No. 19-185

In the Supreme Court of the United States

KALEV MUTOND, IN HIS INDIVIDUAL CAPACITY ONLY, ADMINISTRATEUR GÉNÉRALE, AGENCE NATIONALE DE RENSEIGNEMENTS, DEMOCRATIC REPUBLIC OF THE CONGO,

AND

ALEXIS THAMBWE MWAMBA, IN HIS INDIVIDUAL CAPACITY ONLY, MINISTRE DE LA JUSTICE, GARDE DES SCEAUX ET DROITS HUMAINS, DEMOCRATIC REPUBLIC OF THE CONGO, PETITIONERS,

v.

DARRYL LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The decision below eviscerates the longstanding doctrine that foreign officials enjoy immunity in U.S. courts in suits relating to their official acts, permitting plaintiffs to plead around immunity in practically every case, simply by suing foreign officials in their personal capacity.

For twenty-nine labored pages, respondent's brief in opposition strains to explain away two circuit splits on vital foreign-policy questions and downplay their importance. But his arguments do not survive even cursory review. Respondent's contention that "no other court of appeals has considered" whether foreign officials lack immunity when sued in their individual capacity (Opp. 10 (capitalization altered)) is instantly disproven: The Ninth Circuit squarely considered the argument that "seek[ing] damages only from [an official's] own pocket * * * will not have the effect of enforcing a rule of law against the [foreign] State," Appellants' Br. at 25, *Doğan* v. *Barak*, No. 16-56704 (May 19, 2017) (*Barak* Appellants' Br.)—and rejected it, *Doğan* v. *Barak*, 932 F.3d 888, 893-894 (2019). Respondent's farfetched claim that the D.C. Circuit applied some doctrinally distinct concept of "displacement" rather than "abrogation" (Opp. 15-19), is impossible to square with the fact that the D.C. Circuit applied the *very same rule* as the Second and Ninth Circuits—citing a common body of *abrogation* precedent—to hold that conduct-based immunity is categorically unavailable for TVPA claims. And respondent's argument (Opp. 20-24) that the decision below accords with *Samantar* stretches beyond recognition its holding that personal-capacity TVPA claims against foreign officials are "properly governed by the common law" of immunity. 560 U.S. 305, 325 (2010). Under the D.C. Circuit's rule, such officials can *never* raise immunity.

The decision below will incite more U.S. litigation against foreign officials, threaten international comity, and put U.S. officials at risk by encouraging foreign governments to refuse to recognize their immunity. Pet. 24-31. Unable to deny the decision will cause those harms, respondent is forced to argue (Opp. 27-29) that official-immunity cases arise infrequently and that the government can avert disaster by routinely filing suggestions of immunity (SOIs). But *seven* official-immunity cases were decided *just this year*, see Addendum, *infra*, each one a potential diplomatic powderkeg. And the Executive Branch has long argued that requiring routine SOIs is needlessly onerous and diplomatically problematic.

This Court's review is urgently needed.

I. The Decision Below Creates Two Circuit Splits And Conflicts With The Executive Branch's Views

A. Respondent does not dispute that, since *Samantar*, numerous cases have applied common-law principles—including principles described in the Restatement—to uphold the immunity of foreign officials sued in their personal capacities for official acts. Pet. 10-11. And respondent has identified *no other* decision that has allowed plaintiffs to evade immunity by simply suing foreign officials in their personal capacities. Indeed, he concedes (Opp. 11) that "the D.C. Circuit might have been the first to emphasize the individual-versus-official capacity distinction."

Respondent instead attempts to rewrite the decision below, asserting that the D.C. Circuit engaged in "fact-dependent analysis" to reach its conclusion. Opp. 11; see *id.* at 1, 15. Poppycock. The D.C. Circuit adopted what is *on its face* a categorical rule that turns on just one fact: "In cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in his personal capacity, exercising jurisdiction does

not enforce a rule against the foreign state." Pet. App. 8a.

Respondent contends (Opp. 11) that the cases the petition cited (Pet. 10-11) did not expressly address the arguments the D.C. Circuit adopted. But courts have considered and rejected those arguments. In *Barak*, 932 F.3d 888, the plaintiffs made precisely the argument the D.C. Circuit accepted: Because they had sued Israeli Defense Minister Ehud Barak "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." *Barak* Appellants' Br. 25; see *id.* at 6, 22-23, 44-45. Relying on the same Restatement language the D.C. Circuit invoked, the Ninth Circuit rejected that argument, holding that Barak was immune because "exercising jurisdiction" over him for conduct undertaken in his official capacity "would be to enforce a rule of law against the sovereign state of Israel." 932 F.3d at 893-894.

