No. 19-185

In The
Supreme Court of the United States

KALEV MUTOND, ET AL.,

Petitioners,

v.

DARRYL LEWIS

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

SUPPLEMENTAL BRIEF OF RESPONDENT

Pratik A. Shah
Counsel of Record
Donald R. Pongrace
Z.W. Julius Chen
Merrill C. Godfrey
Lide E. Paterno
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, DC 20006
(202) 887-4000
pshah@akingump.com

Counsel for Respondent

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Although the Government recommends that the petition be granted, in reality it seeks to litigate an entirely new issue that was neither pressed nor passed upon below: whether the Restatement (Second) of Foreign Relations Law defines the contours of foreign-official conduct-based immunity under the common law. According to the Government, the parties and the lower courts should never have assumed that, absent a suggestion of immunity, Restatement § 66 governs whether Petitioners may be sued under the Torture Victim Protection Act (TVPA). But in disagreeing with Restatement § 66's application—the essential predicate for both questions presented—the Government only adds to an already lengthy list of reasons why this case is a poor vehicle for resolving undeveloped yet complicated immunity issues. The Government should not be permitted at the invitation stage to commandeer this case in an attempt to reshape immunity law, particularly when it had ample opportunity to air its views below (as it has in other instances) and when it can easily press its framework-shattering position in any future case. The petition should be denied.

I. THE GOVERNMENT'S BRIEF REINFORCES THE NEED TO AWAIT A BETTER VEHICLE

1. The Government acknowledges that "the court of appeals assumed without actually deciding that the Second Restatement identified the relevant standard" for conduct-based immunity because "neither party disputed the Second Restatement's application." SG

Br. 14, 22. Yet the Government now claims that it "was error" to proceed on that basis. SG Br. 14.

That claim is perplexing. The Government does not cite a single post-*Samantar* case rejecting Restatement § 66. That is presumably because both before and after this Court's decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010)—which itself observed that the Restatement was "previously found instructive," *id.* at 321—courts have looked to Restatement § 66 in adjudicating conduct-based immunity claims. *See* Pet. 10-11 (cataloging "many cases that have expressly relied on the Restatement when delineating conduct-based immunity under the common law").

That includes the three decisions comprising the supposed circuit conflict. Pet. 10-11. Notably, in *Doğan v. Barak*, 932 F.3d 888 (9th Cir. 2019)—the most recent of those decisions—the Government's *amicus* brief offered no objection to the parties' discussion of Restatement § 66. To the contrary, it characterized "the Second Restatement" as "describ[ing] the common-law regime." U.S. Br. 13, No. 16-56704, 2017 WL 3331682 (9th Cir. July 26, 2017).

In light of that uniform invocation of Restatement § 66, the D.C. Circuit had no "independent obligation" (SG Br. 22) to question the parties' or the district court's reliance on that provision. There is no shortage of examples in which courts have assumed without deciding an uncontested, antecedent question. *E.g.*, *Gamble v. United States*, 139 S. Ct. 1960, 1964 n.1 (2019) ("[W]e follow the parties' lead and assume, without deciding, that the

state and federal offenses at issue here satisfy the other criteria for being the 'same offence[.]'"). Indeed, the Solicitor General has urged precisely that course in any number of cases. *E.g.*, U.S. Br. 32 n.10, *Wittman v. Personhuballah*, No. 14-1504, 2016 WL 447656 (U.S. Feb. 3, 2016) ("[T]his Court should assume without deciding that compliance with Section 5 was a compelling state interest *** . No party disputes that point here.").

The Government has long been aware of Petitioners' bid to secure immunity for the unlawful torture alleged. SG Br. 4-5. The Restatement test is the *only* basis on which Petitioners claimed immunity in this case. Pet'rs C.A. Br. 14 n.4 ("Restatement § 66(f) sets out the proper framework for determining whether a foreign official is entitled to immunity under the common law."). After declining multiple requests to provide a suggestion of immunity, the Government stood idly by as the parties litigated and the courts below resolved Petitioners' motion to dismiss under Restatement § 66.

Even if the D.C. Circuit nonetheless could have *sua sponte* reconsidered the established Restatement framework applied by the district court, the D.C. Circuit did not do so. A party may not undertake an expansive "reformulation" of issues, especially when that "would lead [the Court] to address a question neither pressed nor passed upon below." *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019). There is no reason to permit the Government an exception here. This Court "generally do[es] not entertain arguments that were not raised below and that are not advanced in this Court by any party"—including where "[t]he

United States makes a *** distinct argument" as *amicus*—"because [i]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) (second alteration in original) (internal quotation marks omitted); *cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579-1582 (2020) ("[Courts] normally decide only questions presented by the parties.").

