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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners Kalev Mutond and Alexis Thambwe Mwamba submit this supplemental brief in response to the amicus brief submitted by the United States and supplemental brief submitted by respondent.[*] Petitioners agree fully with the United States that, left undisturbed, the decision below will "severely restrict the longstanding doctrine of conduct-based immunity for foreign officials, in conflict with the decisions of other courts and with the Executive Branch's long-stated views." U.S. Br. 8. And petitioners agree that, to avoid this unacceptable outcome, the Court should grant review of both questions presented. *Id.* at 8, 17, 22.

Respondent incorrectly claims that the United States seeks to inject new issues into this case. Not so. The *sole* issue in this case remains what it has been since day one: whether petitioners are immune from suit under the common law for their official acts. In answering that question in the negative, the court of appeals announced a brand-new categorical exception to conduct-based immunity for personal-capacity suits; it also held just as categorically that the TVPA implicitly abrogated common-law immunity. The United States adds nothing to the two questions presented; it simply asks this Court to grant the petition to reverse those two blatantly incorrect and enormously consequential holdings.

[*] At the time respondent filed this lawsuit, neither petitioner was on the Office of Foreign Asset Control's (OFAC) list of Specially Designated Nationals (SDN List). But on December 12, 2016, while the case was pending in district court, OFAC added petitioner Kalev Mutond to the SDN List pursuant to the DRC sanctions, 31 C.F.R. pt. 547. Because it may not be apparent from the record below, pursuant to 31 C.F.R. § 501.605(c), we hereby notify this Court of Mr. Mutond's designation.

Respondent is also wrong that this case is a bad vehicle. Respondent identifies no barriers to this Court deciding both questions presented. As the United States recognized, both holdings are binding in the D.C. Circuit, and the court of appeals ruled on both of the questions presented. No more is required. Respondent is mistaken that petitioners might ultimately be denied immunity on another ground on remand, but in any event, that would not impede a definitive decision on the questions prevented, and it does not mitigate the disruption that the decision below is already causing. The Court should follow the United States' unequivocal recommendation and take up both questions now.

1. The United States is correct that the decision below creates a circuit split with the Second and Ninth Circuits on whether the TVPA abrogated, *sub silentio*, common-law conduct-based immunity. U.S. Br. 20-21; see Pet. 12; Reply 4-7. The United States' brief did not address, however, the separate circuit split on the first question presented: whether a categorical exception to foreign-official immunity controls whenever a plaintiff purports to sue foreign officials in their personal capacities. That split is equally important and also requires this Court's intervention.

As explained in our prior briefs (Pet. 11; Reply 3), the Ninth Circuit in *Doğan* v. *Barak*, 932 F.3d 888 (2019), considered and rejected the same "personal capacity" argument that respondent presents here. Respondent has neither disputed that fact nor identified *any* other decision that has allowed plaintiffs to evade immunity by the simple expedient of putting the words "in their personal capacities" in the caption of the case. See U.S. Br. 17 ("Such a rule has been endorsed by no other court of appeals * * * ."). In any other circuit, petitioners could have asserted immunity; but in the D.C. Circuit, they are

exposed to liability for their official acts merely because respondent ostensibly sued them in their personal capacities. That is a paradigmatic circuit split.

2. Respondent accuses the government of trying to "litigate an entirely new issue that was neither pressed nor passed upon below," namely, whether the Restatement defines the contours of foreign-official conduct-based immunity under the common law. Supp. Br. 1. The government's brief argues no such thing. The first question presented, as formulated by the United States, is "Whether the court of appeals erred in finding that petitioners are not immune from suit on the ground that a categorical exception to foreign-official immunity applies whenever officials are sued in their personal capacities." U.S. Br. I. That is materially indistinguishable from how petitioners framed the question. See Pet. I ("Whether a plaintiff can preclude conduct-based immunity for foreign government officials merely by suing them in their personal capacities."). The United States could not be any clearer that there is no such exception—not under the Restatement, not under principles articulated by the Executive Branch, and not under any other source used for determining the common law of immunity. See, *e.g.*, U.S. Br. 16. That the government has a particular view of *how* courts should determine the common law of immunity hardly represents an "expansive 'reformulation' of issues." Supp. Br. 3.

