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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

In *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), this Court held that the common law, rather than the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity of foreign government officials who are sued for acts performed in an official capacity. The questions presented are:

1. 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;

2. Whether the court of appeals erred in finding that Congress's creation of a cause of action in the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, implicitly abrogated conduct-based foreign-official immunity under the common law.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. For much of our Nation's history, principles adopted by the Executive Branch, which were binding on the courts, determined the immunity of foreign states in civil suits in courts of the United States. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). In 1976, Congress enacted the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.* (FSIA), which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. See *Samantar* v. *Yousuf*, 560 U.S.

305, 313 (2010). With respect to claims against a "'foreign state or its political subdivisions, agencies, or instrumentalities,'" the FSIA "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004) (citation omitted).

Prior to the enactment of the FSIA, courts had also recognized immunity of officials of foreign governments. *Samantar*, 560 U.S. at 314; see pp. 13, 17, *infra.* In *Samantar*, this Court held that the FSIA did not govern immunity determinations concerning foreign officials. 560 U.S. at 313-326. *Samantar* found nothing in the statute's text, history, or purpose indicating that Congress intended to regulate foreign-official immunity. *Id.* at 313-323. Instead, this Court explained, when a plaintiff sues a foreign official "in his personal capacity and seek[s] damages from his own pockets, [the suit] is properly governed by the common law" of foreign-official immunity that predated the statute. *Id.* at 325.

Under that common-law framework, applied principally in suits against a foreign state, courts followed "a two-step procedure" for resolving questions of immunity. *Samantar*, 560 U.S. at 311; see *id.* at 312. If the State Department determined that immunity should be recognized, then "the district court surrendered its jurisdiction." *Id.* at 311 (citation omitted). If the State Department did not file a suggestion of immunity, then the court "had authority to decide for itself whether all the requisites for such immunity existed," by considering "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 311-312 (quoting *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943) (*Ex parte Peru*); *Hoffman*, 324 U.S. at 36) (brackets in original). In either

case, the Executive Branch identified the governing principles, which were binding on the courts. See *Hoffman*, 324 U.S. at 35 ("It is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *Ex parte Peru*, 318 U.S. at 589.

Although cases involving individual foreign officials were relatively rare, courts followed the same two-step procedure, *Samantar*, 560 U.S. at 312, and the Court concluded that it saw "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity," *id.* at 323. In general, a foreign official may be immune under the common law based either on the official's current status, such as a sitting head of state, or based on the nature of the official's challenged conduct. See 1 *Oppenheim's International Law* 1038, 1043-1044 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); *Arrest Warrant of 11 Apr. 2000* (*Dem. Rep. Congo* v. *Belg.*), 2002 I.C.J. 3, 21-22. This case concerns the conduct-based immunity of foreign officials from civil suit in courts in the United States.

2. a. In 2016, respondent, a United States citizen, was working as an "unarmed security advisor" to Moise Katumbi, a politician in the Democratic Republic of the Congo (DRC). Pet. App. 31a.[1] He was arrested in April of 2016 at a political rally in Lubumbashi, and was transferred to Kinshasa and there detained by the DRC's National Intelligence Agency (Agence Nationale de Renseignements, or ANR) until early June of 2016. *Id.*

[1] The facts described herein are taken from respondent's complaint. See Pet. App. 28a-39a.

at 32a-36a. Respondent alleges that during his six-week detention, he was interrogated by the ANR for approximately 16 hours a day. *Id.* at 33a. Respondent further alleges that his captors intentionally starved him, denied him sleep, and deprived him of basic hygiene necessities, all in an effort to secure a false confession that he was an American mercenary. *Id.* at 33a-34a.

