsibility for planning, commanding, and failing to prevent the fatal attack. ER121, ER122-123 ¶¶3, 8-9. Under both U.S. and international law, commanders are liable for the unlawful actions taken by security forces under their control. *Hilao v. Estate of Marcos*, 103 F.3d 767, 777-78 (9th Cir. 1996).

On December 31, 2015, the Israeli embassy requested that the United States submit a Suggestion of Immunity ("Suggestion") expressing the view that Defendant is immune from suit on the basis of foreign sovereign immunity because he had acted in his official capacity as Minister of Defense in the course of "an authorized military action taken by the State of Israel." ER117-119. The diplomatic note did not address whether the extrajudicial execution of Mr. Doğan at point blank range was similarly "authorized."

On January 19, 2016, Defendant moved to dismiss this action on the basis of

foreign sovereign immunity, the political question doctrine, the act of state doctrine, and failure to state a claim. Defendant argued that the doctrine of foreign sovereign immunity rendered him absolutely immune from suit because his actions were undertaken in his official capacity.

On June 10, 2016, the U.S. Department of Justice filed a Suggestion on behalf of the U.S. State Department, asserting its belief that "Barak is immune from suit" and demanding that the district court acquiesce to its view. ER078. The Suggestion consisted exclusively of legal arguments that Defendant is immune from suit and that the court must accept this determination in light of the Executive's constitutional authority over foreign affairs. ER084-085, ER087. The Suggestion expressed no views as to the merits of Plaintiffs' claims or the foreign policy consequences of the case. ER077-093.[1]

At the hearing on July 25, 2016, the district court (Honorable Otis D. Wright II) stated that "I'm inclined to grant the motion and not because the second branch has issued a suggestion of immunity," but rather under the Political Question Doctrine, "because none of us in the third branch really know what the State Department is dealing with, I think each of us need to stay in our own lanes."

[1] Media reports cited by the district court state that on June 28, 2016, Israel entered an "agreement" while denying any liability. Israel agreed to make a payment of $20 million to the Turkish government in exchange for a release from liability for criminal and civil claims filed against Israel in Turkey. Plaintiffs have never been contacted regarding this "agreement" and have never received any funds.

ER060-062. Yet, when the district court subsequently issued its order on October 13, 2016, it dismissed all of Plaintiffs' claims on the basis of foreign sovereign immunity and did not reach the political question doctrine. ER003-027. The district court granted Defendant immunity on the grounds that it owed absolute deference to the State Department's Suggestion, and alternatively that immunity was warranted as a matter of the court's independent judgment. ER015.

SUMMARY OF THE ARGUMENT

The central flaw in the lower court's analysis was its failure to recognize that foreign sovereign immunity consists of several distinct immunities governing different types of defendants, only one of which is at issue here. Whereas immunity for foreign states and their instrumentalities (such as government-owned ships) is governed by the Foreign Sovereign Immunities Act of 1976, immunity for individual foreign government officials remains governed by the common law. U.S. and International law have long distinguished between status-based absolute immunities for sitting heads of state and diplomats during their tenure in office, and more limited conduct-based immunities for certain acts of all other current and former government officials. Incredibly, this basic framework, so critical to any analysis of a suggestion of immunity, is never discussed in the district court's 25-page order.

The district court erred in granting absolute deference to the State

Department's Suggestion of Immunity. As the Supreme Court has repeatedly held, the Executive's power to act must stem either from an act of Congress or the Constitution. *Medellin v. Texas*, 552 U.S. 491, 524 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585 (1952). No act of Congress gives the Executive the last word on immunity for former foreign officials like Defendant. To the contrary, Congress assigned this power to the courts when it passed the Torture Victim Protection Act ("TVPA") and imposed liability on foreign officials for acts of torture and extrajudicial killing.

The district court nevertheless concluded that the TVPA does not apply because Congress did not intend the statute to abrogate immunity. This is incorrect for two reasons. First, the text, history, and purpose of the TVPA, as well as general principles of domestic sovereign immunity law, all demonstrate Congress's intent to impose liability on former foreign government officials, such as Defendant, for acts of torture and extrajudicial killing. Second, conduct immunity *never* applied at common law for former officials who had committed acts of torture and extrajudicial killing in office. The district court further erred in misinterpreting the state action requirement of the TVPA as conferring immunity for all foreign government officials, an absurd construction that would render the statute a nullity.

The Executive branch cannot override this valid statute. It is only where the

Constitution assigns the Executive an *exclusive power* may the President override a valid act of Congress. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015). Contrary to the State Department's Suggestion, the Supreme Court has expressly held that the Executive lacks exclusive constitutional authority under its unenumerated foreign affairs power, the sole basis the Executive identified for its immunity determination here. *Id.* at 2089-90.

The district court failed to acknowledge that the Executive's power to render determinations of the various immunities arises from separate constitutional sources. The Reception clause, U.S. Const. art. II, § 3, provides the Executive with authority over immunity determinations for states, and sitting heads of state and diplomats, and confers exclusive authority on the Executive to render such determinations. The Executive's authority over conduct immunity determinations for all other government officials, by contrast, arises only from its non-exclusive unenumerated foreign affairs power. In the court below, the Executive cited a number of cases where courts deferred to Executive branch suggestions for state and status-based immunities. Those cases all are inapposite to the instant case, which involves only conduct immunity and the Executive's separate and more limited foreign affairs power.

The district court additionally ignored nearly 40 years of International and U.S. law and every applicable case in this Circuit by declining to recognize the *jus*

cogens exception to immunity. *Jus cogens* norms are universal international norms from which no derogation is permitted and include prohibitions on torture and extrajudicial killing. States are unable to immunize acts of torture and extrajudicial killing because they cannot authorize or ratify such universally prohibited conduct as "official acts." Because Defendant's actions violated *jus cogens* norms, he is not immune from suit.

The district court erred, first in deferring to the State Department's Suggestion of immunity and again in granting immunity under its own analysis. The judgment below should be vacated.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* the grant of a motion to dismiss for lack of subject matter under Federal Rule of Civil Procedure 12(b)(1). *Mills v. United States*, 742 F.3d 400, 404 (9th Cir. 2014). Whether Congress has provided for liability for acts of torture and extrajudicial killing by foreign government officials is a question of statutory interpretation and is reviewed de novo. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004). Evidentiary errors are reviewed for abuse of discretion and mandate reversal where they were "manifestly erroneous and prejudicial." *Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007).

II. The District Court Erred By Granting Absolute Deference to the Executive's Suggestion of Immunity for a Former Government Official

A. The District Court's Grant of Absolute Deference to the Executive Offends the Separation of Powers

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "[A]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813. Where courts grant improper deference to the Executive's views, this Court reverses. *See Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1205-08 & n.15 (9th Cir. 2007), *vacated on other grounds*, 550 F.3d 822 (9th Cir. 2008) (reversing district court's dismissal of claims under the political question doctrine, which gave the State Department's statement of interest binding effect).

"The President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (quoting *Youngstown*, 343 U. S. at 585). Here, neither any act of Congress nor the Constitution grants the Executive the power to make its immunity suggestions absolutely binding on courts for the conduct of former foreign government officials.

1. The TVPA Evidences the Express Will of Congress that Immunity Should be Denied for Acts of Torture and Extrajudicial Killing

Enacted in 1992, the TVPA creates a cause of action against individuals for truly heinous acts under actual or apparent color of foreign law. Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note). "[T]he TVPA should be interpreted through reference to its text, legislative history, and general principles of domestic law." *Doe v. Drummond Co.*, 782 F.3d 576, 607 (11th Cir. 2015). The text, purpose, and history of the TVPA each evidence Congress's express intent to impose liability for torture and extrajudicial killing without exception on former foreign government officials like Defendant, a conclusion reinforced by general principles underlying the law of domestic sovereign immunity.

a. The TVPA's Text Demonstrates Defendant is Not Immune

The text of the TVPA provides that the statute imposes civil liability on "an individual who, under actual or apparent authority, or under color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing[.]" 28 U.S.C. § 1350 note § 2(a). The statutory text is clear and unambiguous: foreign officials who engage in torture or extrajudicial killing are liable for their unlawful acts. The statutory language makes no exception and certainly not the blanket exception the district court gave to all official acts.