Respondent's core objection to the government's brief boils down to his claim that the court of appeals "assumed without deciding" that the Restatement articulates the applicable test for determining foreign-official immunity. See Supp. Br. 2-3. But in the usual case—like the cases respondent cites (see *ibid.*)—a court's "assumption" of one legal question enables it to rule on *another* question. Here, by contrast, the court of

appeals assumed the Restatement test applied and then treated that test as dispositive of petitioners' immunity. That approach is wrong in principle: immunity is jurisdictional and cannot be simply assumed. See, *e.g.*, *Eliahu* v. *Jewish Agency for Israel*, 919 F.3d 709, 712 (2d Cir. 2019) (per curiam). Moreover, the parties' citation of the Restatement as *one* authority helping to discern the scope of the common law of immunity in no way constitutes a concession that the Restatement should be woodenly applied without regard to other authorities, and in particular, case law and the views of the Executive Branch. See, *e.g.*, Appellees' Br. 20, C.A. Doc. 1,724,809 (citing U.S. statements of interest in prior cases). Even if it were otherwise, the court of appeals, as the United States correctly noted (at 22), had "an independent obligation to ascertain and apply the governing legal principles to the question of immunity."

In any event, whether the court of appeals assumed that the Restatement applies in no way detracts from the binding force of its categorical ruling that "[i]n cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in a personal capacity, exercising jurisdiction does not enforce a rule against the foreign state" and thus defendants in such a suit are "not entitled to the conduct based foreign official immunity." Pet. App. 8a. Nor would such an assumption prevent this Court from ruling that there is no categorical exception to immunity for personal-capacity suits under *any* standard. That is all that petitioners (and the United States) ask the Court to do.

3. There can be no question that the D.C. Circuit's categorical holding is already causing confusion in the lower courts that requires immediate correction. Judge Friedrich's recent decision in *Broidy Capital Management LLC* v. *Muzin*, No. 19-cv-150, 2020 WL

1536350 (D.D.C. Mar. 31, 2020), illustrates the problem. In *Broidy*, as in the decision below, the plaintiffs (Broidy) sued agents of a foreign sovereign (Qatar) in their personal capacities only. Searching for the proper standard, the court noted that, despite expressing some "hesitation" about the Restatement test, the D.C. Circuit decision in this case "appears to have accepted the Restatement's definition of conduct-based immunity." *Id.* at *5 n.1, *6. And the way Judge Friedrich applied the Restatement confirms that the decision below does not, as respondent asserts (Br. in Opp. 1), involve any "fact-intensive analysis." Rather, it announced a categorical exception to immunity for personal-capacity suits. Judge Friedrich had, before the decision below, rejected the proposition that immunity could be circumvented by the expedient of suing officials in their personal capacity. See *Doe 1* v. *Buratai*, 318 F. Supp. 3d 218, 233 (D.D.C. 2018). But bound by the categorical rule of the decision below, she faithfully applied it:

> This case falls squarely under *Lewis*. * * * [J]ust as in *Lewis*, Broidy is suing the defendants "in their individual capacities" and "is not seeking compensation out of state funds." Thus, "[i]n cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official"—or, by the same logic, an agent—"in a personal capacity, exercising jurisdiction does not enforce a rule against the foreign state."

Broidy, 2020 WL 1536350, at *8 (alterations in original) (quoting *Lewis* v. *Mutond*, 918 F.3d 142, 147 (D.C. Cir. 2019), reprinted at Pet. App. 7a-8a).

Judge Friedrich also recognized that the D.C. Circuit's interpretation of the Restatement is irreconcilable with the State Department's test for immunity, under which courts ask "whether it is 'the

established policy of the State Department to recognize' the asserted 'ground of immunity.'" *Id.* at *5 (quoting *Samantar* v. *Yousuf*, 560 U.S. 310, 312 (2010)). In light of this conflict—and the confusion created by the decision below—Judge Friedrich applied *both* tests. In *Broidy*, the two tests fortuitously came to the same result: the defendants were not entitled to immunity. *Id.* at *6-8. But here, the distinction matters. If the court of appeals had applied "the principles of foreign-official immunity long advanced by the Executive Branch" (U.S. Br. 8-9) rather than the D.C. Circuit's categorical exception for cases labeled as personal-capacity suits, the outcome would have been different. Petitioners would have been immune.

Respondent mocks as "highly qualified" the government's warning that "plaintiffs may begin to seek out Washington, D.C. as a forum." Supp. Br. 8 (emphasis omitted). But *Broidy* illustrates the urgent need for uniformity among the circuits. That case was "the third lawsuit that Broidy brought against members of the Qatari Enterprise." *Id.* at *3. The first, in the Central District of California, was dismissed "for lack of personal jurisdiction." *Ibid.* The second, in the Southern District of New York, "was dismissed on grounds of diplomatic immunity." *Ibid.* But under the decision below, this third lawsuit was permitted to proceed in the District of Columbia. *Id.* at *21.