At the time of respondent's detention, petitioner Kalev Mutond was the ANR's Administrator General, and petitioner Alexis Thambwe Mwamba was the DRC's Justice Minister. Pet. App. 3a. Respondent alleges that Mutond "was at all times responsible for giving orders to and supervising all ANR personnel," including with respect to respondent's detention, and that Mutond personally told respondent, "[d]on't let me find out you're a mercenary." *Id.* at 29a, 34a. Respondent alleges that Thambwe exercised "full authority over decisions" related to detainees in the DRC, including "whether to detain, charge, try, or release" respondent. *Id.* at 29a. Respondent also alleges that Thambwe conducted a press conference in which he described respondent as a mercenary sent to assassinate then-DRC President Joseph Kabila. *Id.* at 34a.

b. Respondent sued petitioners under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1330 note). Pet. App. 38a. He seeks to recover at least $1,500,000 in compensatory damages and $3,000,000 in punitive damages. *Ibid.*

After respondent filed this suit, the DRC's Ambassador to the United States sent the State Department two diplomatic communications about the case. Pet. App. 40a-46a. As relevant here, those letters disputed respondent's allegations of mistreatment but repre-

sented that "any actions [petitioners] took or statements they made in connection with [respondent's] detention was in their official capacities." *Id.* at 45a; see also *ibid.* ("The lawsuit raises detrimental and spurious allegations that are flatly controverted by U.S. officials' own observations of [respondent]'s treatment, contemporaneous statements of [respondent]'s counsel, and the record of communications between the D.R.C. and U.S. governments. * * * [B]ut even accepting the allegations as true (which they are not), they describe official acts."). The DRC's communications asked the State Department to file a suggestion of immunity in this case. *Id.* at 46a.

c. Without action by the State Department, the district court granted petitioners' motion to dismiss for lack of subject matter jurisdiction. Pet. App. 27a. The court noted that the foreign-official immunity inquiry is governed by the two-step procedure described in *Samantar*, and the court proceeded to the second step in the absence of a suggestion of immunity. *Id.* at 21a; see *Samantar*, 560 U.S. at 311-312. The court cited the Restatement (Second) of Foreign Relations Law of the United States (1965) (Second Restatement) for the proposition that "[c]onduct based immunity is available to 'any [] [p]ublic minister, official, or agent of the [foreign] state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.'" Pet. App. 20a (quoting Second Restatement § 66(f)) (brackets in original).

The district court found that test for foreign-official conduct-based immunity satisfied here. Pet. App. 21a. The court determined that petitioners were indisputably DRC officials. *Id.* at 23a. Relying in part on the

DRC's diplomatic letters, the court also concluded that petitioners performed the challenged actions in the course of their official duties. *Id.* at 23a-24a. Finally, the court concluded that exercising jurisdiction would amount to enforcing a rule of law against the DRC. Respondent contended that petitioners were acting outside their constitutional authority, but the court held that adjudicating respondent's claims would require the court "to question the constitutionality of an action that a foreign nation has ratified" and would thereby "place an even greater 'strain upon our courts and our diplomatic relations.'" *Id.* at 25a (citation omitted). The court accordingly dismissed respondent's suit for lack of subject matter jurisdiction. *Ibid.*

d. The court of appeals reversed. Pet. App. 1a-15a. In its principal opinion, the court analyzed whether petitioners are entitled to conduct-based immunity using the same Second Restatement provision cited by the district court, observing that both parties "assume[d]" that Section 66(f) of the Second Restatement "accurately sets out the scope of common-law immunity for current or former officials." *Id.* at 6a. "[P]roceed[ing] on that understanding without deciding the issue," *ibid.*, the court then held that the Second Restatement's standard was not met.

Relying on a law review article and an illustration from the Second Restatement, the court of appeals concluded that adjudicating a suit against a foreign official would have the effect of enforcing a rule of law against a foreign state if the "judgment against the official would bind (or be enforceable against) the foreign state." Pet. App. 7a (citing Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 Ford-

ham L. Rev. 2669, 2676-2678 (2011), and discussing Second Restatement § 66 cmt. b(2), which states that immunity would be warranted in a suit against an official "seeking to compel him to apply [foreign state] funds"). The court observed that petitioners had "not proffered anything to show that [respondent] seeks to draw on the DRC's treasury or force the state to take specific action." *Ibid.* "In cases like this one," the court held, "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." *Id.* at 8a. As a result, the court concluded that petitioners are not entitled to conduct-based foreign-official immunity. *Ibid.*