Courts may interpret statutes by examining "the language of related or similar statutes." *City & Cnty. of S.F. v. U.S. Dep't of Transp.*, 796 F.3d 993, 998 (9th Cir. 2015). The TVPA was enacted in the same year, and by the same

Congress, as the Anti-Terrorism Act ("ATA"), Pub. L. No. 102-572, Title X, § 1003(a)(4), 106 Stat. 4521 (codified at 18 U.S.C. §§ 2331 *et seq.*). Unlike the TVPA, which *creates* liability for individuals acting "under actual or apparent authority, or color of law, of any foreign nation," the ATA expressly *precludes* liability for any "officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. § 2337(2). This difference between the two statutes demonstrates that Congress knew how to draft language shielding foreign officials from liability for acts undertaken under color of law when sued in their official capacity. Congress chose to make no such exception when it enacted the TVPA.

The district court nevertheless held that that a categorical exemption to liability arises from the silence of the TVPA on this issue for all official acts by any foreign government official. ER019. Yet the Supreme Court has warned that "[d]rawing meaning from silence" in statutory text "is particularly inappropriate when Congress has shown that it knows how to [address an issue] in express terms." *Samantar v. Yousuf*, 560 U.S. 395, 317 (2010); *see also Dean v. United States*, 137 S. Ct. 1170, 1176 (2017) (rejecting interpretation of statute that it prohibited a practice because it was silent on that issue, unlike a subsequent statute in which Congress prohibited the practice in express terms). Inasmuch as Congress knew how to make certain exemptions to liability for foreign officials

under the ATA, the absence of any comparable exemptions in the TVPA is telling.

This Court generally looks to legislative history only where "the statutory language does not resolve an interpretive issue." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996). The text of the TVPA is unambiguous in imposing liability on former foreign officials for acts of torture and extrajudicial killing. The inquiry into its meaning could end here.

b. The TVPA's Purpose Demonstrates Defendant is Not Immune

If the Court also considers the TVPA's purpose, it would find further support for the conclusion that Defendant is not immune. The House Committee Report, the Senate Committee Report, and courts have all recognized that Congress's express purposes in enacting the TVPA were (a) to codify the cause of action for torture by foreign government officials acting in their official capacity that had been recognized in *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and (b) to extend this cause of action to plaintiffs who are U.S. citizens. H.R. Rep. No. 102-367, at 3 (1991); S. Rep. No. 102-249, at 3-4 (1991); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995). Significantly, in *Filártiga*, the court considered but did not grant immunity for the former foreign government official defendant in that case. 630 F.2d at 879.

The blanket immunity granted by the district court on Defendant is directly contrary to Congress's purposes of outlawing torture and denying perpetrators of

such heinous acts safe haven in the United States. *See*, *e.g.*, H.R. Rep. No. 102-367, at 2 ("Official torture and summary execution violate standards accepted by virtually every nation."); S. Rep. No. 102-249, at 3 ("This legislation . . . [will ensure] that torturers and death squads will no longer have a safe haven in the United States."); *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) ("[The TVPA] seems to represent a . . . direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations.").[2] Congress's purpose in passing the TVPA thus further demonstrates its intent to impose liability for acts of torture and extrajudicial killing by foreign government officials, and that immunity should not apply in this case.

c. The TVPA's Legislative History Demonstrates Defendant is Not Immune

The TVPA's legislative history reveals that Congress carefully considered the issue of immunities and in particular whether *former* foreign government officials such as Defendant Barak would ever receive such protection for acts committed while serving as government officials. Both the House and Senate

[2] Many members of Congress echoed this sentiment. *See, e.g.,* 135 Cong. Rec. H6423, H6424 (daily ed. Oct. 2, 1989) (statement of Rep. Faxcell) ("We cannot allow individuals to get away with conduct that violates the most basic human rights."); 134 Cong. Rec. H9692 (daily ed. Oct. 5, 1988) (state of Rep. Leach) ("We are dealing with one of the most awful crimes imaginable to the human mind, that of torture.").

Reports identify the specific immunities Congress intended to preserve, namely the sovereign immunity of foreign states and the status-based immunities for sitting heads of state and diplomats. The House Report, for instance, states that

> While sovereign immunity would not generally be an available defense [for individual officials], nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.

H.R. Rep. No. 102-367, at 4.

At the same time, the Congressional Reports emphasize that the TVPA permits claims against other foreign officials to go forward. Thus, the Senate Report explains that the "TVPA is not intended to override traditional diplomatic immunities" for "foreign diplomats" or "visiting heads of state" but "the committee does not intend these immunities to provide *former officials* with defense to a lawsuit brought under this litigation." S. Rep. No. 102-249, at 7 (emphasis added).

Notwithstanding these clear statements of Congressional intent, the district court concluded that Congress did not expect the TVPA to abrogate immunity under the common law for acts of torture by foreign government officials who are neither sitting heads of state nor diplomats. ER025. The court below cited language from the Senate Report suggesting that government officials would not be immune from acts of torture because no government would ratify their conduct. *Id*. 23:7-22 (citing S. Rep. No. 102-249, at 8). Under the district court's reasoning,

when a state purports to ratify the conduct underlying a TVPA claim, immunity must apply. *Id.*

The district court's interpretation of the statute fails for several reasons. First, the court below ignored language in the Senate Report observing that acts of torture and extrajudicial killing by foreign states remained widespread. "While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the worlds governments engage in, tolerate, or condone such acts." S. Rep. No. 102-249, at 2. Under the district court's logic, because these foreign governments condone acts of torture, liability would not lie with any of the officials committing such abuses.

Second, simply because states are unlikely to ratify torture does not mean that Congress believed any such ratification would be effective. Hence, the court in *Doe I v. Liu Qi*, 349 F.Supp.2d 1258, 1282-83, 1287-88 (N.D. Cal. 2004), report and recommendation adopted 349 F. Supp. 2d 1264, 1286-88, denied immunity to a Chinese government official accused of torture even though the torture was allegedly undertaken pursuant to China's national policy. The court explained that acts of torture authorized by a "policy of the state . . . are not immunized" because "an official obtains sovereign immunity [under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604 *et seq.*,] as an agency or instrumentality of the state only if he or she acts under a *valid and constitutional* grant of authority." *Id.*

at 1286-87 (emphasis added)).[3] Accordingly, while Israel may *embrace* its official's unlawful acts as "authorized military action taken by the State of Israel," ER026, it is without the authority to *immunize* them.

Further reinforcing this conclusion is the fact that the Senate Report adopted the same reasoning with regard to the act of state doctrine.

> Similarly, the committee does not intend the "act of state" doctrine to provide a shield from lawsuit for former officials . . . [T]the "act of state" doctrine is meant to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 102-249, at 8. The reason that the act of state doctrine does not bar claims of torture by foreign officials is not simply because states would not choose to ratify torture as their "public acts," but because they lack the power to do so. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 759 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013) ("[Claims alleging violations of *jus cogens* norms] are not barred by the act of state doctrine because [they] are not sovereign acts" (citation omitted)); *Siderman de Blake v. Republic of Argentina*,

[3] In 1976, Congress passed the FSIA, which codified the common law of sovereign immunity for states. *Samantar*, 560 U.S. at 313. While several courts initially interpreted the FSIA as governing immunity for individual officials, the Supreme Court held in 2010 in *Samantar* that the FSIA applies only to states, and that the immunity of foreign government officials remains governed by the common law. *Id.* at 310 & n.4, 320.

