No. 21-1013

In the Supreme Court of the United States

REPUBLIC OF TURKEY,

Petitioner,

v.

LUSIK USOYAN; JOHN DOE, I; LACY MACAULEY; JOHN DOE, II; MEHMET YUKSEL; KASIM KURD; STEPHEN AUTHUR; HEEWA ARYA, personally and on behalf of his minor child C.A.; C.A., a minor by her guardian Heewa Arya; ABBAS AZIZI; CEREN BORAZAN; JANE DOE I; JANE DOE II; JANE DOE III; ELIF GENC; RUKEN ISIK; JALAL KHEIRABADI; MEHMET OZGEN; MEHMET TANKAN; MURAT YASA,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court has never addressed the Foreign Sovereign Immunities Act's ("FSIA") Discretionary Function Rule, 28 U.S.C. § 1605(a)(5)(A), despite its potential impact on all nations' national security interests. It should take this opportunity to do so to prevent the D.C. Circuit's new "plausibility" standard from effectively eliminating the Discretionary Function Rule from the FSIA. Now, any litigious, politically-motivated plaintiff may sue a foreign nation in United States courts for personal injury by alleging that the challenged conduct's stated rationale is not "plausible." This is a radical departure from the Discretionary Function Rule's plain language, which preserves immunity from tort liability even if discretion is abused. Absent a grant of certiorari, 700 district judges are now encouraged to second-guess the prudence of foreign sovereigns' discretionary decisions.

Respondents' primary argument is that this case is not worthy of review because the D.C. Circuit's decision is "fact-bound." *See* Opp'n at 19-25. It is not. There is no dispute that "[t]he events at issue, including the use of force, occurred while the Turkish security forces were engaged in their employment of providing security for President Erdogan." *Usoyan*, 438 F. Supp. 3d 1, 12 (D.D.C. 2020). Thus, under the Discretionary Function Rule, the lower court's inquiry was limited to whether presidential security is "susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Ignoring this limitation, the D.C. Circuit engaged in a subjective, fact-specific examination of whether the conduct was "justified" in order to

determine whether it was susceptible to policy analysis. The question for this Court is, therefore, purely legal: does the FSIA's Discretionary Function Rule permit a post-hoc, frame-by-frame review of a foreign sovereign's discretionary conduct to determine if it was "justified," or did Congress intend to preserve immunity for such conduct "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT THAT THE D.C. CIRCUIT'S "PLAUSIBILITY" STANDARD CREATES WITH THE DISCRETIONARY FUNCTION RULE AND THIS COURT'S DECISIONS.

A. The Opposition Does Not Undermine Turkey's Showing That "Plausibility" Negates *Berkovitz's* Prong Two.

Respondents' position is untenable. They contend that the D.C. Circuit's novel, fact-specific "plausibility" standard is the correct way to interpret and apply the second prong of *Berkovitz v. United States*, 486 U.S. 531 (1988) under "settled [case] law." *See* Opp'n at 4, 13, 21-22. Yet Respondents conspicuously fail to cite any such case law because it does not exist. *See Gaubert*, 499 U.S. at 325 (emphasis added) (explaining that the focus of prong two is "not on the agent's subjective intent . . . but on the nature of the actions taken and whether they are ***susceptible*** to policy analysis"). Rather, Respondents focus on language discussing *Berkovitz*'s first prong, *see* Opp'n at 13, 21-

22, which requires a different analysis from prong two, and is immaterial because both courts below correctly held that prong one was satisfied.

Respondents, echoing the D.C. Circuit, quote a prong one analysis for the proposition that "[d]iscrete injury-causing actions can, in certain cases, be sufficiently separable from protected discretionary decisions to make the discretionary function exception inapplicable." Opp'n at 13 (quoting *Usoyan v. Republic of Turkey*, 6 F.4th 31, 46 (D.C. Cir. 2021) (quoting *Moore v. Valder*, 65 F.3d 189, 197 (D.C. Cir. 1995))). However, *Moore* never reached *Berkovitz*'s prong two analysis because it determined that the conduct at issue was not discretionary and thus failed at prong one. *Moore* held that "[d]isclosing grand jury testimony to unauthorized third parties . . . is ***not*** a discretionary activity nor is it inextricably tied to matters requiring the exercise of discretion." *Moore*, 65 F.3d at 197. Here, in contrast, the D.C. Circuit and the District Court correctly held that the Turkish presidential security detail had discretion to act under *Berkovitz*'s first prong. *See Usoyan*, 6 F.4th at 38. Accordingly, oral argument before the D.C. Circuit focused almost exclusively on *Berkovitz*'s second prong.