Respondent characterizes the Ninth Circuit's analysis as "context-specific" and "based on the record before [it]." Opp. 12. But far from distinguishing the cases, respondent has identified the heart of the circuit split. The Ninth Circuit analyzed the record to determine whether exercising jurisdiction over Barak would impose a rule of law against Israel. The D.C. Circuit went no farther than the complaint's caption: Because respondent purported to sue the petitioners in their personal capacities, common-law immunity disappeared. Pet. App. 8.

Respondent's reliance on the SOI in *Barak* is misplaced. Opp. 12. The Ninth Circuit explicitly said it "need not decide the level of deference owed" an SOI because its "independent judicial determination of entitlement to immunity" demonstrated Barak was immune. See 932 F.3d at 894. And there is no basis for respondent's suggestions (Opp. 2, 10, 25) that the absence of an

SOI here should be held against petitioners. The State Department has made clear it has neither the inclination nor the resources to opine in every case. As the government has explained, "[immunity] principles are susceptible to general application by the judiciary without the need for recurring intervention by the Executive, particularly in the form of suggestions of immunity filed on a case-by-case basis." U.S. Br. at 21 n.*, *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007) (U.S. *Dichter* Br.). The State Department need not intervene in straightforward cases involving clear-cut immunity. That is the explanation the State Department gave petitioners for not intervening in the district court below. And there was no need for it to participate before the D.C. Circuit because the district court had correctly granted immunity in a well-reasoned opinion. If the Court has any doubts about the government's views, it need only ask for them.

B. Respondent fares no better trying to explain away the second split. According to respondent, the Second and Ninth Circuit decisions holding that the TVPA does not abrogate common-law conduct-based immunity (see Pet. 12) accords perfectly with the D.C. Circuit's holding that the TVPA "displaces any common-law, conduct-based immunity that might otherwise apply in the context of the Act" (Pet. App. 10a), because "abrogation" and "displacement" are, respondent claims, distinct doctrines (Opp. 16-17). This is meaningless wordplay. Respondent's invented distinction has no grounding in the decision below.

Judge Randolph's controlling opinion (Pet. App. 11a-15a) does not even use the word "displace"—much less invoke some "displacement doctrine." And it left no doubt that the TVPA abrogates the common law. The case that provides the opinion's controlling rule *precisely mirrors* the abrogation standards the Second and Ninth

Circuits applied—indeed, it and *Dichter* both invoked the same *abrogation* case. Compare *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981) (cited at Pet. App. 14a) ("[T]he question was whether the legislative scheme 'spoke directly to a question' * * * ." (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978))), with *Matar* v. *Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question * * * ." (quoting, *inter alia*, *Mobil Oil*, 436 U.S. at 625)), and *Barak*, 932 F.3d at 894 ("[C]ommon-law principles * * * should not be abrogated absent clear legislative intent to do so."); accord Pet. 20 (citing abrogation cases using similar standards). Judge Randolph expressly rejected the classic *abrogation* argument that "statutes in derogation of the common law are to be strictly construed." Pet. App. 14a n.6. He took pains to distinguish *Manoharan* v. *Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) (per curiam), which invoked the *very same rule*, *id.* at 180 (quoting, *inter alia*, *Mobil Oil*, 436 U.S. at 625), to hold "the TVPA did not abrogate * * * common law immunity" for heads of state, *ibid*. See Pet. App. 14a-15a & n.6. And Judge Randolph looked to legislative history to determine congressional purpose (*id.* at 15a), which respondent acknowledges (Opp. 16-17) is an element of abrogation analysis. The other opinions' offhand characterization (Pet. App. 2a, 10a) changes nothing of substance.

