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

SUPPLEMENTAL BRIEF FOR PETITIONER

MARK E. SCHAMEL
CHRISTOPHER M. SCHAFBUCH
LOWENSTEIN SANDLER LLP
2200 Pennsylvania Ave. NW
Suite 500E
Washington, DC 20037

DAVID S. SALTZMAN
Counsel of Record
SALTZMAN & EVINCH, PLLC
1310 19th Street NW
Washington, DC 20036
(202) 637-9877
DSaltzman@SaltzmanEvinch.com

CATHY A. HINGER
VICTORIA A. BRUNO
WOMBLE BOND DICKINSON (US) LLP
2001 K Street NW
Suite 400 South
Washington, DC 20006
Counsel for Petitioner

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SUPPLEMENTAL BRIEF FOR PETITIONER

The decision below effectively repeals the Foreign Sovereign Immunities Act's ("FSIA") Discretionary Function Rule, which immunizes a foreign sovereign's discretionary actions "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). If left to stand, 700 district judges will become responsible for deciding whether to strip a foreign sovereign's immunity guided only by whether they think the challenged conduct "viewed up close," was "justified." App. 27. This cannot be what Congress intended.

The Government contends that the FSIA "is subject to an important," yet unwritten, "limitation: foreign security personnel may use force on domestic territory only . . . when the use of force reasonably appears necessary to protect against a threat of bodily harm." U.S. Br. at 12. This standard would create confusion. It repudiates the plain statutory language preserving sovereign immunity 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). It directly conflicts with this Court's precedent and Congressional intent to "prevent judicial 'second-guessing'" of discretionary governmental functions. *United States v. Gaubert*, 499 U.S. 315, 323 (1991). And, it begs the question: "reasonable to whom?" Article III judges or a presidential security detail that thwarts multiple assassination attempts every year?

The Government agrees that the source of a foreign sovereign's discretion to act is its "inherent authority." U.S. Br. at 10. Accordingly, it does not identify any

treaty or other applicable law that abridges Turkey's inherent discretion to act. Yet, the Government suggests, contrary to the FSIA's plain text and history, that a foreign sovereign should be bound by the Fourth Amendment's ban on "unreasonable" seizures, and by various Executive Branch policies governing the excessive use of force by U.S. law enforcement officers and security personnel—neither of which applies to foreign security personnel.

A sovereign nation has inherent authority to determine when the use of force is appropriate to protect its dignitaries, which is not diminished when in hindsight certain acts flowing from that determination appear unreasonable, unnecessary, or not "protective" in character.[1]

The Government's proposal creates disarray. The Court should grant the petition and announce a clear rule for application of the Discretionary Function Rule in an FSIA case.

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[1] The Court recently expressed its concern about adding non-enumerated, judicially created exceptions to the FSIA during oral argument in *Federal Republic of Germany, et al. v. Philipp, et al.*, 141 S. Ct. 703 (2021). *See* Oral Arg. Tr. at 83:18-22 (Barrett, J.) ("I think you're struggling to identify limits because you know that it's problematic to interpret it so broadly that it would have the 700 district judges in the country adjudicating all these kinds of claims."); *id.* at 61:15-21 (Breyer, J.) ("I mean, terrible things happen in this world. And that's why I was somewhat moved by Eizenstat's statement that the way to go after them practically is through all kinds of mediation, arbitration, and other kinds of special agreements, and not necessarily 700 judges.").

I. THE COURT SHOULD PROVIDE CLEAR GUIDANCE ON THE FSIA'S DISCRETIONARY FUNCTION RULE.

The Government's brief underscores the need for clarity in interpreting the Discretionary Function Rule. The Government says that while the D.C. Circuit reached the correct result, cases interpreting the FTCA's discretionary function exception are not "fully applicable to the FSIA context," U.S. Br. at 19, and "[s]everal aspects" of the "opinion could be read to characterize the discretionary-function exception too narrowly," *id.* at 17. As a result, the Government struggles to reconcile the decision below with the Court's prior decisions in FTCA cases.

The Government focuses mainly on the first step of the two-part framework articulated by this Court in *Berkovitz v. United States*, 486 U.S. 531 (1988), which asks whether the challenged conduct was discretionary. The Government argues that it was not discretionary because foreign security officers have discretion to use force only when it "reasonably appears necessary to defend" a protectee from bodily harm. U.S. Br. at 12. However, both courts below correctly held that *Berkovitz*'s first step ***had*** been met. The district court "conclude[d] that there was no federal statute, regulation, or policy specifically prescribing Defendant Turkey's actions during the events at issue in these cases," App. at 56, and the D.C. Circuit affirmed, observing that "the Turkish Security Detail's protective mission was discretionary," *id.* at 24.