Respondents also wrongly label as precedent prong one decisions that instruct courts to "focus on the specific conduct at issue," rather than viewing it "from 50,000 feet." Opp'n at 22 (quoting *Usoyan*, 6 F.4th at 47 (quoting *Limone v. United States*, 579 F.3d 79, 101 (1st Cir. 2009)). *Limone* held that analyzing whether "law enforcement investigations" were discretionary under *Berkovitz*'s first prong "operates at too high a

level of generality." *Limone*, 579 F.3d at 101. The First Circuit explained that, "when the FBI's conduct is examined in context, warts and all, any illusion that the conduct was discretionary is quickly dispelled." *Id.* "Consequently, the conduct was unconstitutional" and, therefore, not "discretionary" under *Berkovitz*'s first prong. *Id*. at 102. To the extent the D.C. Circuit applied the fact-specific framework of *Berkovtiz*'s first prong to its analysis under *Berkovitz's* second prong, it erroneously collapsed the *Berkovitz* test into a single question. As explained in the Petition, the balance of other Circuits recognize this error and direct lower courts to avoid it. *See* Pet. at 20-21.

Prior to the decision below, no court resolved *Berkovtiz*'s second prong by subjectively dissecting the specific conduct at issue. That is because the Discretionary Function Rule expressly forbids such second-guessing. *See* 28 U.S.C. § 1605(a)(5)(A). As then-Circuit Judge Gorsuch explained in *Sydnes v. United States*, "[f]orcing the government, at the jurisdictional stage, to defend its rationale for its [ ] decision in particular cases would, moreover, ***eviscerate the benefits of sovereign immunity*** that Congress has chosen to retain in discretionary function cases, and essentially enmesh us in a mini-trial about the merits." 523 F.3d 1179, 1186 (10th Cir. 2008) (emphasis added).

Berkovitz's second prong requires a theoretical inquiry into whether the challenged conduct is "susceptible" to policy analysis. *Id*. *Sydnes*, for example, held that courts analyzing the Discretionary Function Rule must "operate at a higher level of

generality than plaintiffs argue for, asking categorically (rather than case specifically) whether the kind of conduct at issue ***can*** be based on policy concerns." *Id.* (emphasis added). Respondents rely exclusively on the Government's brief to argue the opposite—that *Berkovitz's* second prong "expressly requires" a fact-based inquiry. *See* Opp'n at 19. However, the Government's brief neither acknowledged *Berkovitz* or its two-prong test, nor analyzed the proper standard for applying *Berkovitz's* second prong. Ultimately, the Government proposed a "reasonableness" standard that the D.C. Circuit cast aside for its equally unworkable "plausibility" standard. The Government's thin veneer of concurrence with the ultimate decision of no immunity, thus, has little value and does not detract from Turkey's showing that the questions presented warrant this Court's review.

B. The Opposition's Remaining Arguments Do Not Give Any Grounds For Denying The Petition.

None of the Opposition's remaining arguments support denial of Turkey's petition. First, Respondents make a flawed argument that Turkey's reliance on *United States v. Varig Airlines,* 467 U.S. 797 (1984), is misplaced. *See* Opp'n at 23. *Varig's* holding that courts may not second-guess a sovereign's discretionary decisions is not, as Respondents argue, a prong one analysis. Nor could it be because *Varig* was decided before *Berkovitz*. *Varig* remains good law and is relevant to the Court's consideration of the scope of the FSIA's Discretionary Function Rule.

Second, Respondents' argument that the decision below did not distinguish between planning- and operational-level decisions, which *Gaubert* prohibits, 499 U.S. at 325, fails because it is directly contradicted by the plain language of the decision below. *See Usoyan*, 6 F.4th at 46 (distinguishing the types of security planning decisions found immune in *United States v. Macharia*, 334 F.3d 61, 66 (D.C. Cir. 2003), from the operational acts at issue in *Usoyan*).

Third, Respondents' attempt to distinguish the recent decisions in *Broidy Capital Management, LLC v. State of Qatar,* 982 F.3d 582 (9th Cir. 2020), and *Ghazarian v. Republic of Turkey,* No. 19-cv-04664-PSG, 2021 WL 5934471 (C.D. Cal. Nov. 16, 2021), is unpersuasive because both correctly applied *Berkovitz's* second prong to conclude that the Discretionary Function Rule immunizes alleged conduct very similar to what Respondents allege here. *Broidy* and *Ghazarian* highlight the legal error in the decision below.

Fourth, Respondents' criticism of Turkey's response to an extreme hypothetical that the D.C. Circuit panel presented during oral argument deserves no consideration. *See* Opp'n at 4, 24. Mowing down protestors is not what transpired in this case, and it is undisputed that the Turkish security detail never used any weapons. Nor is it even Turkey's position, as Respondents contend, *id.* at 17-18, that there is no limit to immunity for the actions of presidential security services. Nor did either court below premise the finding of no immunity on any allegations that Turkey's conduct rises to the level of terrorism. The

hypothetical, and Respondents' reliance on it, is irrelevant. In fact, the hypothetical is illustrative of the subjective second-guessing that *Berkovitz* sought to avoid.