965 F.2d 699, 718 (9th Cir. 1992) (stating, with regard to sovereign immunity, that "[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act").[4]

Third, the TVPA's definition of "torture" further demonstrates that states simply do not possess the authority to immunize their officials' misconduct in situations such as those presented by this case. The TVPA was enacted in part to fulfill the Unites States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). S. Rep. No. 102-249, at 3. The TVPA incorporates the CAT's definition of torture. *Doe I*, 349 F. Supp. 2d at 1312; S. Rep. No. 102-249, at 3, 6. This definition exempts actions pursuant to "lawful sanctions." 28 U.S.C. § 1350 note § (3)(b)(1). "Lawful sanctions" include "sanctions authorized by domestic law," but not sanctions that "defeat the object and purpose of the Convention to prohibit torture." S. Rep. No. 102-249, at 6; 136 Cong. Rec. 36, 198 (daily ed., Oct. 27, 1990). The significance of this definition is that "[a] government cannot exempt torturous acts from [TVPA's] prohibition merely by authorizing them as permissible forms of

[4] The *Siderman* court held that the FSIA, which governed the plaintiffs' claims against the state of Argentina, did not recognize an exception to sovereign immunity for *jus cogens* violations, and that any such exception would have to be made by Congress. 965 F.2d at 719. Congress excepted the *jus cogens* violations of torture and extrajudicial killing from immunity for individuals by passing the TVPA.

punishment in its domestic law." *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005). Accordingly, the TVPA's definition of "torture" directly undercuts the district court's and Executive's assertion that Israel has the ability to immunize Defendant's actions simply by embracing them as its official acts authorized by its domestic law.

The district court ignored much of this legislative history and concluded that immunity was necessary because, in its absence, "any military operation that results in injury or death could be characterized at the pleading stage as torture or an extra-judicial killing," thereby "embroil[ing] the Judiciary in sensitive foreign policy matters." ER026. The court below has misinterpreted the reach of the TVPA. The statute excludes from the definition of extrajudicial killing "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a). The Senate Report further explains that lawful killings include those committed by armed forces during war. S. Rep. No. 102-249, at 6. Contrary to the district court's mistaken beliefs, the TVPA will not embroil courts in lawful military operations because deaths resulting from such operations are not "extrajudicial killings" covered by the statute.

d. General Principles of Domestic Sovereign Immunity Law Demonstrate Defendant is Not Immune

This Court should also consider the domestic law of sovereign immunity as it too demonstrates that the TVPA imposed liability on former foreign government

officials for acts of torture and extrajudicial killing. Section 1983 jurisprudence is highly relevant to the Court's analysis of the TVPA. Congress used similar language to draft the two statutes. *Compare* 28 U.S.C. § 1350 note § 2(a) (encompassing acts taken "under actual or apparent authority, or color of law"), *with* 42 U.S.C. § 1983 (encompassing acts taken "under color of any statute, ordinance, regulation, custom, or usage"). Moreover, the TVPA's legislative history contains express references to § 1983. *See* H.R. Rep No. 102-367, at 3; S. Rep. No. 102-249, at 8 (each stating that courts should construe the phrase "under color of law" with regard to § 1983).

Domestic immunity law demonstrates that statutory references to "official capacity" merely refer to the official's position and do not indicate that the acts were lawful under domestic law. Thus, in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), the court analogized the state action requirement under the TVPA to the same requirement under § 1983, noting that a government official "who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be 'official' simply by virtue of his position and the circumstances of the act." Domestic law also reveals that there is no tension between imposing personal liability on government officials for their official acts and maintaining the immunity of the state they serve. Under § 1983, government officials may be held personally liable even if the government itself would be

immune from suit. *See Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) (stating that state officials not absolutely immune in their personal capacity from money damages from actions undertaken in their "official capacities," even though state is immune). So too Plaintiffs' claims against Defendant in his personal capacity for acts undertaken in his official capacity, which may proceed under the common law of foreign sovereign immunity, do not undermine Israel's immunity, which is protected by the FSIA.

Citing *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012), and *Malley v. Briggs*, 475 U.S. 335, 339 (1986), the district court stated that statutes are generally read as retaining common-law immunities even where "the statute on its face admits no immunities," and that common-law immunities "should not be abrogated absent clear legislative intent to do so." ER023. Neither case is that far-reaching. In *Malley*, the Court explained that even where an immunity existed at common law, "the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." 475 U.S. at 340. And in *Filarsky*, the Court, after concluding that the defendant would have enjoyed immunity at common law, went on to consider whether any of "the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common law rule." 132 S. Ct. at 1665.

This Court and the Supreme Court have each found that Congress abrogated

common law immunities in statutes, like the TVPA, that contain no explicit discussion of the immunity. In *Keeton v. Univ. of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998), this Court held that the Age Discrimination in Employment Act ("ADEA") abrogates states' sovereign immunity even though it contains no reference to this immunity, because the statute specifically includes state governments among the class of defendants who may be sued.[5] The Supreme Court subsequently adopted this aspect of *Keeton*'s holding in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000). "*Kimel* recognized that [Congress's] expression of intent [to abrogate immunity], while explicit, did not appear in terms on the face of the ADEA." *Krystal Energy*, 357 F.3d at 1058; *see also Davidson v. Bd. of Governors of State Colls. & Univs.*, 920 F.2d 441, 443 (7th Cir. 1990) (Congress need not say "in so many words that it was abrogating the states' sovereign immunity," because "that degree of explicitness is not required[.]").

The plain language of the TVPA similarly establishes liability for individuals "who, under actual or apparent authority, or color of law, of any foreign nation" commit acts of torture or extrajudicial killing. 28 U.S.C. § 1350 note§ 2(a). Thus, even assuming that the common law at the time of TVPA's enactment in 1992 provided for absolute immunity for acts of torture, the TVPA's

[5] States' Eleventh Amendment immunity incorporates the common law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 140-42 & n.18 (1984); *Fleming v. Dep't of Pub. Safety*, 837 F.2d 401, 407 (9th Cir. 1988).

legislative history and purpose counsel strongly against recognizing any such immunity here.

But, more fundamentally, there was no common law conduct immunity for torture in 1992. Previously, the Second Circuit held in *Filártiga* that "official torture is now prohibited by the law of nations," and that the law of nations "has always been part of the federal common law," and did not find the defendant immune. 630 F.2d at 884-85. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30, 732 (2004) (stating that "the domestic law of the United States recognizes the law of nations," which includes a prohibition against torture, and collecting cases); *In re Estate of Marcos Human Rights Litig.* (hereinafter "*Marcos Estate I*"), 978 F.2d 493, 502 (9th Cir. 1992) ("It is also well settled that the law of nations is part of federal common law."). The prohibition against torture under U.S. and International law is not consistent with the application of immunity to all such acts.

Nor did the common law prior to 1992 recognize an absolute immunity for former government officials generally. Section 66(f) of the Restatement (Second) of Foreign Relations Law (1965) ("Restatement"), provides that immunity for an official who is not a head of state, head of government, or diplomat, applies only "with respect to acts performed in his official capacity *if the effect of exercising jurisdiction would be to enforce a rule of law against the state*." (Emphasis added.) *See also Hassen v. Sheikh Khalifa Bin Zayed Al Nahyan*, No. CV 09-

01106 DMG (MANx), 2010 U.S. Dist. LEXIS 144819, at *15 (C.D. Cal. Sep. 17, 2010) (adopting this rule). "[E]nforc[ing] a rule against a state" means situations such as those in which a foreign official seeks to enforce a contract by ordering payment from government funds. *Id.* cmt. b, illus. 2. Here, because Plaintiffs sue Defendant only in his individual capacity, and seek damages only from his own pocket, the exercise of jurisdiction will not have the effect of enforcing a rule of law against the State of Israel and immunity does not apply.