Both lower courts nonetheless said that the challenged conduct failed to meet the second step of

Berkovitz, which asks only whether decisions by visiting presidential security details to use force are theoretically susceptible to social, economic, political, or national security policy analysis. *Miller v. United States*, 992 F.3d 878, 889 (9th Cir. 2021). Thus, the main question presented is whether the D.C. Circuit erroneously collapsed both *Berkovitz* steps into a single inquiry. *See Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1166 (11th Cir. 2020).

The Court should confirm that the *Berkovitz* test applies to the FSIA, and announce clear guidance on how to apply it.

II. THE GOVERNMENT CLAIMS, BUT FAILS TO ESTABLISH, THAT A SOVEREIGN'S AUTHORITY TO PROTECT ITS PRESIDENT IS SUBJECT TO THE AUTHORITY OF THE UNITED STATES.

The Government wrongly and without support claims that a foreign sovereign's security decisions are "subject to the authorization of the receiving state." U.S. Br. at 10. But the Government cannot cite a single controlling authority in international law or American jurisprudence. Perhaps the Government is referring to the issuance of visas authorizing security officers to enter the United States for the purpose of a protective mission. But the granting of entry for that purpose does not subject those officers to U.S. laws and Fourth Amendment limitations in carrying out their protective missions. Only a foreign sovereign is capable of waiving any part of its inherent authority to exercise its discretionary functions. U.S. Br. at 10.

The Government's contrary position is remarkable. If adopted, it may invite reciprocal erosion of immunity for the United States when its security agents are protecting American presidents, diplomats, and missions anywhere in the world outside of United States borders.

III. THE GOVERNMENT CLAIMS, BUT FAILS TO ESTABLISH, THAT A PRESIDENT'S SECURITY TEAM HAS DISCRETION TO USE FORCE ONLY WHEN DOING SO "REASONABLY APPEARS NECESSARY" TO PROTECT THE PRESIDENT.

The Government asserts that the United States only authorizes the use of force when it "reasonably appears necessary to protect against a threat of bodily harm." U.S. Br. at 12. The Government cites no precedent, controlling law, practice or policy to support this aspirational proscription of sovereign authority. Instead, it points to (1) a diplomatic note on the process and rules for importing firearms and ammunition in the United States; (2) the absence of law explicitly authorizing a foreign state to use force within the receiving state; and (3) the U.S. State Department's Foreign Affairs Manual, which gives the U.S. Diplomatic Security Service the discretion to use force when reasonable under the circumstances. U.S. Br. at 12-13. None of these sources supports the Government's claim that a foreign sovereign's ability to protect its president is subject to an Article III judge's opinion of what was reasonable.

First, the diplomatic note. The Government highlights a phrase in the note that states that

firearms and ammunition may be imported by foreign protective escorts for the purpose of protecting the dignitary they are accompanying. U.S. Br. at 11. This is irrelevant. The note cannot constrain the discretion of a foreign sovereign's presidential security detail to use force in the United States. Nor does it put foreign sovereigns on notice that their decisions about how best to protect their heads of state must be "reasonable" as may be adjudicated in U.S. courts through private litigation. Moreover, there is no allegation that a firearm was drawn or used against the plaintiffs or any other person. The United States cannot expect foreign nations to glean from this note a directive or U.S. policy that foreign security officers may only use "reasonable" force—with or without firearms.

The Government next asserts that "no source of law affords foreign security personnel discretion to use force on U.S. territory except in the exercise of their protective function." *Id.* at 13. For one, Turkey used force in reacting to a potential threat by supporters of a terrorist organization near the Turkish President. The lack of explicit authorization also is consistent with the position of the D.C. Circuit, with which Turkey agrees: foreign sovereigns have an inherent right to protect senior officials representing the state, and there is no source of law that specifically guides a foreign sovereign's decision-making concerning the security of its president. App. at 18-22. Nor is any positive law required to enable such conduct. *See Broidy Capital Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 591-92 (9th Cir. 2020) (emphasis in original) (holding that "the ***policy discretion*** of a ***foreign sovereign*** is . . . evaluated by . . . limitations that bind

that sovereign, whether contained in its own domestic law or (we will assume) in applicable and established principles of international law.")