II. THIS CASE PRESENTS A FIRST OPPORTUNITY FOR THE COURT TO ADDRESS THE FSIA'S DISCRETIONARY FUNCTION RULE.

This case presents an excellent opportunity to clarify the scope of immunity under an exceptionally important provision of the FSIA. This Court has recently taken up other FSIA cases to clarify the scope of the expropriation exception, § 1605(a)(3), *see Fed. Rep. of Germany v. Phillip*, 141 S. Ct. 703 (2021); the terrorism exception, § 1605(a)(7) (now repealed), *see Rep. of Iraq v. Beaty*, 556 U.S. 848 (2009); the immovable property exception, § 1605(a)(4), *see Perm. Mission of India v. City of New York*, 551 U.S. 193 (2007); the commercial activity exception, § 1605(a)(2), *see Rep. of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); and waiver, § 1605(a)(1), *see Argentina Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). Yet this Court has never interpreted the FSIA's Discretionary Function Rule, despite how important sovereign immunity is to the protection of the United States' national interests and foreign relations, likely because no Court has previously strayed so far as to create a new standard as the D.C. Circuit did in this case.

Respondents use the bulk of their brief to paint this case as "a fact-bound disagreement," Opp'n at 20, about whether there was a "security justification for the

attack," *id.* at 8; *see also id.* at i, 19-25. However, the question is not whether the D.C. Circuit correctly assessed the dangerousness of the situation outside of the Turkish Ambassador's residence on May 16, 2017, or the reasonableness of Turkey's response. The question is whether the D.C. Circuit eviscerated the Discretionary Function Rule by undertaking a fact-specific and subjective analysis of presidential security functions in the first place. In this regard, Respondents do not dispute that the D.C. Circuit correctly concluded:

- Sovereigns have broad, inherent authority to protect their president and other dignitaries while present in the United States, which derives from the customary international law of nations, and is not circumscribed by any specific prescription found in U.S. law. *See Usoyan*, 6 F.4th at 40-41.

- Congress intended that the Discretionary Function Rule preserve foreign sovereign immunity for discretionary acts "regardless of whether the discretion be abused." *Id.* at 38.

- The Turkish security detail were acting within the scope of their employment to protect the Turkish president and other members of Turkey's diplomatic mission. *See Usoyan*, 438 F. Supp. 3d at 12.

- The Turkish security detail's protective mission was, therefore, discretionary, and their actions satisfied the first prong of this

Court's test for application of the Discretionary Function Rule under *Berkovitz*. *Usoyan*, 6 F.4th at 43-45.

- There is no blanket exception to the Discretionary Function Rule for criminal acts. *See id.* at 45 & n.8.

The D.C. Circuit said, somewhat paradoxically, that

> we do not base our conclusion on whether Turkey's actions were justifiable; that is a merits question, not a jurisdictional one. In the same way that speeding down a residential street may occasionally be justifiable but is not an execution of policy, the Turkish security detail's actions may have been justified in some circumstances but cannot be said in this case to have been plausibly grounded in considerations of security-related policy and thus do not fall within the discretionary function exception.

Usoyan, 6 F.4th at 47. Setting aside the strikingly inapt comparison between driving a car and protecting a head of state, *cf. Gaubert*, 499 U.S. at 325 n.7, this statement shows that the D.C. Circuit panel believed and held that Turkey's conduct was not justified. Although the D.C. Circuit's decision contends it leaves open the question of whether the conduct was justified for the merits stage, the statement is hollow, for if Turkey's conduct were justifiable at trial, then it should have been entitled to immunity in the first place since justifiable conduct must necessarily be plausibly related to the protective mission. This is precisely why prong two is and must remain theoretical.

Granting the Petition would give this Court an opportunity to reject the motley standards proposed below and establish uniform authority consistent with *Berkovitz* and the FSIA's plain text. Correcting the D.C. Circuit's decision is also consistent with the restrictive theory of immunity, which this Court has consistently reaffirmed as settled law. *See Rep. of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 140-41 (2014). "Under this theory, 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.'" *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)).

CONCLUSION

Respondents and the courts below have rationalized a finding of no immunity on various new grounds that all conflict with the plain language of the FSIA's Discretionary Function Rule. The standard is not any of those Plaintiffs advocated below, which the District Court rejected (*e.g.*, (i) a serious crimes exception, (ii) the D.C. criminal code restraining presidential security's discretionary conduct, or (iii) the First Amendment carve-out in 18 U.S.C. § 112). Nor is it the District Court's "violent physical acts" standard, App. 71, which both the Government and the D.C. Circuit rejected. Nor is it the Government's "reasonableness" standard, which the D.C. Circuit rejected. And it is not the D.C. Circuit's novel "plausibility" standard. This Court should grant certiorari to reject that standard as well, and let the statute speak: immunity is preserved for any claim based upon the exercise or performance

or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. 28 U.S.C. § 1605(a)(5)(A).

Respectfully submitted.

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