During the pre-FSIA era, decisions involving claims against individual foreign officials were "few and far between," *Samantar*, 560 U.S. at 323, and the few cases that arose "generally involved status-based immunities such as head-of-state immunity, or diplomatic immunity," *Yousuf v. Samantar*, 699 F.3d. 763, 772 (4th Cir. 2012). "The rare cases involving immunity asserted by lower-level foreign officials provided inconsistent results," *id.*, and demonstrate that, consistent with the Restatement, foreign officials generally were not provided immunity when their acts exceeded their lawful authority and the court's exercise of jurisdiction did not have the effect of imposing a rule of law upon the sovereign itself.[6]

[6] *See, e.g., Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) (suggesting that a British official could be tried in U.S. court for acts taken as part of his official position); *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) (opining that a French official was subject to suit for acts taken while governor of a French colony); *People v. McLeod*, 1 Hill 377, 589 (N.Y. Sup. Ct. 1841) (rejecting foreign official's claim to immunity notwithstanding the State's ratification of the official's conduct, and holding that Britain had not "placed the offenders beyond

Because "general principles of [the] domestic law" of sovereign immunity militate against a finding of immunity, *Drummond Co.*, 782 F.3d at 607, the district court's interpretation of the TVPA is incorrect and its judgment should be vacated.

e. The District Court's Construction of the TVPA is Erroneous Because it Renders the Statute a Nullity

"[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982). The district court's interpretation that immunity applies to all "official public acts" by foreign government officials, ER019, would render the TVPA a nullity, an absurd outcome

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the law, and beyond our jurisdiction, by adopting and approving [the defendant's] crime."); *Pilger v. United States Steel Corp.*, 130 A. 523, 524 (N.J. 1925) (denying immunity for public trustee acting on behalf of the government of Great Britain because sovereign immunity did not extend to "suits arising out of the unlawful acts of [the state's] representatives" and does not bar "suits brought against them for the doing of such unlawful act."); *Lyder v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) (rejecting claim that suit against a consul was in fact a suit against his government, and holding that the official's immunity included only claims in which the state was the real party in interest and not those in which the officer acted "in excess of his authority or under void authority"). Very few conduct immunity decisions post-date *Lyder*, and a study of the Department of State's immunity decisions from 1952 to 1977 identified only four decisions involving the conduct-based immunity of individual defendants. Immunity was denied in one case, granted in two others, and the outcome of the fourth case is unclear. Chimene Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61, 71-72 (2010). None of these cases held that officials acting outside the scope of their lawful authority would be entitled to immunity. Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Fordham L.R. 2669, 2677 & nn. 40-44 (2011).

that clearly runs counter to Congressional intent. The TVPA contains a state action requirement, imposing liability only on government officials acting "under color of law" or in their "official capacity." 28 U.S.C. § 1350 note § 2(a) (requiring that proscribed acts be committed "under actual or apparent authority, or color of law"); H.R. Rep. No. 102-367, at 5; S. Rep. No. 102-249, at 8; *see also Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003) (torture only covers acts "'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'" (quoting 8 C.F.R. § 208.18(a)(1)). Purely private acts, on the other hand, are not covered by the statute. *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) ("[T]he TVPA contains explicit language requiring state action . . . 'The bill does not attempt to deal with torture or killing by purely private groups.'" (quoting H.R. Rep. No. 102-367, at 5)); *Drummond Co.*, 782 F.3d at 603 n.37 (noting state action requirement). Since the TVPA requires actions taken "under color of law," granting immunity on that basis nullifies the statute due to the very conduct it requires.[7] As one oft-cited scholar recognized, granting immunity for acts

[7] Appellants use the terms "under color of law" and "official capacity" interchangeably in their Complaint and in this Opening Brief because this is the practice followed by Congress and courts. *See United States v. Belfast*, 611 F.3d 783, 809 (11th Cir. 2010) ("There is no material difference between this notion of official conduct [under the color of law] and that imparted by the phrase 'in an official capacity.'"); S. Exec. Rep. 101-30, at 14 (stating that the CAT "is limited to torture 'inflicted by or at the instigation or with the consent or acquiescence of a

committed in an official capacity

> turns the fundamental premise of much international human rights law on its head—namely, that certain actions rise to the level of international law violations precisely because they involve the abuse of state authority. . . . It would be passing strange to find that international law categorically prevents states from holding individuals accountable for universally recognized violations of international law.

Chimene Keitner, *Officially Immune?*, 36 Yale J. Int'l L. Online (2010) 1, 4, 10.

Both the district court and Executive, however, maintain that the TVPA would still have meaning because liability at least exists where the foreign state disavows the actions and expressly waives immunity or the Executive branch issues Suggestion of no immunity. ER089, ER026-027. Not so. The Supreme Court rejected an analogous argument about Eleventh Amendment immunity in *Kimel*. "[R]espondents maintain that perhaps Congress simply intended to permit an ADEA suit against a State only in those cases where the State previously has waived its Eleventh Amendment immunity to suit. We disagree." 528 U.S. at 75. The legislative history of the TVPA demonstrates that Congress did not intend that foreign governments be permitted to immunize acts of torture and extrajudicial killing.

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public official or other person acting in an official capacity.' Thus, . . . in terms more familiar in U.S. law, it applies to torture inflicted 'under color of law.'"); *see also Yousuf*, 699 F.3d at 777 (holding defendant liable under the TVPA, which requires acts under "color of law," for acts committed in his "official capacity").

As a practical matter the district court's holding leaves victims of the most severe human rights abuses—here an American citizen—with no recourse. It creates the perverse incentive for states to immunize their officials for their most horrifying acts by ratifying their misconduct. This Court should not sanction such an absurd result.

In sum, the text, purpose, and history of the TVPA, and general principles of domestic sovereign immunity law, all demonstrate Congress's express intent to impose liability for acts of torture and extrajudicial killing on a former foreign government official, and that conduct immunity is not available. And as set forth below, because the Executive lacks exclusive authority over conduct immunity determinations, its Suggestion in this case was not binding on the district court.

2. The Executive Lacks the Constitutional Authority to Override the Will of Congress

In recent years, the Supreme Court has repeatedly turned to Justice Jackson's framework from *Youngstown*, 343 U.S. at 635-38 (concurring opinion), which divides exercises of Executive Branch power into three categories. *See*, *e.g.*, *Zivotofsky*, 135 S. Ct. at 2083-84; *Medellin*, 552 U.S. at 524-24 (each discussing *Youngstown* framework). Under the third category of this framework, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637.

The TVPA places this case in the third *Youngstown* category, where Executive power is at its weakest. To disable an act of Congress, "the President's asserted power must be both 'exclusive' and 'conclusive' on the issue." *Zivotofsky*, 135 S. Ct. at 2084 (quoting *Youngstown*, 343 U.S. at 637-38). Here, the Executive lacks exclusive and conclusive authority over foreign affairs and so is unable to override the TVPA.

The district court concluded that the Executive can bind the judiciary by virtue of its constitutional authority over foreign affairs and foreign policy. ER013, ER016-018. But, in *Zivotofsky*, the Supreme Court rejected the contention that the "President has 'exclusive authority to conduct diplomatic relations,' along with 'the bulk of foreign-affairs powers,'" adding that "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy." 135 S. Ct. at 2089-90.

Previously, in *Medellin*, the Supreme Court rejected a similarly sweeping claim of Executive authority over international affairs. In that case, President Bush issued a memorandum directing state courts to give effect to a non-binding determination by an international tribunal inconsistent with state criminal law. 552 U.S. at 503. Citing *Youngstown*, the Court rejected the argument that the President's constitutional role empowered him to bind domestic courts even with regard to "sensitive foreign policy decisions." *Id.* at 523-24; *see also id.* at 526-27;

id. at 532 (the Constitution empowers "the President to execute the laws, not make them"). The Court determined that the President's assertion of authority fell within the third *Youngstown* category, and therefore was not binding on courts. *Id.* at 527.

In sum, the TVPA demonstrates Congress's express will that conduct immunity be denied for former officials like Defendant for acts of torture and extrajudicial killing undertaken under actual or apparent authority or color of law of any foreign nation. Because the Executive's foreign affairs power—the only authority it asserts in this case—is neither "exclusive" nor "conclusive" on this issue, it is unable to disable the TVPA. Consequently, the Executive's Suggestion is not binding in this case, and the district court erred when it held to the contrary.