Judge Randolph concurred in the judgment. Pet. App. 11a-15a. He expressed considerable hesitation about the Second Restatement's test for foreign-official immunity under the common law. *Id.* at 12a. Judge Randolph nonetheless concurred in the judgment because he reasoned that any common law doctrine of conduct-based immunity for foreign officials did not "control" in cases arising under the TVPA. *Id.* at 13a. Judge Randolph determined that because the TVPA "imposes liability for actions that would render the foreign official eligible for immunity under the [Second] Restatement," it creates "a clear conflict between statutory law and judge-made common law." *Id.* at 13a-14a. In the face of such a "conflict," Judge Randolph concluded, "the common law must give way." *Id.* at 14a.

Judge Srinivasan filed a concurring opinion, in which he "fully join[ed]" the court of appeals' principal opinion, and also agreed with Judge Randolph that the TVPA "displaces any common-law, conduct-based immunity that might otherwise apply." Pet. App. 10a. The

court's principal opinion thus explained that Judge Randolph's opinion "provide[s] [an] alternative holding" to support the court's judgment that petitioners are not entitled to immunity. *Id.* at 2a. The court therefore remanded the case to the district court for further proceedings. *Id.* at 8a-9a.

DISCUSSION

This case presents two important questions about the immunity of foreign officials in civil actions: (1) whether foreign officials sued in their personal capacities may ever be protected by conduct-based immunity, and (2) whether conduct-based immunity for foreign officials has been abrogated in suits under the TVPA. The court of appeals' answers to those questions would 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. If left undisturbed, the decision below could open the District Court for the District of Columbia to suits challenging a variety of foreign military or policy decisions, could invite similar treatment of this Nation's officials by other states, and could seriously interfere with the Executive Branch's conduct of foreign relations. The petition for a writ of certiorari should be granted.

A. This Court Should Grant Review To Clarify That No Categorical Exception To Conduct-Based Foreign-Official Immunity Exists For Personal-Capacity Suits

The court of appeals first erred by concluding that conduct-based immunity has no application to suits against foreign officials in their personal capacities. That holding contradicts the principles of foreign-

official immunity long advanced by the Executive Branch, and necessitates this Court's review.

The D.C. Circuit's principal holding is a broad one: "In 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. [Petitioners] are thus not entitled to the conduct-based foreign official immunity." Pet. App. 8a. Respondent attempts to characterize that holding as a "fact-intensive analysis" of this case. Br. in Opp. 1; see Pet. App. 6a-8a. But the only "facts" on which the court of appeals focused are features of this case that can be, and often are, easily replicated in nearly any action seeking damages from a foreign official: Respondent's complaint does not "seek[] to draw on the [foreign state's] treasury or force the state to take specific action." Pet. App. 7a. Thus contrary to respondent's claim, the decision below appears to reflect a "categorical rule" of non-immunity in personal-capacity suits against foreign officials. Br. in Opp. 2.

1. The decision below is contrary to the long-stated views and practice of the Executive Branch

a. The Executive Branch has repeatedly suggested immunity in suits filed against foreign officials in their personal capacities. See, *e.g.*, 15-cv-8130 *Doğan* v. *Barak*, D. Ct. Doc. 48 (C.D. Cal. June 10, 2016); 11-cv-1433 *Doe* v. *Zedillo Ponce de Leon*, D. Ct. Doc. 38 (D. Conn. Sept. 7, 2012); 05-cv-10270 *Matar* v. *Dichter*, D. Ct. Doc. 36 (S.D.N.Y. Nov. 17, 2006). None of those filings has hinted that conduct-based immunity might turn on a pleading distinction between personal- and official-capacity suits. Indeed, the question of official immunity logically arises when the defendant is not

sued in his official capacity—*i.e.*, when the foreign government is *not* the real party in interest.