Respondent's own "highly qualified" statement that "*the Government* provides not a single example of such a case filed since the D.C. Circuit issued its decision over a year ago," Supp. Br. 8 (emphasis added), fails to acknowledge that earlier this month, yet another TVPA case was filed in the District of Columbia: An Egyptian American journalist sued sitting IMF executive director and former Egyptian prime minister Hazem el Beblawi for alleged torture and attempted extrajudicial killing

related to the Arab Spring uprisings. Conveniently, the suit seeks money damages from the official personally, not from any government or agency. See Complaint, *Soltan* v. *Beblawi*, No. 20-cv-1437 (D.D.C. June 1, 2020). Just as water finds the unplugged leak, more plaintiffs are sure to sue in Washington, D.C., a jurisdiction that hosts 177 embassies, and is a routine destination for visiting foreign officials.

4. Nearly all of respondent's objections concern the first question presented. But that ignores the independent certworthiness of the D.C. Circuit's holding that the TVPA abrogated immunity, which created a clear circuit split on a question of vital importance to the United States. U.S. Br. 17-21. That alone provides reason enough to grant review.

Even when respondent does mention the second question, his objections are trifling. He notes that "only 11" of the 23 post-*Samantar* cases petitioners cited (see Reply App'x) involved TVPA claims—"essentially one case per year." Supp. Br. 8. Putting aside the *Soltan* case he neglected to mention, respondent tellingly ignores that every one of those cases would likely fall under the court of appeals' personal-capacity exception, meaning there would be no immunity in every one of those 23 cases. And raw numbers do not begin to tell the whole story. Every such lawsuit is a potential diplomatic powderkeg, seeking to interpose U.S. courts in highly charged conflicts between foreign governments and their own citizens.

Respondent flippantly suggests that the United States can simply file a suggestion of immunity *in every case*. Supp. Br. 8. But respondent never explains how a suggestion of immunity can override the court of appeals' holding that the TVPA *abrogates* common-law immunity. See Pet. 15; U.S. Br. 21. And requiring the government to file suggestions of immunity in every case raises far more important concerns than just the "impractical[ity]"

(Supp. Br. 8) of doing so. Oftentimes the government finds it necessary to take a hands-off approach to litigation for diplomatic or policy reasons. Even in the unlikely event the number of lawsuits does not increase in the wake of the D.C. Circuit's ruling, it risks placing the government in an awkward position diplomatically to require the United States to take a position on official immunity in *every* lawsuit seeking money damages from a foreign official.

5. Finally, there are no vehicle problems that would keep the Court from resolving the questions presented, much less "fatal" ones. Contra Supp Br. 6. Respondent's alternative arguments for affirmance present no barrier to review. Respondent argues that he could still prevail on the ground that petitioners' actions on behalf of the DRC were not "official acts" because torture is illegal under DRC law. *Id.* at 7. But he ignores that the DRC itself has expressly ratified petitioners' conduct and claimed their actions as its own, as the United States acknowledges (at 4-5). There could be no better evidence that an act is "official." In any case, this Court routinely reviews cases where alternative bases exist to deny relief after the legal error is corrected. *E.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014); *Zivotofsky* v. *Clinton*, 566 US 189, 200-202 (2012). "[T]he existence of a potential alternative ground * * * not addressed by the court of appeals, is not a barrier to [this Court's] review." U.S. Cert. Reply at 3, *United States* v. *Bean* (No. 01-704) (collecting examples).

Nor is there any reasonable probability that some hypothetical future jurisdictional discovery will render the case moot. Contra Supp. Br. 7-8. In the many months since the court of appeals' mandate issued (and since this petition was filed), respondent still has not moved to resume district court proceedings; and even if he did,

petitioners would have strong grounds for a stay pending resolution of their petition. Permitting intrusive discovery against foreign officials who are immune from the jurisdiction of U.S. courts frustrates the fundamental purpose of immunity. The prospect of U.S. courts subjecting foreign officials to burdensome jurisdictional discovery is hardly a reason to *avoid* review; it underscores the importance of acting *immediately*.

The United States is correct (at 22) that respondent cannot invoke his own failure to argue abrogation below as a basis for avoiding this Court's review. And it is well established that this Court can "review * * * an issue not pressed so long as it has been passed upon," *United States* v. *Williams*, 504 U.S. 36, 41 (1992). There is no question the D.C. Circuit did so here. Moreover, as the United States recognizes (at 23), no further percolation is warranted. It is now settled law in the D.C. Circuit that the TVPA tacitly abrogated conduct-based immunity. Future litigants will have no reason to address that issue. And future plaintiffs will have every incentive to bring TVPA claims in the D.C. Circuit to take advantage of its favorable circuit law. That effectively reduces the chances that other circuits will have significant opportunities to weigh in before the decision below has done significant damage by "interfer[ing] with the Executive Branch's conduct of foreign relations." U.S. Br. 8.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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