NO. _____

In the Supreme Court of the United States

TERESITA A. CANUTO,

Petitioner,

—v—

DEPARTMENT OF DEFENSE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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AUGUST 24, 2018

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QUESTION PRESENTED

Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 extends to an individual for acts taken in the individual's former capacity as an acting official because the act apply on behalf of a foreign state.

PARTIES TO THE PETITION

Petitioner

Teresita A. Canuto

Respondents

Department of Defense

Department of Homeland Security

Office of the President

National Kidney and Transplant Institute (NKTI)

Bank of America

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JURISDICTION

This Court has jurisdiction to review this case under 28 U.S.C. § 1254 (2006), which provides that (c)ases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

In the early 2014, Ash Carter, Secretary of Defense, Ray Mabus, Secretary of Navy, Patrick J. Murphy, Acting Secretary of Army, Deborah L. James, Secretary of Air Force, Troy Alexander, Batallion Commander of U.S. Army Reserve, George Pickett, OSM/Command Sergeant Major U.S. Army Reserve,

Jeh Johnson, Secretary of Homeland Security, Barack Obama, Commander in Chief of Army and Navy were serving the government as federal officials, officers, head of the departments, agency of the United States government.

Following the attack of September 11, 2001, the United States abandoned its policy of opposing torture. A program of cruel psychological and physical abuse was applied to detainees in the United States control and Guantanamo Bay and other sites beyond United States borders. These detainees were suspected terrorists and unlawful enemy combatants.

While the government's policy was being carried out plaintiff claim was tortured without trial. Plaintiff brought suit as a result of the treatment received from the above federal defendants. Respondents were represented by their counsel Marsha Wellknown Yee. Federal defendants argues to the district court that they are entitled to immunity and the complaint should be dismissed. The district court accordingly dismiss the claim because federal officials, officers were immune. (Case No. 16-2282 *Canuto v. Mattis*)

Federal defendants are federal officials of the United States Secretary of Defense's, Acting Secretary of Army's, Secretary of Air Force's, Batallion Commanders' of Army, Secretary of Homeland Security's, Commander in Chief of Army and Navy's official capacity, they are responsible for enforcing United States laws, customs, practices, and policies. In that capacity, federal officials, head of the government of United States presently enforcing the laws, customs, practices and policies complained in this action.

Specifically, federal defendants are the authority charged with processing and issuing concealed carry permit to continuous sexual assault and battery or torture of plaintiff in California where plaintiff resides. They are sued in their official capacity.

In the early 2013, torture, extrajudicial killing was done to plaintiff's brother by the foreign state or National Kidney and Transplant Institute (NKTI). The said actions taken under the color of law engaged by an acting official apparent authority was a provision of material support to the federal officials of the United States government. Plaintiff sued the *Department of Defense et al.* Case No. 1:17-cv-00979 APM. The district court accordingly dismiss the claim because of failure to state a claim and lack of jurisdiction.

This case concerns the appropriate standard for establishing jurisdiction in an action against a foreign state under the FSIA or Act, 28 U.S.C. 1330. As stated in jurisdictional immunity of a foreign state 28 U.S.C. § 1605 A Terrorism exception applies to jurisdictional immunity of a foreign state-

(a) In general (1) no immunity-

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of

> material support or resources is engaged in by an official, employee, or against of such foreign state which acting within the scope of his or her office, employment, or agency.
>
> Under the statute of Foreign Sovereign Immunities Act, personal jurisdiction–subject matter jurisdiction together with valid service equals personal jurisdiction. As stated in § 1330(b) "personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under Section 1608 of this title. Section 1608 prescribe the exclusive means of service in both foreign states and their agencies and instrumentalities. These provisions are mandatory, but alternatives are specified in descending order of preference. Under § 1608(d) both states and their agencies and instrumentalities have sixty days from date of service to answer or respond to a complaint. In practice however, effecting (and establishing proof of service) can be time consumming and fraught with delays.

The merits of the underlying cause of action "fully overlap with an element of the jurisdictional inquiry, and another that applies if partial or no overlap exists. *Simon*, 812 F.3d at 141. That elaborate jurisdictional superstructure is nowhere to be found in the relevant provisions of the FSIA, and it is divorced form the statute's underlying goals. *Cf. Chabad*, 528 F.3d at 955-957 & n.3 (Henderson J., concurring).