Finally, the Government points to the United States' own policies and practices. It says that "U.S. security personnel charged with protecting U.S. diplomatic and consular personnel and senior officials in foreign territory . . . are required as a matter of policy to respect that constraint" on reasonable uses of force. U.S. Br. at 13 (citing U.S. Foreign Affairs Manual, Use of Force Policies and Reporting, 12 FAM 090). That is the Government's prerogative, but its own practices do not bind other sovereigns. And, as discussed above, the Government's argument improperly collapses the two-part *Berkovitz* test into a single question of discretion to act.

In sum, the Government's arguments against the petition are unsupported and unworkable. Further, these arguments muddle the distinct purpose of the *Berkovitz* test and sidestep the main issue in this appeal: whether the decision below erroneously created a new exception to the FSIA that undermines Congress' intent to preserve immunity for discretionary functions and conflicts with this Court's FTCA precedent. *Compare* App. at 66 ("the Court makes a very narrow, fact-specific decision"), *with Foster Logging*, 973 F.3d at 1165 n.9 ("The inquiry is not fact-based.").

IV. IMPORTING THE "REASONABLENESS" TEST FROM FOURTH AMENDMENT EXCESSIVE FORCE CLAIMS DOES NOT RECONCILE THE DECISION BELOW WITH PRIOR PRECEDENT.

It is obvious why neither this Court nor any court of appeals has ever adopted the Government's suggestion to import the "reasonableness" test from Fourth Amendment excessive force cases: The United States Constitution, including the Fourth Amendment's protection against "unreasonable" seizures, does not apply to foreign sovereigns. *Cf. Philipp*, 141 S. Ct. at 714. The Fourth Amendment's inapplicability is even more glaring in light of the FSIA's plain textual mandate that immunity be preserved "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). As this Court has recognized, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text." *Rep. of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014).

The FSIA's text and history are clear that immunity is preserved for ***any*** tort claim involving a sovereign's exercise of discretion. Post hoc armchair quarterbacking of whether a sovereign's use of force reasonably appeared necessary or was "protective in character" is statutorily forbidden.[2] U.S. Br. at 8, 15-

[2] The "protective in character" inquiry that the Government advocates would gut Plaintiffs' claims against Turkey. Plaintiffs allege over 100 times in their Complaints that Turkey's agents were engaged in protective services precisely so that they could plead a basis for agency liability against the foreign sovereign.

16. The Government asks the Court to distinguish between a sovereign's use of force to "protect" and its use of force to "attack." *See id.* Yet, the FSIA does not recognize this distinction, which is antithetical to the restrictive theory of sovereign immunity codified by the FSIA. *See Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). Rather, the FSIA "preserve[s] a dichotomy between private and public acts." *Philipp*, 141 S. Ct. at 713. ***Any*** act, including the use of force, that involves the exercise of discretion and is fundamentally governmental (as opposed to "private," like a traffic accident) is shielded from "judicial second-guessing" via tort law. *Gaubert*, 499 U.S. at 323.

It is irrelevant whether, when a sovereign uses discretionary force, in hindsight it appears reasonable or necessary. Those distinctions do not exist in the statute, and this Court has repeatedly declined to expand any of the FSIA's narrow enumerated exceptions, even for "atrocities such as the Holocaust." *Philipp*, 141 S. Ct. at 712. Yet, the D.C. Circuit carved out a new exception for "unreasonable" conduct where Congress has created none. This Court should grant the petition and restore the FSIA as written.

The fact-intensive "reasonableness" test the Government espouses also is contrary to the law of a majority of circuits, which analyze the discretionary function exception at a categorical, even theoretical, level of generality.[3] The Government's test would be a

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[3] *See Reyes-Colon v. United States*, 974 F.3d 56, 59 (1st Cir. 2020); *Fidelity & Guar. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988),

radical break from the current body of law. It would require fact-intensive judicial second-guessing, which this Court has repeatedly admonished the lower courts to avoid. Such a test would strip the noncommercial torts exception of any predictability, by allowing over 700 hundred district judges to opine on what is "reasonable" when it comes to head of state protection. *See supra* n.1. That "disarray" is precisely what Congress sought to eliminate in crafting the FSIA; it hoped to end "the inconsistent application of sovereign immunity." *Samantar v. Yousuf*, 560 U.S. 305, 312-13 (2010).

V. THE COURT SHOULD GRANT TURKEY'S PETITION TO PROVIDE CLEAR GUIDANCE ON WHO BEARS THE BURDEN OF PROVING THAT THE DISCRETIONARY FUNCTION EXCEPTION DOES NOT APPLY.