The government likewise sees no distinction between displacement and abrogation. In informing the Ninth Circuit of its conclusion that the decision below was mistaken, the government suggested the terms were equivalent, explaining that "the TVPA did not displace conduct-based foreign-official immunity for the reasons given by the district court and in the United States' amicus brief." U.S. 28(j) Letter at 2, *Doğan* v. *Barak*, No. 16-56704 (9th Cir. June 5, 2019). Both framed their

analysis in "abrogation" terms. See *Doğan* v. *Barak*, No. 15-cv-8130, 2016 WL 6024416, at *11-13 (C.D. Cal. Oct. 13, 2016); U.S. Br. at 15-21, *Doğan* v. *Barak*, No. 16-56704 (9th Cir. July 26, 2017) (U.S. *Barak* Br.).[1]

Whether styled as "abrogation" or "displacement," the fact remains: Foreign officials sued in the Second and Ninth Circuits *can* raise common-law conduct-based immunity to defend against TVPA claims; foreign officials sued in the D.C. Circuit *cannot*. In the Second or Ninth Circuits, respondent's suit would have been summarily dismissed. See, *e.g.*, *Wickrematunge* v. *Rajapaksa*, No. 19 Civ. 2577 (C.D. Cal. Oct. 17, 2019), ECF No. 70 (invoking *Barak* to dismiss personal-capacity TVPA lawsuit against former Sri Lankan defense secretary without awaiting SOI).

Respondent emphasizes that the decision below was decided at *Samantar*'s second step, without an SOI. Opp. 18. But he never explains why that matters. As respondent admits, the Ninth Circuit considered whether the TVPA "abrogate[s] wholesale *all* common-law immunities." Opp. 17 (quoting 932 F.3d at 895) (emphasis added). The court's unqualified holding that "the TVPA does not abrogate foreign official immunity," *Barak*, 932 F.3d at 896, does not depend on whether the Executive Branch suggested immunity (a fact *never mentioned* in the court's analysis). And tellingly, respondent never

[1] Respondent makes much of the government's argument in *Barak* that the (out-of-circuit) decision below should not affect its reasoning. Opp. 13, 19. That was the implication of the government's position that courts are bound to accept a suggestion of immunity without further analysis. U.S. *Barak* Br. 11-14. But the D.C. Circuit's analysis conflicts with the Ninth Circuit's "independent judicial determination of entitlement to immunity" that it conducted despite the government's view. See *Barak*, 932 F.3d at 894.

disputes that petitioners would have prevailed in the Ninth Circuit.[2]

C. Respondent does not dispute that the Executive Branch has repeatedly suggested immunity for foreign officials sued in their personal capacities and has consistently argued that the TVPA does not abrogate common-law immunity. Instead, he argues (Opp. 24-25) that the government briefs the petition cited (Pet. 13-14) are relevant only where the government has suggested immunity. The Executive Branch disagrees: Its briefs set forth principles "susceptible to *general application* by the judiciary *without the need for recurring intervention by the Executive*." U.S. *Dichter* Br. 21 n* (emphasis added). Respondent argues (Opp. 24-25) that the State Department could still suggest immunity under the decision below—a dubious prospect (see Pet. 15). But even this best-case scenario would force the State Department to intervene in *every* foreign-official immunity case—the sort of "recurring intervention" and resource drain the Executive Branch seeks to avoid.

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[2] There is no principled basis for respondent's attempt to cabin *Dichter* to cases involving SOIs. Opp. 19. If the TVPA abrogated—or "displaced"—common-law immunity, then there is no immunity for the State Department to suggest. Pet. 15. As for *Dichter*'s statement that "the TVPA will apply to any individual official whom the Executive declines to immunize," the court was referring to cases where the Executive suggests *non*immunity, which would be binding "under [the court's] traditional rule of deference." 563 F.3d at 15. The government's *amicus* brief confirms this reading. It explained that "a foreign official will be subject to liability under the TVPA in any case where the Executive *informs the court* that it has *decided not to recognize* the foreign official's claim of immunity from suit." U.S. *Dichter* Br. 28 (emphasis added).

II. The Decision Below Conflicts With *Samantar*

Under the decision below, courts will have no substantive role in determining common-law immunity if plaintiffs simply sue foreign officials in their personal capacities or allege TVPA violations, upending *Samantar*'s two-step framework. Pet. 14-15.

Respondent's arguments to the contrary (Opp. 20-24) are nonresponsive and unpersuasive. *Samantar* in no way "supports" (Opp. 20) the D.C. Circuit's personal-capacity holding. *Samantar* stated that some *official*-capacity suits should be treated as suits against the sovereign and analyzed under the FSIA. 560 U.S. at 325. The Court distinguished such suits from *personal*-capacity suits (like *Samantar* and this case), which are "governed by the common law." *Ibid.* That statement is hard to square with the idea that common-law immunity is *categorically unavailable* in personal-capacity suits.