Congress mandated a careful, substantive inquiry into whether a foreign state is immune from jurisdiction in every case, not just in a limited class of cases. Other rationales that have been advanced by plaintiff in support of the "exceptionally low" standard applied by the United States Court of Appeals for the District of Columbia Circuit, also fail to justify use of that standard to make jurisdictional determination under the FSIA. First, it is not correct to say that Section 1605(a)(3) merely requires "assert(ion)" of a certain type of claim–that is, that a plaintiff must merely assert as a (non-frivolous) legal conclusion that its rights in property have been taken in violation of international law in order to clear the hurdle of Rule 12(b)(1). *Chabad*, 528 F.3d at 941. Section 1605(a)(3) could, of course, have been worded to refer to claims "alleging" or "asserting" taking of property in violation of international law, *see, e.g.*, 15 U.S.C. 8405, or to claims "arising under" or "brought to enforce international law, *see Manning*, 136 S.Ct. at 1570-1575." But Congress chose in Section 1605(a)(3) to impose substantive requirements rather than simply to describe the subject matter of the suit. *See Verlinden*, 461 U.S. at 496 (distinguishing FSIA from statutes that "do nothing more than grant jurisdiction over a particular class of cases").

A foreign state shall not be immune from the jurisdiction of the courts of the United States provided that (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, against which claim is asserted; the service of process shall be deemed to constitute valid delivery of such notice;(2) notice to the foreign state of the commencement of suit as provided in section

1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware a foreign state was involved of the date such party determined the existence of the foreign state's interest. Whenever notice is delivered under subsection (h)(1), the suit to enforce a claim for damage shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem.

Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), Section 40 of the Arms Export Control Act (22 U.S.C. 2780) or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism, and the term "torture" and "extrajudicial killing" have the meaning given these terms in section 3 of the Torture Victim Protection Act of 1991. (28 U.S.C. 1350 note).

28 U.S.C. 1606 provides:

Extent of liability

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide for damages only in punitive in na-

ture, the foreign state shall be liable for actual compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

ARGUMENT

I. THE U.S. COURT OF APPEALS ERRED WHEN IT DISMISSED APPELLANT'S CLAIM AGAINST NATIONAL KIDNEY AND TRANSPLANT INSTITUTE (NKTI) BECAUSE ACCORDING TO THE COURT APPELLANT FAILED TO PROVIDE A SHORT AND PLAIN STATEMENT OF THE GROUNDS FOR COURT'S JURISDICTION. FED. R. CIV. P. 8(1)(1). APPELLANT ASSERTS THAT THE DISTRICT COURT HAS JURISDICTION TO HEAR CLAIMS AGAINST FOREIGN STATES UNDER 28 U.S.C. § 1330, BUT THAT SECTION PERMITS JURISDICTION ONLY WHEN AN EXCEPTION TO SOVEREIGN IMMUNITY APPLIES AND APPELLANT DOES NOT ALLEGE THAT ANY EXCEPTION APPLIES

A. Appellant Claims for Damages to a Foreign State (NKTI)

The cause of action was due to torture, extrajudicial killing and provision of material support, or resources, in which was engaged by an official, employee, or against of such foreign state which acting within the scope of his or her office, employment, or agency.

"Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1441(d), 1602 *et. seq.*, pro-

> vides that a foreign state and its instrumentalities are immune from suit in United States courts, subject to limited statutory exceptions. The expropriation exception provides that a foreign state not immune "in any case . . . in which of rights in property' or a "taking in violation of international law" are in issue.

The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every civil actions against a foreign state or its political subdivision, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

The FSIA provides that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certains international agreements and by exceptions enumerated in the statute. 28 U.S.C. 1604; *see* 28 U.S.C. 1605-1607.

It also provides that federal district courts shall have jurisdiction of any nonjury civil action . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement," 28 U.S.C. 1330(a).

As stated in Section 1605(a)15) of the FSIA provides that a foreign state is not immune from suit in any case:

> not otherwise encompassed in (the exception for commercial activity), in which money damages are sought against a foreign state

> for personal injury or death, or damage to or loss of property, occurring in the United States and caused by tortious act or omission of that foreign state. The foreign state (NKTI) committed torture and extrajudicial killing which are acts of international terrorism and has extent liability under 28 U.S.C. § 1606.

Actions taken under the color of law by an acting official apparent authority are considered official. The order of torture and extrajudicial killing against appellant's younger brother by intentionally injecting inappropriate drugs to his bloodstream which has "0" blood type (as blood test lab result) that his death is subject to FSIA, statutory exceptions in which "right in property" and taken or in "violation of international law."

Plaintiff-appellant's allegations are legally sufficient to satisfy the exceptions substantive requirements and were not "wholly insubstantial or frivolous." The court determined that the claim pleaded in the complaint was legally sufficient to fulfill section 1605(a)(4)'s requirements.