Instead, conduct-based foreign-official immunity generally turns on whether the challenged *action* was taken in an official capacity. That common-sense rule has a long pedigree in the Executive Branch. See *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * * , [that] will of itself be a sufficient answer to the plaintiff's action."); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797) ("[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States."). And the official-capacity standard has remained consistent in the Executive Branch's numerous filings in lawsuits against foreign officials. See, *e.g.,* 15-cv-1265 *Miango* v. *Democratic Republic of the Congo*, D. Ct. Doc. 151-1, at 2 (D.D.C. May 1, 2019) ("As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate."); U.S. Suggestion of Immunity at 5-6, *Ben-Haim* v. *Edri*, No. L-3502-15 (N.J. Super. Ct. Law Div. Dec. 3, 2015) ("As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity."); see also 11-cv-1433 *Doe* v. *Zedillo Ponce de Leon*, D. Ct. Doc. 38, at 5; Gov't Amicus Br. at 21, *Matar* v. *Dichter*, No. 07-cv-2579 (2d Cir. Dec. 19, 2007). The State Department's adherence to that principle is also reflected

in its annual *Digest of United States Practice in International Law*. See, *e.g.,* Office of the Legal Advisor, U.S. Dep't of State, *Digest of United States Practice in International Law* (Carrielyn D. Guymon, ed. 2015), Ch. 10, § B(3), at 426.[2]

b. The contrast between the Executive Branch's long-stated position and that in the decision below reflects a fundamental methodological flaw in the D.C. Circuit's approach to foreign-official immunity in this case. Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit.

1. In *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left undisturbed the Executive Branch's historical authority to determine the immunity of foreign officials. See *id.* at 321-325. Under that tradition more generally, the Executive's articulation of foreign immunity principles historically has been adhered to in judicial proceedings, including in cases in which the Executive Branch expresses no view about a particular defendant's immunity. See, *e.g.*, *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 765-766 (2019) ("If the Department submitted a recommendation on

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[2] The Executive Branch's recognition of foreign-official immunity in the civil context does not imply that foreign officials are entitled to immunity in criminal cases brought by the United States. In choosing to prosecute a foreign official, the Executive Branch has necessarily determined that the official is not protected by immunity. See, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998).

immunity, courts deferred to the recommendation. If the Department did not make a recommendation, courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy."); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); *Compania Espagnola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938). In *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945), for example, the Executive took no position on the immunity of a particular ship owned by the Mexican government, but it identified precedent under which a state-owned vessel is not immune if it is used by a private party for commercial purposes. *Id.* at 31-32. The Court recognized that the Executive had applied that principle in other immunity determinations, deemed that practice "controlling," and applied the same principle to the specific vessel at issue. *Id.* at 38. As the Court explained, affording immunity on principles not accepted by the Executive "may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations" as would be denying immunity in the face of the Executive's suggestion to the contrary. *Id.* at 36.

2. The courts' deference to the Executive Branch's position on foreign-official immunity under that framework rests on the separation of powers under the Constitution. Before Congress enacted the FSIA, this Court had long recognized that the Executive's authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, followed from the Executive's constitutional responsibility for conducting the Nation's foreign relations. See, *e.g.*, *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a

conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); see also *Hoffman*, 324 U.S. at 34; *United States* v. *Lee*, 106 U.S. 196, 209 (1882); *National City Bank* v. *Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke* v. *Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs"); 22 U.S.C. 2656.

The Executive's authority to make foreign-*official* immunity determinations has the same constitutional foundation. As this Court has recognized, suits against foreign officials implicate many of the same foreign-affairs concerns as do suits against foreign states. Although foreign-state and foreign-official immunity are not invariably coextensive in scope, see *Samantar*, 560 U.S. at 321, the historical basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers," *Underhill* v. *Hernandez*, 65 F. 577, 579 (2d Cir. 1895), aff'd, 168 U.S. 250 (1897); see *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). As a result, suits against foreign officials implicate much the same considerations of comity and respect for other nations' sovereignty as suits against foreign states. See *Underhill*, 65 F. at 579; cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (The "strong sense of the Judicial Branch" is "that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international

sphere."). In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch's role to assess those considerations in determining whether foreign officials are entitled to immunity. *Samantar*, 560 U.S. at 321-325.