Respondent suggests (Opp. 22) that courts will "polic[e] baseless attempts to plead around immunity." But he never explains how courts *could* police baselessness where the *sole relevant factor* is whether the plaintiff has sued the official in his personal capacity. Respondent's authorities underscore the D.C. Circuit's error, emphasizing that courts cannot "simply rely on the characterization * * * in the complaint" but must determine whether the remedy "is truly against the sovereign." Opp. 22 (quoting *Lewis* v. *Clark*, 137 S. Ct. 1285, 1290 (2017)). The decision below fatally undercuts courts' ability to police "artful pleading" that *Samantar* relied upon. See 560 U.S. at 325.

Respondent argues (Opp. 22-24) that "there is no disagreement" between *Samantar* and the D.C. Circuit's holding that the TVPA abrogates immunity because *Samantar* did not itself determine the contours of common-law immunity. But this Court remanded in *Samantar* for the lower courts to apply common-law foreign-

official immunity in the first instance. If the TVPA abrogated—or "displaced"—common-law immunity, remand would have been pointless.

III. The Decision Below Is Wrong

The petition catalogs the D.C. Circuit's numerous errors. Pet. 16-24. Remarkably, respondent devotes *not a single page* to defending the decision below on the merits. That omission is telling.

Judge Friedrich's decision in *Doe 1* v. *Buratai*, 318 F. Supp. 3d 218 (D.D.C. 2018), puts the errors of the decision below in stark relief. As Judge Friedrich explained, allowing personal-capacity lawsuits conflicts with common-law principles because holding foreign officials personally liable for state conduct "would affect how [the foreign] government, military, and police function, regardless whether the damages come from the defendants' own wallets or [state] coffers." *Id.* at 233. And as Judge Friedrich also held, the TVPA does not abrogate common-law immunity because "the [TVPA] does not 'speak directly' or make 'evident' that it abrogates common law foreign-official immunity." *Id.* at 237. She also observed that "[t]he Act evinces no decision to transform federal courts into a forum for adjudicating * * * disputes" that would "embroil[] the Judiciary in sensitive foreign policy matters." *Ibid.* Respondent has no answer to that careful analysis.

IV. The Decision Below Will Have Sweeping Repercussions

The petition explains how the decision below will incite further U.S. litigation against foreign officials, threaten international comity, distort the State Department's role in determining immunity, and put U.S. officials at risk by encouraging foreign governments to refuse to recognize their immunity. Pet. 24-31.

Respondent cannot dispute that the decision below will have those harmful effects; he simply argues the cases are too rare (Opp. 27-28) to cause real damage. Not so. It takes only a single case to threaten comity with, and reciprocal lawsuits in, another country. And we are aware of *at least 23* cases raising conduct-based immunity filed just since *Samantar*, with the pace accelerating ominously in recent years. See Addendum, *infra*. That list includes suits against foreign officials from some of the Nation's most important allies and strategic partners. Each raises exceptionally important and sensitive questions implicating foreign relations and national security. And the issue is not how many suits against foreign officials *have been* filed, but how many more *will be* if the D.C. Circuit's immunity opt-out stands.

Respondent contends (Opp. 28) that the State Department can clean up the D.C. Circuit's mess by filing SOIs in every suit against foreign officials. That is no solution. The Department has long maintained that the judiciary should determine immunity "without the need for recurring intervention by the Executive." U.S. *Dichter* Br. 21 n.*. In addition to the drain on resources, "[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 436 (1964). This Court should not allow the D.C. Circuit to force the State Department's hand.

V. This Case Is An Ideal Vehicle For Resolving These Issues

Respondent identifies no issues that would prevent this Court from deciding both questions presented. Respondent errs in suggesting (Opp. 25-26) that this Court would have to resolve an antecedent question whether the Restatement sets forth the common law. The Court

needs only decide whether foreign officials can raise immunity in personal-capacity TVPA suits. It need not define the precise contours of immunity. Pet. 31-32.