> "The court has given similar treatment to other immunity exceptions. *See OBB Personenverkehr AG v. Sachs*, 136 S.Ct. 390, 395-398 (2015) (conclusively resolving at Rule 12(b)(1) stage whether action for personal injury was "biased upon a commercial activity" under Section 1605(a)(2); *Nelson*, 507 U.S. at 351 (same); *Amerada Hess*, 488 U.S. at 439-443 (conclusively deciding at Rule 12(b)(1) stage that "none" of the FSIA's immunity

> exceptions "apply to the facts of this case"). Outside the sovereign immunity context certain other jurisdictional provisions have been held to call for a definitive legal assessment of substantive requirements at the threshold of the case. *See, e.g. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-279 (1977)."

As also stated in § 1605. General exceptions to the jurisdictional immunity of a foreign state

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case.
>
> (1) in which the foreign state has waived its immunity either explicity or by implication, nothwithstanding any withdrawal of the waiver which the foreign state may purport to affect except in accordance with the terms of the waiver;

NKTI has waived its immunity by implication through provision of material support or resources to federal defendants through the acts of torture, extrajudicial killing in which engaged by official, employees of NKTI. Federal defendants are sued also in other case for torture inflicted to plaintiff by the members of the military of Department of Defense of United States. (*see*, case no. 16-02282 EGS, *Canuto v. Department of Defense et al.*)

II. THE U.S. COURT OF APPEALS AND DISTRICT COURT ERRED WHEN IT DENIED JURISDICTION TO A FOREIGN STATE. THE FOREIGN STATE WAS PROPERLY SERVED WITH SUMMONS AND COMPLAINT BY THE APPELLANT THROUGH INTERNATIONAL PROCESS SERVER OF SUMMONS

A foreign state shall not be immune from jurisdiction provided that:

> (1) Notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent . . . against which claims is asserted. The service of process shall be deemed to constitute valid delivery of such notice:
>
> (2) Notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.
>
> (3) Whenever notice is delivered under subsection (b)(1) the suit to enforce a claim for damages shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem.

In accordance with the Federal Rules and Civil procedure, the appellant properly served the foreign state (NKTI) and federal defendants with summons and

complaint. Both the NKTI and federal defendants did not filed their answers to summons in the district court of Columbia. Under the statute of Foreign Sovereign Immunities Act, personal jurisdiction, under the statute, subject matter jurisdiction together with valid service equals personal jurisdiction. As stated in § 1330(b), "personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

Circumvent FSIA immunity simply by suing an official instead of a state agency. According natural persons immunity is most consistent with the history and purpose of foreign sovereign immunity. The FSIA was intended to codify the common law of sovereign immunity, which executive and judicial precedent shows was historically extended to natural persons. *Underhill*, 168 U.S. at 252-253; *Verlinden*, 461 U.S. at 488; 1 U.S. Op. Att'y Gen. 82 (1797). Aside from decisions of American Courts at the circuit level, U.N. conventions and decisions of European courts remain in general agreement that foreign sovereign immunity protects natural persons acting in an official capacity. *Valentin*, 888 F.9th at 18 n.5; *Jones* (2006) UKHL 26 at &10.

Not covering natural persons under FSIA would jeopardize important policy justifications for foreign sovereign immunity by suing officials would undermine the policy of not allowing our courts to be used to judge, embarass and undermine other nations. *See Heaney*, 445 F.2d at 503 (immunity intended to avoid conflict and embarassment). Additionally, since the U.N. and other nations immunize natural persons, not

providing them immunity in the U.S. could seriously breach reciprocity, as other nations would immunize American officials, but the U.S. would not accord their officials equal immunity. *Valentin*, 888 F.9th at 18 n.5; *Jones*, (2006) UKHL at MO. Finally, as a textual matter the 28 U.S.C. § 1605(a)(1) FSIA exception for state sponsors of terror explicitly includes officials and employees.

The court accordingly dismissed the claim under FSIA NKTI was immune. However, the Circuit court on the mistaken belief that FSIA does not apply to foreign officials. Plaintiff now reguesting this court to reverse the Circuit Court, NKTI is not entitled to immunity for his action.

Foreign sovereign immunity is a crucial, broad lived doctrine in international law. The policy motivation for foreign sovereign immunity have tradetionally given it broad application. Foreign sovereign immunity is the long standing that the courts of one nation should not be used to official actions of other nations. *Underhill*, 168 U.S. at 252-253. The United States has adhered closely to this doctrine recently through the adoption of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-1611; 1 U.S. Op. Att'y Gen. 82 (1797). The United States and other nation the doctrine of sovereign immunity for several reasons first is comity and mutual respect among nations.

CONCLUSION

For the foregoing reasons the Petitioner requests that the Court reverse the decision of the Columbia Circuit.

Respectfully submitted,

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AUGUST 24, 2018

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