B. The State Department's Views Regarding Conduct Immunity Are Not Binding on Courts

The district court granted absolute deference to the State Department's Suggestion because it failed to distinguish among various immunities governing foreign officials and states and failed to recognize that the Executive's views as to conduct-based immunity are not binding. As the Fourth Circuit explained in *Yousuf*, "we give absolute deference to the State Department's position on status-based immunity doctrines such as head-of-state immunity," but "[t]he State Department's determination regarding conduct-based immunity, by contrast, is not controlling[.]" 699 F.3d at 773.

Acknowledging that deference to the Executive "appear[s] to violate the

separation of powers," the district court concluded that this was nonetheless required by a line of Supreme Court cases discussing the "two-step procedure" wherein courts historically deferred to State Department suggestions of immunity. ER013-015. Under the first step, the foreign sovereign could request a suggestion of immunity from the State Department. *Samantar*, 560 U.S. at 311. Under the second step, if the State Department issued a suggestion of immunity, courts typically, but not always, honored such requests.[8] Where the State Department did not issue a suggestion, courts decided the immunity issue on their own after inquiring whether the State Department's established policy was to recognize the specific immunity at issue. *Id.*

The practice of judicial deference to executive foreign immunity determinations emerged in the 1930s in a line of *in rem* actions against ships owned by foreign governments. *See, e.g.*, *Compania Espanola De Navegacion Maritima, S. A. v. The Navemar*, 303 U.S. 68, 71, 74 (1938) (vessel allegedly owned by the Spanish Government); *Ex parte Republic of Peru*, 318 U.S. 578, 580, 589 (1943) (ship owned by the Peruvian government); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (seized ship owned but not in the possession or

[8] *See, e.g., Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926) (holding that, contrary to the State Department's views, steamship owned and operated by the Italian government was entitled to immunity); *Republic of Philippines by Central Bank of Philippines v. Marcos*, 665 F.Supp.793, 797-98 (N.D. Cal. 1987) (rejecting the State Department's suggestion of head-of-state immunity).

service of the Mexican government). These cases illustrate the application of immunity for foreign *states*, not foreign *officials*, because ships owned by foreign sovereigns are "instrumentalities" of that state and entitled to the state's own immunity. 28 U.S.C. § 1605(b) (governing "a suit in admiralty . . . to enforce a maritime lien against a vessel or cargo of the foreign state"); H.R. Rep. No. 94-1487, at 15-16 (listing shipping line as example of an agency or instrumentality of a foreign state under the FSIA); *see also Libya Velidor v. L/P/G Benghazi*, 653 F.2d 812, 814-15 (3d Cir. 1981) ("The FSIA renders ships owned by foreign governments immune from arrest, and any arrest must be lifted immediately upon ascertaining the sovereign ownership of a vessel.").[9]

Different rules govern immunity for foreign officials. At common law, immunities for foreign officials consist of status-based immunities for incumbent heads of state and diplomats and conduct-based immunities for other government officials. *Yousuf*, 699 F.3d at 769, 774.[10] Status immunity provides absolute immunity for certain government officials, specifically heads of state and

[9] The enactment of the FSIA eliminated the State Department's role over immunity determinations for foreign states and their instrumentalities. *Samantar*, 560 U.S. at 313-14.

[10] Though overlooked by the district court, the distinction between status-based and conduct-based immunities has long been widely recognized. *See, e.g.*, *id.*; *Mireskandari v. Mayne*, No. CV 12-3861 JGB (MRWx), 2016 U.S. Dist. LEXIS 38944, at *45-51 (C.D. Cal. Mar. 23, 2016) (quoting *Yousuf* at length and adopting its reasoning); *Hassen*, 2010 U.S. Dist. LEXIS 144819, at *12-17; *Sikhs for Justice v. Singh*, 64 F. Supp. 3d 190, 193 (D.D.C. 2014); Restatement § 66.

diplomats, and applies only during their tenure in office. *Id*. at 769. Conduct immunity, by contrast, is both broader and shallower: it provides immunity for all current and former government officials, but applies only to certain official acts. *Id.*

Defendant claims only conduct immunity in this case. None of the cases cited by the district court as illustrations of the judicial deference to the State Department involve conduct immunity. ER013-014. *See, e.g.*, *The Navemar*, 303 U.S. at 74 (immunity for foreign ship); *Ex parte Peru*, 318 U.S. 578 at 589 (same); *Hoffman*, 324 U.S. at 38 (denying immunity for foreign ship); *Heaney v. Government of Spain*, 445 F.2d 501, 504-053 (2d Cir. 1971) (immunity for diplomat); *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960) (same).[11] Similarly, another line of cases cited in the Executive's Suggestion of Immunity involve status immunity for sitting heads of state. *See Habyarimana v. Kagame*,

[11] The district court cites to several additional cases, none of which involve State Department suggestions of immunity or address the level of deference owed suggestions for individual foreign government officials. *See* ER014. *The Pesaro*, 255 U.S. 216 (1921), concerned the appropriate level of deference owed the suggestion of a foreign ambassador that a vessel sued *in rem* was owned by a foreign government and thus immune. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983), concerned the constitutionality of the FSIA, and *Republic of Aus. v. Altmann*, 541 U.S. 677 (2004), concerned the statute's retroactivity. *Samantar v. Yousuf*, another case cited by the district court, did not reach the question of conduct immunity for the defendant official, and is not authority for this proposition. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

696 F.3d 1029, 1030-31 (10th Cir. 2012) (immunity for sitting head of state); *Ye v. Zemin*, 383 F.3d 620, 623-27 (2004) (same). ER080.

It is critical to distinguish among the various immunities at issue in these cases since the immunities arise from distinct sources of Executive authority, entitling them to distinct levels of deference. The status-based immunities for sitting heads of states and diplomats are entitled to absolute deference because they arise from an enumerated constitutional power exclusive to the Executive. *Yousuf*, 699 F.3d at 772. The Reception Clause, article II, § 3 of the United States Constitution, assigns the Executive exclusive power to "receive Ambassadors and other public Ministers," which implicitly includes the power to accredit diplomats and recognize foreign governments and their heads of state. *Yousuf*, 699 F.3d at 722 ("Like diplomatic immunity, head-of-state immunity involves 'a formal act of recognition,' that is 'a quintessentially executive function' for which absolute deference is proper."); *see also Zivotofsky*, 135 S. Ct. at 2087-89 ("It is no longer questioned that the President . . . determines whether the United States should recognize or refuse to recognize a foreign government . . . . 'Political recognition is exclusively a function of the Executive." (citations and omitted)). The Reception Clause thus explains the three lines of cases in which courts deferred to the State Department's views regarding the application of status-based immunities attendant to this specific enumerated constitutional power. *Yousuf*, 699 F.3d at 772.

Conduct immunity determinations, by contrast, "do not involve any act of recognition for which the Executive Branch is constitutionally empowered; rather, they simply involve matters about the scope of defendant's official duties." *Id.* at 773. These types of immunity determinations may impact foreign affairs or the nation's foreign policy, areas for which the Constitution confers some authority to the Executive. *Id.* Indeed, the Executive asserts its general foreign affairs power as the basis for its argument that the district court must grant deference to its Suggestion. ER083-084. Unlike the recognition power, however, the Executive's power over foreign affairs is not exclusive. *Zivotofsky*, 135 S. Ct. at 2089-90.

The judiciary should give due consideration to the reasonable views of the Executive Branch over foreign affairs. *See, e.g.*, *Sosa*, 542 U.S. at 733 n.21 (identifying "a policy of case-specific deference to the political branches" and stating that "federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy"); *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").[12] But neither the Supreme Court nor the Ninth Circuit has held that the Executive may bind domestic courts on the basis of its general foreign affairs power alone.

[12] *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261-64 (2d Cir. 2007) (adopting a policy of case-specific deference to the political branches in matters implicating foreign affairs).

As the Court ruled in *Republic of Aus. v. Altmann*, 541 U.S. 677, 701-02 & n.23 (2004), while the State Department's "considered judgment of the Executive on a particular question of foreign policy" might be entitled to some deference, it "could or would" not "trump" the court's own immunity determination under the FSIA. In short, the State Department's Suggestion regarding Defendant's conduct immunity in this case does not control. *See Yousuf*, 699 F.3d at 773.