2. The decision below erred in relying on the Second Restatement

Instead of considering whether petitioners took the acts at issue in an official capacity and whether they would be immune from suit under the principles accepted by the Executive Branch, the court of appeals assumed without actually deciding that the Second Restatement identified the relevant standard. Pet. App. 6a. That was error.

a. Reliance on the Second Restatement's provisions on foreign-official immunity as a conclusive statement of current law is misplaced. Cf. *Samantar*, 560 U.S. at 321 n.15 (expressing "no view" on whether the Second Restatement "correctly" articulates common-law immunity principles). The Second Restatement was published in 1965. Its drafters acknowledged the "paucity of adjudicated decisions in the international field" at the time and admitted their reliance on less conventional sources to divine the principles of foreign-relations law. Second Restatement § 1 cmt. c. The Restatement has twice been revised since that time, with each revision noting that foreign-relations law had undergone "significant change since publication of the previous Restatement." Restatement (Third) of Foreign Relations Law of the United States Intro. (1987) (Third Restatement); see also Restatement (Fourth) of Foreign Relations Law of the United States Intro. & Part IV Intro. Note (2018) (Fourth Restatement) (similar). Neither the Third Restatement (which was a complete revision) nor

the Fourth (which is thus far only a partial revision but includes a provision on sovereign immunity) repeats the Second Restatement's test for foreign-official immunity.

b. Even taken at face value, it is far from clear that the Second Restatement provision at issue here addresses the question presented by this case. Section 66 of the Second Restatement is entitled "applicability of immunity *of foreign state*." Second Restatement § 66 (emphasis added; capitalization omitted; font altered). The relevant Subsection, 66(f), purports to explain that the "immunity *of a foreign state* * * * extends to" any "public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." *Id.* § 66(f) (emphasis added; font altered). That section is written in terms that appear to consider only when a suit against a foreign official would effectively trigger the foreign nation's (pre-FSIA) *sovereign* immunity. Indeed, the test mirrors the standard articulated by this Court—just two years earlier—for determining when a suit against a federal official is, in reality, a suit against the United States without its consent. See *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (citations omitted).

As this Court explained in *Samantar*, the common law doctrine of foreign-official immunity is distinct from the now-statutory doctrine of foreign-sovereign immun-

ity. See 560 U.S. at 321-322. Practice confirms that distinction, as the Executive has "sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify." *Id.* at 321-322; see, *e.g.*, *Greenspan* v. *Crosbie*, No. 74-cv-4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (suggestion that Canadian officials enjoyed immunity from securities fraud conspiracy claims, while the province of Newfoundland could be held liable). That distinction makes sense, as personal damages actions against foreign officials could unduly chill the performance of their duties, trigger concerns about the treatment of United States officials abroad, and interfere with the Executive's conduct of foreign affairs—even when a foreign state itself could be sued.

Because the Second Restatement's Section 66(f) is not written in terms that address the circumstances in which foreign officials may enjoy common law conduct-based immunity independently of their sovereigns, it does not answer the immunity question here. But even if Section 66(f) were instructive, the court of appeals should have interpreted it in a manner consistent with the principles of foreign-official immunity recognized by the Executive Branch. See *Smith* v. *Ghana Commercial Bank, Ltd.*, No. 10-cv-4655, 2012 WL 2930462, at *10 (D. Minn. June 18, 2012), report and recommendation adopted, 2012 WL 2923543 (D. Minn. July 18, 2012), aff'd (8th Cir. Dec. 7, 2012) (exercising jurisdiction over Ghanaian Attorney General "would be 'to enforce a rule of law against' the Republic of Ghana" when the plaintiff's claims challenged the Attorney General's "decisions about how to pursue those accused of wrongdoing within Ghana's territory").