Respondent seeks refuge in *his own failure* to raise TVPA abrogation below. Opp. 27. But the D.C. Circuit passed upon the issue, and it is squarely presented. Pet. 31 & n.6. That court's willingness to decide unbriefed issues may explain its failure to anticipate its decision's disastrous consequences. It does not insulate its error from this Court's review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Finally, respondent is wrong that this case could be mooted before the Court resolves it (Opp. 27) because the D.C. Circuit remanded for jurisdictional discovery (Pet. 32). Respondent has not yet sought, and the district court has not yet ordered, such discovery. But if the district court proceeded, petitioners would have a strong basis for a stay pending resolution of their petition. Indeed, the risk of intrusive discovery against immune foreign officials is *all the more reason* for immediate review. Pet. 32.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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ADDENDUM

Wickrematunge v. *Rajapaksa*, No. 19 Civ. 2577 (C.D. Cal. Oct. 17, 2019) (former defense secretary of Sri Lanka)

Samanatham v. *Rajapaksa*, No. 19 Civ. 2626 (C.D. Cal. Sept. 23, 2019) (former defense secretary of Sri Lanka)

Eliahu v. *Jewish Agency for Israel*, 919 F.3d 709 (2d Cir. 2019) (Israeli rabbinical judges)

Miango v. *Democratic Republic of Congo*, No. 15 Civ. 1265 (D.D.C. Jan. 19, 2019) (DRC officials)

Doe 1 v. *Buratai*, 318 F. Supp. 3d 218 (D.D.C. 2018), aff'd, No. 18-7170, 2019 WL 668339 (D.C. Cir. Feb. 15, 2019) (Nigerian officials)

Ben-Haim v. *Edri*, 183 A.3d 252 (N.J. App. Div. 2018) (Israeli rabbinical judges)

Lewis v. *Mutond*, 258 F. Supp. 3d 168 (D.D.C. 2017), vacated and remanded, 918 F.3d 142 (D.C. Cir. 2019) (DRC officials)

C.G. ex rel. Garcia v. *Gutierrez*, No. 16 Civ. 158, 2017 WL 1435720 (E.D.N.C. Apr. 21, 2017) (Mexican consular employee)

Farhang v. *Indian Inst. of Tech.*, 655 F. App'x 569 (9th Cir. 2016) (Indian official)

Doğan v. *Barak*, No. 15 Civ. 8130, 2016 WL 6024416 (C.D. Cal. Oct. 13, 2016), aff'd, 932 F.3d 888 (2019) (former Israeli defense minister)

In re Terrorist Attacks on Sept. 11, 2001, 122 F. Supp. 3d 181 (S.D.N.Y. 2015) (Saudi official)

Moriah v. *Bank of China Ltd.*, 107 F. Supp. 3d 272 (S.D.N.Y. 2015) (former Israeli official)

Doe v. *Zedillo Ponce de León*, 555 F. App'x 84 (2d Cir. 2014) (former president of Spain)

Rishikof v. *Mortada*, 70 F. Supp. 3d 8 (D.D.C. 2014) (Swiss consular employee)

Wultz v. *Bank of China Ltd.*, 32 F. Supp. 3d 486 (S.D.N.Y. 2014) (former Israeli official)

Smith Rocke Ltd. v. *Republica Bolivariana de Venezuela*, No. 12 Civ. 7316, 2014 WL 288705 (S.D.N.Y. Jan. 27, 2014) (Venezuelan official)

Rosenberg v. *Lashkar-e-Taiba*, 980 F. Supp. 2d 336 (E.D.N.Y. 2013), aff'd sub nom. Rosenberg v. Pasha, 577 F. App'x 22 (2d Cir. 2014) (former directors of Pakistani intelligence service)

Mohammadi v. *Islamic Republic of Iran*, 947 F. Supp. 2d 48 (D.D.C. 2013), aff'd, 782 F.3d 9 (D.C. Cir. 2015) (Iranian officials)

Odhiambo v. *Republic of Kenya*, 930 F. Supp. 2d 17 (D.D.C. 2013), aff'd, 764 F.3d 31 (D.C. Cir. 2014) (Kenyan officials)

Giraldo v. *Drummond Co.*, 808 F. Supp. 2d 247 (D.D.C. 2011), aff'd, 493 F. App'x 106 (D.C. Cir. 2012) (former president of Colombia)

Smith v. *Ghana Commercial Bank, Ltd.*, No. 10 Civ. 4655, 2012 WL 2930462 (D. Minn. June 18, 2012), R&R adopted, 2012 WL 2923543 (July 18, 2012), aff'd, No. 12-2795 (8th Cir. Dec. 7, 2012) (Ghanan attorney general)

Ahmed v. *Magan*, No. 10 Civ. 342, 2011 WL 13160129 (S.D. Ohio Nov. 7, 2011) (former Somali official)

Yousuf v. *Samantar*, No. 04 Civ. 1360, 2011 WL 7445583 (E.D. Va. Feb. 15, 2011), aff'd, 699 F.3d 763 (4th Cir. 2012) (former Somali prime minister and defense minister)