To ignore those principles, and allow the Government to remake this case by injecting a question that neither the parties nor the lower courts have broached, would break from this Court's role as a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Government previews an argument why Restatement § 66 fails to "answer the immunity question here," and why this Court should instead adopt an approach keyed to "whether petitioners took the acts at issue in an official capacity." SG Br. 14-17. But merits aside,[1] the fact remains that certiorari-stage supplemental briefing is not the place to tee up such issues.

That is particularly true here. As noted, the Government does not cite *any* court that has departed

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[1] The Government's overarching point seems to be that "suits against foreign officials implicate many of the same foreign-affairs concerns as do suits against foreign states." SG Br. 13. But that principle is entirely consistent with a court's decision to withhold conduct-based immunity in a circumstance where protection of the foreign state is unnecessary, as is the case when exercising jurisdiction over a suit against a foreign official would not be "tantamount to enforcing a rule of law against the [foreign state] itself." Pet. App. 6a.

from Restatement § 66(f). The Government thus attempts to leapfrog the normal judicial process with no development of the predicate issue at all—not just in this case but in any other as well. The D.C. Circuit's principal and concurring opinions, moreover, are inextricably intertwined with Restatement 66(f)'s framework. Assuming that framework were discarded, the questions *actually* presented may no longer be salient—and certainly not as adjudicated below.

Adding further confusion, the Government's proffered test is not the only possible replacement for the Restatement. *See, e.g.*, Chimène I. Keitner, *Foreign Official Immunity After Samantar*, 44 VAND. J. TRANSNAT'L L. 837, 838-839, 849-852 (2011) (proposing factors to consider and "push[ing] against the view that the only relevant question for determining an individual's entitlement to conduct-based immunity is whether the alleged conduct is attributable to the foreign state" because "grant[ing] blanket immunity for all conduct attributable to the state *** would excessively restrict the jurisdiction of U.S. courts"). Had the question and universe of potential answers been put squarely before the courts below, this Court might have "the benefit of thorough lower court opinions to guide [its] analysis." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). As things stand, however, this Court would "strain to address issues that are less than fully briefed and that the district and appellate courts have had no opportunity to consider." *Comcast Corp. v. National Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1018 n.* (2020).

Making matters worse, "neither party in the court of appeals briefed the second question presented" either. SG Br. 22. That should give this Court serious pause before taking up Judge Randolph's "alternative holding that the TVPA displaces conduct-based immunity in this context." Pet. App. 2a.

In the end, the Government rightly concedes that this case has vehicle "flaws." SG Br. 22. But the Government underplays those flaws as "minor" obstacles to review. *Id*. Where (as here) a court of appeals assumes but does not decide an issue, that is ordinarily reason enough for the Solicitor General to recommend denial of a petition. *See, e.g.*, U.S. Br. 22, *HSBC Holdings PLC v. Picard*, No. 19-277, 2020 WL 1877959 (U.S. Apr. 10, 2020) ("[T]his case would provide a particularly poor vehicle for clarifying the type of conflicts of law that are relevant to comity concerns, because the court of appeals merely 'assume[d] without deciding' that the application of Section 550(a)(2) to the transfers here would present a 'true conflict' between U.S. law and foreign law.") (second alteration in original). The same should be true here.

2. Beyond those fatal vehicle defects, the Government makes no attempt to grapple with possible alternative grounds for affirmance. Because the D.C. Circuit's principal opinion below concluded that Petitioners did not satisfy the necessary third prong of Restatement § 66(f)'s test for conduct-based immunity (*i.e.*, whether "the effect of exercising jurisdiction would be to enforce a rule of law against the state"), it had no need to address Respondent's

arguments on the second prong (*i.e.*, whether the case concerns acts performed in an "official capacity"). Pet. App. 5a, 8a.

The second prong was briefed and argued extensively before the D.C. Circuit. The acts alleged in the complaint plainly constitute torture unlawful under both international law and the law of the Democratic Republic of the Congo (DRC). It is difficult to see how such acts, for which Petitioners are responsible, could be considered an "official" act of the DRC. *See Yousuf v. Samantar*, 699 F.3d 763, 775-778 (4th Cir. 2012) ("Because this case involves acts that violated *jus cogens norms*, including torture, *** Samantar is not entitled to conduct-based official immunity under the common law[.]"). As Respondent argued below, in the TVPA context, "because no state officially condones torture *** , few such acts, if any, would fall under the rubric of 'official actions.'" S. REP. NO. 102-249, at 8 (1991). Given the Government's view (Br. 14) that the dispositive factor for conduct-based immunity should be whether the acts at issue were taken in an "official capacity," Petitioners may not prevail even under the Government's test.

The Government also ignores the fact that this case could become moot at any point. BIO 27. Petitioners portray the D.C. Circuit as having "remanded for jurisdictional discovery," Reply Br. 11, but it did no such thing. The D.C. Circuit merely instructed the district court to resolve Petitioners' motion to dismiss for lack of personal jurisdiction—which remains fully ripe and unstayed—and to consider Respondent's opposed "*request*[] [for]

jurisdictional discovery if the [district] court were inclined to" dismiss. Pet. App. 9a (emphasis added).