The court of appeals thus fundamentally erred in assessing conduct-based immunity for foreign officials. Rather than determining whether petitioners' challenged actions were taken in an official capacity, for which it is the policy of the Executive to recognize immunity, the court relied on the Second Restatement to effectively establish a categorical exception to conduct-based immunity for personal-capacity suits. Such a rule has been endorsed by no other court of appeals, and this Court's review is warranted.

B. This Court Should Grant Review To Resolve The Circuit Conflict About Whether The TVPA Implicitly Abrogates All Conduct-Based Foreign-Official Immunity

The court of appeals also erred in holding that Congress *sub silentio* abrogated conduct-based foreign-official immunity for claims arising under the TVPA. That holding is incorrect and conflicts with the decisions of other courts of appeals, necessitating this Court's review.

1. The decision below is incorrect

The pedigree of foreign-official immunity stretches back centuries. See p. 13, *supra*; see, *e.g.*, *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812); *Actions Against Foreigners*, 1 Op. Att'y Gen. at 81; *Suits Against Foreigners*, 1 Op. Att'y Gen. at 46. "Just as longstanding is the principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (brackets in original); see, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813). As a result, a "statute must

'speak directly' to the question addressed by the common law" if it is to "abrogate a common-law principle." *Texas*, 507 U.S. at 534 (citation omitted). That rule is particularly clear for common-law immunities, as this Court has explained: "[W]e 'proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.'" *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012) (citation omitted; second set of brackets in original).

The TVPA created a cause of action for damages against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," "subjects an individual" to "torture" or "extrajudicial killing." § 2(a), 106 Stat. 73. The statute creates a cause of action only; it says nothing about immunities. Because the TVPA does not "speak directly to the question addressed by the common law" concerning conduct-based immunity for foreign officials, the statute does not abrogate that doctrine. *Texas*, 507 U.S. at 534 (citation and internal quotation marks omitted).

Nor does the TVPA's legislative history evince an intention to discard the common law on foreign-official immunity. That legislative history is somewhat muddled by Congress's erroneous assumption, at the time of passing the TVPA, that the FSIA would govern foreign-official immunity. But the legislative history nonetheless reflects Congress's understanding that some TVPA suits could be barred by pre-existing immunity doctrines that were unchanged by the TVPA. See H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1991) ("The TVPA is subject to restrictions in the [FSIA]" regarding immunities.); S. Rep. No. 249, 102d Cong., 1st Sess. 7 (1991) (Senate Report) (similar). Consistent

with that understanding, the Senate Report explained that for an official to be immune from a TVPA suit, the official must have "an agency relationship to [the] state," which could require the state to "'admit some knowledge or authorization of the relevant acts.'" Senate Report 8 (citation omitted). The Senate Report expressed the view that, in practice, foreign states would rarely do so for the heinous acts covered by the TVPA. *Ibid.* But that practical observation is only relevant if the TVPA did not abrogate conduct-based immunity for foreign officials as a legal matter.

Contrary to Judge Randolph's opinion, the fact that the TVPA creates a cause of action does not pose a "clear conflict" with the doctrine of conduct-based immunity for foreign officials. Pet. App. 14a. That statutory causes of action may coexist with common-law immunities is well-established in American law. The best example is Section 1983, which—much like the TVPA—creates a right of action against "[e]very person who, under color of [law]," deprives another of his or her legal rights. 42 U.S.C. 1983. Like the TVPA, Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). But because common-law immunity principles are "an entrenched feature" of American law, "'well grounded in history and reason,'" this Court has repeatedly held that they "were not somehow eliminated 'by covert inclusion in the general language' of § 1983." *Rehberg* v. *Paulk*, 566 U.S. 356, 361 (2012) (citation omitted); see *id.* at 361-362 (collecting cases). Instead, the Court has construed the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U.S. 335, 339 (1986) (citation omitted); see, *e.g.*,

Pierson v. *Ray*, 386 U.S. 547, 554-555 (1967) (even though the word "person" in Section 1983 includes legislators and judges, the statute does not abrogate the common law doctrine of absolute legislative and judicial immunity).