The Court also should grant the petition to decide which party bears the burden of proof in applying the Discretionary Function Rule. There is a clear circuit split on this question under the FTCA's analogous discretionary function rule, *see* Pet. Br. at 28, which is the main source of guidance in FSIA cases, *see* App. at 8. The Government agrees that the lower courts have "incorrectly" treated foreign sovereign immunity "as an

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cert. denied, 487 U.S. 1235 (1988) (Mem.); *Indemnity Ins. Co. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009); *Gibson v. United States*, 809 F.3d 807, 813 (5th Cir. 2016); *Jude v. Comm'r of Soc. Sec.*, 908 F.3d 152, 159 (6th Cir. 2018); *Lam v. United States*, 979 F.3d 665, 674-75 (9th Cir. 2020); *Ball v. United States*, 967 F.3d 1072, 1076 (10th Cir. 2020); *Foster Logging*, 973 F.3d at 1165 n.9 (11th Cir. 2020).

affirmative defense." U.S. Br. at 22. Moreover, both lower courts decided this issue.

The district court incorrectly held that "the defendant foreign sovereign bears the burden of persuasion to show that the claimed exception to sovereign immunity does not apply." App. at 46. On appeal, Turkey argued that this district court erred in shifting the burden in this manner, writing:

> Despite Plaintiffs' failure to satisfy their basic pleading burden on the second prong of the *Berkovitz* Test, the District Court impermissibly shifted the burden of persuasion onto Turkey. *See* JA444. This was improper because 'the D.C. Circuit has not held that the burden of proof ever shifts to the government' to prove that its tortious acts were non-discretionary. *Donahue v. United States*, 870 F. Supp. 2d 97, 104 n.4 (D.D.C. 2012) (collecting cases). . . . Moreover, placing the burden of persuasion on a foreign sovereign to establish its immunity conflicts with the statutorily-mandated presumption of sovereign immunity. *See* 28 U.S.C. § 1604; *Bolivarian Republic of Venezuela, et al. v. Helmerich & Payne Int'l Drilling Co., et al.*, 137 S. Ct. 1312, 1319 (2017) (discussing that the FSIA"s general rule of presumptive immunity, and the limited exceptions thereto, are intended to preserve the dignity of foreign sovereigns and to ensure comity between nations).

Turkey's App. Br., 2020 WL 7181060, at *27-28 (D.C. Cir. Dec. 4, 2020). Turkey reiterated this argument in its reply brief, too:

> Turkey does not bear the burden to prove it is immune under the Discretionary Function Rule. *See* Plaintiffs' Br. at 19, 23, 39, 48-49. The FSIA entitles Turkey to a presumption that its actions are discretionary, and thus, immune. 28 U.S.C. § 1604 (emphasis added) ("a foreign state ***shall*** be immune"). Moreover, the tortious acts exception "***shall not*** apply" to "***any*** claim based upon" a Discretionary Function, "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A) (emphasis added). As with the FTCA, on which the FSIA was modeled, immunity is never abrogated for claims based on a discretionary function. *See Gray v. Bell*, 712 F.2d 490, 508 (D.C. Cir. 1983) (alteration in original) (holding that "discretionary function clause ***does not of its own force*** provide the government protection from suit, but rather preserves a preexisting cloak of governmental immunity"); *Donahue v. United States*, 870 F. Supp. 2d 97, 104 n.4 (D.D.C. 2012) (recognizing that "the D.C. Circuit has not held that the burden of proof ever shifts to the government" to prove that its tortious acts were non-discretionary).

Turkey's App. Reply Br., 2020 WL 7122136, at *4 n.2 (D.C. Cir. Dec. 4, 2020) (alteration in original).

In affirming the district court's opinion, the D.C. Circuit necessarily also rejected Turkey's arguments on the threshold question of burden shifting. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (a court's holding consists of "not only the result but

also those portions of the opinion necessary to that result").

CONCLUSION

The Republic of Turkey's petition for certiorari should be granted.

Respectfully submitted.

DAVID S. SALTZMAN
Counsel of Record
SALTZMAN & EVINCH, PLLC
1310 19th Street NW
Washington, DC 20036
(202) 637-9877
DSaltzman@SaltzmanEvinch.com

MARK E. SCHAMEL
CHRISTOPHER M. SCHAFBUCH
LOWENSTEIN SANDLER LLP
2200 Pennsylvania Ave. NW, Suite 500E
Washington, DC 20037
(202) 753-3805
mschamel@lowenstein.com
cschafbuch@lowenstein.com

CATHY A. HINGER
VICTORIA A. BRUNO
WOMBLE BOND DICKINSON (US) LLP
2001 K Street NW
Suite 400 South
Washington, DC 20006
(202) 857-4489
Cathy.Hinger@wbd-us.com
Victoria.Bruno@wbd-us.com

Counsel for Petitioner