3. The Government nonetheless vaguely asserts that this case remains "a suitable vehicle for resolving the questions presented" because "[t]he D.C. Circuit's ruling is significant enough." SG Br. 22 (formatting modified). But there is no urgency that compels this Court's immediate review.

Consistent with its refusal to provide a suggestion of immunity to Petitioners and its decision to sit this case out (until invited by this Court), the Government does *not* argue that allowing Respondent to vindicate his TVPA claim would be problematic. Rather, the Government makes the highly qualified statement that other "plaintiffs *may begin* to seek out Washington, D.C. as a forum for suits against foreign officials." SG Br. 22-23 (emphasis added). Indeed, the Government provides not a single example of such a case filed since the D.C. Circuit issued its decision over a year ago in March 2019.

Tellingly, the Government does not embrace Petitioners' list of 23 (supposedly) relevant cases since *Samantar*. Reply Br. 10. For good reason: only 11 of those cases involved TVPA claims—*i.e.*, essentially one case per year. It would hardly be impractical for the Government to issue a suggestion of immunity in critical circumstances, and the Government (unlike Petitioners) does not suggest otherwise.

At the same time, nothing is stopping the Government from raising its challenge to application of Restatement § 66 in any pending immunity case. Because the D.C. Circuit explicitly did not decide the

issue, it remains an open question in that court (and every other court of appeals). Parties would have the opportunity to address the Government's argument, and a court would have the opportunity to adjudicate it. Then the issue might become ripe for this Court's review. In fact, citing the decision below, the Government has already raised the issue in another case in the district court. U.S. Statement of Interest 8 n.6, *Miango v. Democratic Rep. Congo*, No. 15-cv-1265 (D.D.C. May 1, 2019), ECF No. 151 (arguing that it "did not participate" in the D.C. Circuit's evaluation of Petitioners' immunity, which "'assume[d]' that the Restatement 'captures the contours of common-law official immunity' *** without deciding the issue," and that "in suits in which the State Department does not participate, courts are to apply the immunity principles accepted by the Executive Branch") (alteration in original).

II. NEITHER QUESTION PRESENTED MERITS THIS COURT'S REVIEW

With respect to the two questions actually presented, the decision below neither creates a circuit conflict nor is incorrect on its merits. Nothing in the Government's brief alters those conclusions.

1. On the first question presented, the Government alleges no circuit conflict over how conduct-based immunity applies to individual-capacity claims. Instead, the Government takes issue with the D.C. Circuit's principal opinion because it "appears to reflect a 'categorical rule' of non-immunity in personal-capacity suits against foreign officials." SG Br. 9. That gloss is incorrect for reasons already explained. BIO 10-15. But to the extent there is any

doubt about what the D.C. Circuit "appears" to have done, such doubt demands further percolation. There is no reason to presume that the D.C. Circuit invited plaintiffs to end-run conduct-based immunity in their complaints, when this Court has made clear that courts can ferret out artful pleading. BIO 22.

The Government makes much of the fact that it has issued suggestions of immunity in personal-capacity suits. SG Br. 9-11. Those suggestions, however, implicate the first step of the immunity analysis, not the second step at which this case was decided. Pet. App. 5a-6a. Accordingly, the Executive Branch can continue to secure dismissals by issuing suggestions of immunity in personal-capacity suits despite the decision below.

2. On the second question presented, the Government echoes (Br. 20-21) Petitioners' circuit-conflict argument. But the Government ultimately confirms Respondent's central distinction (BIO 18-19) between the decision below (no suggestion of immunity) and *Doğan* (suggestion of immunity): "The United States stated in a 28(j) letter to the Ninth Circuit that the D.C. Circuit's TVPA holding was not 'controlling' in *Doğan* because the D.C. Circuit's decision arose at step two of the immunity inquiry." SG Br. 21 n.3; *see* U.S. Rule 28(j) Ltr. 1, No. 16-56704 (9th Cir. June 5, 2019), ECF No. 69 ("[T]he [D.C. Circuit's] analysis *** is *not relevant* to the State

Department's controlling determination that Barak is immune from suit.") (emphasis added).[2]

Walking back that statement, the Government now submits (Br. 21 & n.3) that Judge Randolph's concurring opinion is not limited to step two and "logically" should produce the same immunity-displacing result at step one. Not only is that supposition unwarranted, but it provides yet another reason for this Court to avoid wading into the question here.

[2] The Government says nothing about its statement in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), to similar effect: "[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." BIO 25 (alteration in original).

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The petition for a writ of certiorari should be denied.

Respectfully submitted.

Pratik A. Shah
Counsel of Record
Donald R. Pongrace
Z.W. Julius Chen
Merrill C. Godfrey
Lide E. Paterno
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Respondent

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