The district court recognized that the Supreme Court's treatment of the Executive's views under the act of state doctrine is relevant to the foreign sovereign immunity context. ER012. Foreign sovereign immunity and the act of state doctrine "have a common source in the case of *The Schooner Exchange* [*v. McFaddon*, 11 U.S. 116, 136 (1812)]," share the same "policy considerations," and are both "judicially created [doctrines] to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

In *First National City Bank*, six members of the Court held that the Executive Branch's views on whether a court should dismiss a case under the act of state doctrine are "entitled to weight for the light they shed on the permutation and combination of factors underlying" this doctrine," but these views "cannot be determinative." *See id.* at 790 (Brennan, J., dissenting); *id.* at 773 & n.4 (Douglas, J., concurring) ("unquestioning judicial deference to the Executive" would reduce

the Court to "a mere errand boy for the Executive Branch"); *id.* at 773 (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.").[13] As Justice Brennan, joined by three other Justices, explained, "blind adherence to [the Executive Branch's] requests . . . politicizes the judiciary." *Id.* at 790. Since "the fate of the individual claimant would be subject to the political considerations of the Executive Branch," "similarly situated litigants would not be likely to obtain even-handed treatment" as "those considerations change as surely as administrations change." *Id.* at 792.[14] To the extent that this Court looks at the case law under the act of state doctrine, those cases further demonstrate that the Executive's views in this case are not controlling.

[13] Although dicta in Justice Rehnquist's plurality opinion supports deference, this position only attracted the votes of two other Justices. *Id.* at 768.

[14] The problems with absolute deference to the Executive's views in the Act of State context are much the same problems Congress sought to cure in enacting FSIA and eliminating the State Department's role in determining immunity for foreign states and their agencies or instrumentalities. *Altmann*, 541 U.S. at 690 (the Executive's role in issuing immunity decisions during the pre-FSIA era "thr[e]w immunity determinations into some disarray, as 'foreign nations often placed diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been'" otherwise available (quoting *Verlinden*, 461 U.S. at 487-88)).

Like the Supreme Court, this Court has consistently declined to give binding effect to the foreign policy views of the Executive Branch, irrespective of the specific doctrine under which they are considered. *See Sarei*, 487 F.3d at 1204 (declining to defer to the State Department's statement of interest that the lawsuit risked adverse impact to U.S. foreign relations, and holding that claims were not barred by the political question doctrine); *Mujica v. Airscan*, 771 F.3d 580, 610 (9th Cir. 2014) (the State Department's statement of interest that the litigation was adverse to U.S.-Colombian relations is entitled to "serious weight" under the international comity doctrine); *cf. Corrie v. Caterpillar*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (the court would give a statement of interest from the State Department "serious weight" but not dispositive effect under the political question doctrine if filed).[15] As these authorities make clear, the Executive's general authority over foreign affairs does not require absolute deference to its view regarding Defendant's immunity in this case.

Nor is absolute deference justified on functional grounds. In *Peru*, the Supreme Court justified its practice of deferring to the Executive in maritime cases because of the need for the judicial and political branches to speak with one voice,

[15] *See also Doe I*, 349 F. Supp. 2d at 1296 ("[T]he views of the State Department, while not 'conclusive,' are entitled to respectful consideration [under the Act of State doctrine]."); *Kadic*, 70 F.3d at 250 ("[A]n assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication[.]").

less the former "embarrass the latter by assuming an antagonistic jurisdiction." 318 U.S. at 588. The need to speak with one voice is obvious with regard to the formal recognition of governments and the attendant function of receiving heads of state and accrediting diplomats. *Zivotofsky*, 135 S. Ct. at 2079 ("Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not."). No such need exists with regard to immunity determinations for discrete acts by lower-level foreign government officials, however, and any resulting embarrassment from the exercise of jurisdiction is insufficient to justify the dramatic step of a court declining to exercise jurisdiction. *See First Nat'l City Bank*, 406 U.S. at 765, 790 (noting "that juridical review of [official] acts . . . of a foreign power could embarrass the conduct of foreign relations by the political branches" as the basis of the act of state doctrine, but rejecting absolute deference to the Executive's views in those cases).

Because absolute deference to the State Department's Suggestion regarding conduct immunity offends the separation of powers, the district court's determination that it was bound by the Suggestion is reversible error.

C. If the Court Concludes that it Must Defer to the Executive, It Should Defer to the TVPA

Were this Court to determine that *Samantar* and the authorities on which it relies mandate that it defer to the Executive's views regarding official immunity

(which they do not), it should defer not to the Suggestion of immunity, but to the TVPA. Since the enactment of the TVPA in 1992, the view of the political branches has been that former foreign officials are to be held liable for acts of torture and extrajudicial killing. In *Altmann*, the Supreme Court held that deference to the political branches' immunity decisions meant "defer[ence] to the most recent such decision – namely, the FSIA." 541 U.S. at 696. So too here, the political branches' decision to pass the TVPA reflects a policy not to confer conduct immunity for acts of torture and extrajudicial killing. The State Department's Suggestion does not override this validly enacted statute. *See Medellin*, 552 U.S. at 523-24.

III. The Executive's Suggestion of Immunity for the Torture and Execution of Furkan Doğan is Not Reasonable and Should Not Be Followed

After mistakenly deeming itself bound by the State Department's Suggestion of Immunity, the district court purported to conduct an "independent inquiry" regarding Defendant's immunity and arrive at the same result. ER018. This too is error. As noted previously, courts are required to give "serious weight" to the Executive's reasonable views regarding the foreign policy consequences of adjudicating a case. But the Executive *is entirely silent on the foreign policy implications of this case. See* ER077-093. At most, there is a single line in the State Department's letter to the Department of Justice, which is appended to the Suggestion, urging immunity "considering the overall impact of this matter on the

foreign policy of the United States." ER093. Unlike suggestions of immunity in other cases which identify specific foreign policy impacts of exercising jurisdiction,[16] the State Department never explains what it believes the foreign policy impact of this case to be, let alone why. Accordingly, this Court should afford little weight to the Executive's nonexistent views on the foreign policy implications of this litigation.

Rather than discuss the *foreign policy implications* of this case, the Executive's Suggestion consists entirely of *legal argument* regarding the contours of foreign sovereign immunity, an analysis of the TVPA, and the level of deference its views should receive. The Constitution assigns the power to interpret the laws to the courts, not the Executive branch. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Discussing an amicus curiae brief from the United States, the Supreme Court pointedly stated that the "interpretation of the FSIA's reach" is "a 'pure question of statutory construction . . . well within the province of the Judiciary'" where the "United States' views on such an issue are of considerable interest" but "merit no special deference." *Altmann*, 541 U.S. at 701 (quoting *INS*

[16] For example, in the statement of interest in *Giraldo v. Drummond*, the Executive explained that enforcing plaintiff's subpoena of the former President of Colombia could irritate the United States's relations with Colombia and trigger reciprocal treatment of U.S. Presidents. ER101 at 8, ER 109-110 at 16-17.

v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)); *Doe I*, 349 F. Supp. 2d at 1298 n.27 ("Deference is due to the State Department on issues involving political, rather than legal judgments[.]").

The Executive's legal argument is particularly unpersuasive here because it directly contradicts positions the Executive has previously taken in other cases raising identical issues. For example, although the Executive now disclaims the Reception Clause as the basis for its authority, ER083, it has repeatedly invoked this provision in the recent past to support its demands for absolute deference. *See Yousuf v. Samantar*, Statement of Interest at 5-6, No. 1:04 CV 1360 (LMB) (E.D. Va. Feb. 14, 2011); *Giraldo v. Drummond Co.*, Statement of Interest, ER097-098 (each stating, in identical sentences, that "the Executive Branch continues to play the primary role in determining the immunity of foreign officials as an aspect of the President's responsibility for the conduct of foreign relations *and recognition of foreign governments*." (emphasis added)).

In addition, the Executive's assertion here that immunity is required because "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers," ER083-084, contradicts its statement in a prior case that "if the defendant were correct that color of law can simply be equated with sovereignty . . . , the torture statute would be rendered meaningless. Such a result must be rejected." U.S.'s Response in

Opposition to Defendant's Motion to Dismiss the Indictment, *United States v. Emmanuel*, No. 06-20758-CR (S.D. Fla. July 5, 2007), at *1. In *Emmanuel*, which involved the prosecution of Roy Belfast Jr. (a/k/a "Chuckie" Taylor) for torture in Liberia, the Court agreed with the U.S. government that the defendant could both act "in an official capacity" and still be held personally responsible for his conduct by a U.S. court.[17] Such inconsistencies provide yet another reason for declining to give the Executive's present opinions much weight. *See Marcos Estate I*, 978 F.2d at 500 ("We do not read the executive branch's flip on this issue as signifying so much; its change of position in different cases and by different administrations is not a definitive statement by which we are bound[.]"). Significantly, the Executive provides no explanation for its change in positions. In fact, it fails even to acknowledge that its positions have changed. *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An [Executive] agency may not . . . depart from a prior policy *sub silentio* . . . . And of course the agency must show that there are good reasons for the new policy.").

Because the Suggestion is not reasonable, the district court erred insofar as it gave the Suggestion any weight at all. This Court should disregard the Suggestion in its own *de novo* review.

[17] Plaintiffs concurrently file a motion asking this Court to judicially notice the Government filings in *Yousuf* and *Emmanuel* cited herein.

IV. Defendant is Not Immune

A. The TVPA Precludes Immunity in this Case

After determining that the Executive's Suggestion neither compels nor supports a finding of immunity in this case, the Court must conduct its own inquiry to determine whether Defendant is immune. As discussed above, *supra* § II.A.1, the text, purpose, and history of the TVPA, and analogous domestic immunity principles, all demonstrate that the TVPA imposes liability on a former foreign official for the actions alleged in this case and that immunity does not apply. Accordingly, the Court need look no further than this statute in determining that Defendant is not immune for his acts planning, commanding, and failing to prevent the torture and extrajudicial killing of Furkan Doğan.

B. Ninth Circuit Precedent Holds that Foreign Officials Are Not Immune for *Jus Cogens* Violations

Even if this Court does not accept Plaintiffs' construction of the TVPA, the Court should still deny Defendant immunity in accordance with Circuit precedent denying immunity for such acts. The Ninth Circuit has repeatedly held that violations of *jus cogens* norms are acts falling beyond the lawful scope of a foreign official's authority, and has accordingly denied immunity for such acts. In *Marcos Estate I*, 978 F.2d at 497-98, the Ninth Circuit held that a government official was not immune for human rights abuses, such as torture and extrajudicial killing, because they arose from acts falling "beyond the scope of [the official's] authority"

which "the sovereign has not empowered the official to do." In *Hilao v. Marcos (In re Estate of Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (hereinafter "*Marcos Estate II*"), the Ninth Circuit similarly held that the alleged "acts of torture, execution, and disappearance were clearly acts outside of [Marcos's] authority as President" and, consequently, were "not 'official acts' unreviewable by federal courts." In fact, every other district court in this Circuit to consider the issue has adopted this rule. *See Doe I*, 349 F. Supp. 2d at 1282-83, 1287-88 (denying immunity to Chinese government official accused of torture, and stating that "[t]he mere fact that acts were conducted [in an official capacity or] under color of law . . . is not sufficient to clothe the official with sovereign immunity"); *Hassen*, 2010 U.S. Dist. LEXIS 144819, *16-17 (official not immune for torture); *cf. Mireskandari*, 2016 U.S. Dist. LEXIS 38944, *50-51 (adopting rule that immunity is not available for torture and extrajudicial killing).

The district court in this case sought to distinguish *Marcos Estate I* and *Marcos Estate II* on the grounds that the Philippine government indicated that Marcos's conduct fell outside his authority as President, while the Israeli government has ratified Defendant's misconduct in this case. ER020. This rule—that a government can immunize its official's acts by purporting to authorize them—is contrary to law. In *Doe I*, the court expressly held that foreign officials are not entitled to immunity for acts exceeding the scope of their lawful authority

even when the acts have been authorized by government policy. 349 F. Supp. 2d at 1286 ("[A]cts by an official which violate the official laws of his or her nation but which are authorized by covert unofficial policy of the state . . . are not immunized[.]"). The court explained that "an official obtains sovereign immunity . . . only if he or she acts under a valid and constitutional grant of authority." *Id.* at 1287 (emphasis added). Under this holding, and consistent with the TVPA, states such as Israel may ratify their officials' unlawful acts but lack the authority to immunize them from liability. *Doe I* thus directly undercuts the district court's reasoning that Defendant is entitled to immunity simply because the Israeli government has said that his conduct was part of an "authorized military action taken by the State of Israel." ER026.

The district court also sought to distinguish *Marcos Estate II* on the additional ground that the Philippine government waived the defendant's immunity by agreeing that the suit should proceed. ER020. But the *Marcos Estate II* court did *not* decide the case based on any finding that the Philippine government had waived Marcos's immunity. "[I]n view of the conclusion that FSIA does not immunize the illegal conduct of government officials," this Court ruled that it was "unnecessary to reach the issue" of whether the submissions by the Philippine government "constitute a waiver of sovereign immunity under FSIA by the Republic of the Philippines, and that Marcos' derivative immunity is thus also

waived." 25 F.3d at 1472 n.7.

Although *Marcos Estate I*, *Marcos Estate II*, and *Doe I* each analyzed officer immunity under FSIA prior to *Samantar*'s holding that FSIA does not apply to individual officials, these cases remain good authority with regard to whether Defendant is immune under the common law. First, the *Samantar* Court noted that the rule denying immunity for acts falling beyond the scope of the official's lawful authority "may be correct as a matter of common-law principles" even though it was applied to the FSIA. *Samantar*, 560 U.S. at 322 n.17. *Marcos Estate I*, *Marcos Estate II*, and *Doe I* courts all had applied that rule.

Second, because the FSIA "codif[ied] the existing common law principles of sovereign immunity" as they existed prior to 1976, *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), courts interpreting the FSIA as to individual officials were, for all practical purposes, interpreting the common law. That the holdings in *Marcos Estate I* and *Marcos Estate II* denying immunity to officials for *jus cogens* violations were consonant with the common law is apparent from the fact that this rule was not based on the FSIA's text. Rather, it was an exception the court read into the statute for individual officials but not for states, even though, under *Chuidian*, the court understood that the same statute governed both individuals and states. *Compare Marcos Estate I*, 978 F.2d at 497-98 (reading an exception into the FSIA denying immunity to officials accused of

torture) *with Siderman*, 965 F.2d at 718-19 (taking a literal reading of the FSIA's enumerated exceptions and declining to recognize a non-enumerated exception for torture by states); *see also Samantar*, 560 U.S. at 322 n.17 ("The Courts of Appeals have had to develop, in the complete absence of any statutory text, rules governing when an official is entitled to immunity under the FSIA.").[18]

C. Should this Court Deem its Pre-*Samantar* Cases Do Not Control, it Should Adopt the Better View Taken by the Fourth Circuit in *Yousuf v. Samantar*

Were this Court to conclude that its pre-*Samantar* cases do not control, it should follow the better reasoned view of the Fourth Circuit in *Yousuf*, 699 F.3d at 776, that foreign officials are not immune for *jus cogens* violations, and not the view of the Second Circuit in *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009), that declined to recognize a *jus cogens* exception. As noted, every in-Circuit decision reached the conclusion that officials are not immune for torture, including the court in *Mireskandari*, which expressly adopted the *Yousuf* rule. 2016 U.S. Dist. LEXIS 38944, *50-51 (concluding that the reasoning in *Yousuf* is "detailed and persuasive" and adopting its rule that immunity is not available for violations

[18] Pre-*Samantar* courts outside the Ninth Circuit similarly denied immunity for *jus cogens* violations on the ground that such acts fall beyond the scope of the official's valid legal authority. *See Xuncax v Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996). Other courts recognized this principle. *See Hernandez v. United States*, 785 F.3d 117, 128 (5th Cir. 2015) (Jones, J., concurring); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980).

of *jus cogens* norms).

As this Court has explained,

> [A] *jus cogens* norm, also known as a 'peremptory norm' of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Siderman, 965 F.2d at 714 (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); *see also Yousuf*, 699 F.3d at 775 (citing same definition). *Jus cogens* norms include prohibitions on torture and extrajudicial killing. *Yousuf*, 699 F.3d at 775. International law does not recognize *jus cogens* violations as sovereign acts.

> Unlike private acts that do not come within the scope of foreign official immunity, *jus cogens* violations may well be committed under color of law and, in that sense, constitute acts performed in the course of the foreign official's employment by the Sovereign. However, as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.

Id. at 775-76; *see also Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates jus cogens as a sovereign act.").

In *Yousuf*, the Fourth Circuit denied immunity to the former Minister of Defense of Somalia for torture and extrajudicial killings by government officials under his command and control, in violation of the TVPA and Alien Tort Claims Act. 699 F.3d at 766. The court conducted a well-reasoned analysis of the scope of conduct immunity, focusing on the policies underlying the TVPA and the

increasing trend in international law and among American courts abrogating immunity for foreign officials who commit *jus cogens* violations. *Id.* at 776-77 (observing that "[a] number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the criminal context for alleged *jus cogens* violations," and that "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity"). The court thus held that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* at 776 (emphasis added); *accord Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016).

Matar, by contrast, provides scant justification for its conclusion that foreign officials are immune even for *jus cogens* violations. 563 F.3d at 14-15. The Second Circuit engaged in no analysis of International law. The court instead relied on inapposite authorities, in particular *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996), for the proposition that the court had "previously held that there is no general *jus cogens* exception to FSIA immunity." 563 F.3d at 14-15. In *Smith*, however, the court rejected only the narrow argument that *jus cogens* violations do not constitute an implied waiver of a state's immunity within the meaning of the FSIA, 28 U.S.C § 1605(a)(1). *Smith* is

entirely silent on the issue of an individual's immunity, and in any event the court's holding does not compel the conclusion that individual immunity must follow the state's immunity. Indeed, the Ninth Circuit has held precisely the opposite. *Compare Marcos Estate I*, 978 F.2d at 497-98, *with Siderman*, 965 F.2d at 718-19. And the Supreme Court has indicated that state and individual immunities are not identical. *Samantar*, 560 U.S. at 321-22. The *Matar* court also deemed itself bound by the Executive Branch's statement of interest suggesting immunity. 563 F.3d at 14. The Ninth Circuit has never held itself bound by an Executive suggestion of immunity, however, and as the foregoing discussion demonstrates it should not do so here.

D. Other Considerations Further Support the Exercise of Jurisdiction

Other considerations further support the exercise of jurisdiction here. First, Mr. Doğan was a U.S. national. Second, Defendant voluntarily entered this Court's jurisdiction, and thus assented to the personal jurisdiction of its courts. *See The Schooner Exchange*, 11 U.S. at 136 (discussing the extent of a nation's jurisdiction "within its own territory"). The importance of this principle in the context of foreign sovereign immunity is demonstrated by the fact that the FSIA, which "codif[ied] the existing common law principles of sovereign immunity," *Chuidian*, 912 F.2d at 1101, recognizes an exception to immunity for conduct occurring with the territory of the United States, *see* 28 U.S.C. § 1605(a)(5).

Moreover, in addition to passing the TVPA, Congress has repeatedly imposed civil and criminal penalties for the acts alleged here. *See* Torture Convention Implementation Act of 1994, 18 U.S.C. §§ 2340-2340A; War Crimes Act of 1996, 18 U.S.C. § 2441; Alien Tort Statute, 28 U.S.C. § 1350; Anti-Terrorism Act, 18 U.S.C. § 2333(a). These statutes articulate a clear political determination to hold perpetrators to account for such misconduct. This Court should find that Defendant is not immune.[19]

IV. The District Court Erred in Admitting, and Considering, Extrinsic Evidence Regarding the Purported Foreign Policy Implications of this Case

While the State Department's Suggestion of Immunity did not address the foreign policy implications of this case, the district court undertook its own freewheeling analysis by asserting numerous factual findings on the basis of extrinsic evidence. The district court in particular cited extensively to the "Turkel Report" produced by the Israeli government and offered by Defendant, and to nine articles offered by neither party. To the extent that these fact findings form the basis for the district court's order, this too is error.

The court below was unable even to consider extrinsic evidence for the purpose of foreign sovereign immunity. Defendant's immunity argument was a

[19] Although the district court did not specifically address Plaintiffs' ATCA and ATA claims, the arguments raised herein are equally applicable to those claims.

"facial" jurisdictional challenge because it did not contest the truthfulness of Plaintiffs' allegations for the purpose of jurisdiction. It instead asserted that the facts alleged in the Complaint and accepted as true—namely, that Defendant acted in his official capacity—deprived the court of subject matter jurisdiction. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (discussing facial attacks). Courts treat facial 12(b)(1) attacks as 12(b)(6) motions. *Id.* Accordingly, when deciding facial attacks courts may not consider evidence extrinsic to the Complaint, even where it is offered by the parties. *See NLRB v. Vista Del Sol Health Servs.*, 40 F. Supp. 3d 1238, 1249-50 (C.D. Cal. 2014). Contrary to what the district court concluded, ER009, it is the nature of the defendant's arguments, and not the mere act of proffering evidence, that determines whether a jurisdictional attack is facial or factual. *See id.*[20]

The district court erred on the additional ground that it used this evidence to conduct its own foreign policy analysis. ER020-021. But such an analysis has no bearing on the question of foreign sovereign immunity. While a court's own analysis of foreign policy considerations may be relevant to the political question

[20] The Turkel Report may not be considered under the incorporation by reference doctrine. Although mentioned in the Complaint, the Turkel Report does not "form the basis" of the Complaint, nor do Plaintiffs "refer extensively" to this document. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Nor may the facts contained in the Turkel report or any of the cited news articles be judicially noticed, because they are not adjudicative facts "not subject to reasonable dispute." *Id.* at 908-09 (citing Fed. R. Evid. 201(b)).

doctrine or act of state doctrine, no case cited by Defendant, the Executive, or the district court permits a district court to decide specific questions of foreign sovereign immunity on this basis. Insofar as the district court relied on this evidence in granting Defendant immunity, its error is prejudicial and provides an additional ground for reversal.[21]

CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be vacated and this case remanded to permit Plaintiffs the ability to litigate their claims on the merits.

DATED: May 19, 2017

Respectfully submitted,

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[21] To the extent that the district court relied upon media accounts of the "agreement" between Turkey and Israel, ER007, Israel's agreement to pay funds for Defendant's actions operates as its waiver of Defendant's sovereign immunity.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed.R.App.P. 32(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 13,998 words, beneath the applicable 14,000 word limit, exclusive of the cover page, table of contents, table of authorities, statutory addendum, certificate, and statement of related cases.

DATED: May 19, 2017

HADSELL STORMER & RENICK LLP

Care of: STOKE AND WHITE LLP

By: s/Dan Stormer
Dan Stormer
Brian Olney
Haydee J. Dijkstal
Attorneys for Plaintiffs-Appellants

ADDENDEUM RE STATUTORY AND CONSTITUTIONAL PROVISIONS

The primary statute at issue, the Torture Victim Protection Act ("TVPA"), provides that "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." 28 U.S.C. § 1350 note § 2(a).

The Alien Tort Claims Act ("ATCA") provides that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

The Anti-Terrorism Act ("ATA") provides that "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." 18 U.S.C. § 2333(a).

This case also concerns the Reception Clause of the United States Constitution. The clause provides that the "President of the United States of

America . . . shall receive Ambassadors and other public Ministers[.]" U.S. Const. art. II, § 3.

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

DATED: May 19, 2017

HADSELL STORMER & RENICK LLP

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9th Circuit Case Number(s) 16-56704

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