There is no reason to interpret the TVPA differently. If anything, the fact that TVPA litigation necessarily involves foreign officials and interests should counsel additional hesitation before concluding that Congress silently dispensed with a long-established immunity doctrine. Cf. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (stating that the Court would understand the government to have rescinded a foreign sovereign's immunity only if it so indicates "in a manner not to be misunderstood").

2. The court of appeals' decision conflicts with the decisions of other courts of appeals

In holding that the TVPA abrogates the common law doctrine of conduct-based immunity for foreign officials, the court of appeals created a conflict with the Second and Ninth Circuits, which this Court should resolve.

In *Doğan* v. *Barak*, 932 F.3d 888 (2019), the Ninth Circuit rejected the argument that because "the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings," the statute abrogated common-law foreign-official immunity. *Id.* at 894. Because the TVPA does not expressly address immunity, the Ninth Circuit explained, principles of immunity "'were incorporated' into the TVPA." *Id.* at 895 (quoting *Filarsky*, 566 U.S. at 389). And in *Matar* v. *Dichter*, 563 F.3d 9 (2009), the Second Circuit similarly rejected the argument that

"any immunity [the foreign official defendant] might enjoy is overridden by his alleged violations of the TVPA." *Id.* at 15. The decision below cannot be squared with those rulings.

Respondent attempts to distinguish *Doğan* and *Matar* on the ground that the Executive Branch filed a suggestion of immunity on behalf of the foreign officials in those cases. See Br. in Opp. 18-19. According to respondent, the D.C. Circuit's decision in this case holds only that the TVPA "displaces" the second step of the common-law foreign-official immunity procedure. *Id.* at 18. But Judge Randolph's brief opinion contains no such limitation. And, as explained above, the same legal principles should govern the foreign-official immunity inquiry at the first and second steps, as the federal courts make immunity determinations by applying "the established policy" of the State Department. *Samantar*, 560 U.S. at 312 (citation omitted). While the D.C. Circuit recognized that courts are "divested of * * * jurisdiction" when the Executive suggests a foreign official's immunity, Pet. App. 5a, the court did not explain how the Executive's suggestion of foreign-official immunity in a TVPA case would coexist with Judge Randolph's determination that the TVPA abrogates conduct-based immunity for foreign officials. The resulting confusion only heightens the need for this Court's intervention.[3]

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[3] 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. 16-56704 *Doğan* v. *Barak*, Docket entry No. 69 at 2 (9th Cir. June 5, 2019). But as described in the text, the D.C. Circuit did not explain how the result under the TVPA could logically be different at steps one and two. Indeed, the United States' 28(j) letter

C. This Case Is A Suitable Vehicle For Resolving The Questions Presented

Respondent contends that this case is a poor vehicle for further review because in the court of appeals, neither party disputed the Second Restatement's application or briefed whether the TVPA abrogated foreign-official immunity. Br. in Opp. 25-27. Those are flaws, but they should not preclude review here.

1. Respondent places too much weight on the fact that the D.C. Circuit applied Second Restatement § 66(f) "without deciding" whether doing so was appropriate. Pet. App. 6a; see Br. in Opp. 25-26. Although the court of appeals relied on the parties' citation of the Second Restatement, the court also had an independent obligation to ascertain and apply the governing legal principles to the question of immunity. See *Samantar*, 560 U.S. at 311. The D.C. Circuit's attempt to reserve judgment on the Second Restatement's test, while also treating that test as dispositive, should not deter this Court's review.

2. Although neither party in the court of appeals briefed the second question presented, the court nonetheless reached it. Judge Randolph's opinion will likely be construed as controlling precedent in the D.C. Circuit, and future litigants may therefore be unlikely to substantively brief the issue. Accordingly, this is a suitable vehicle from the D.C. Circuit through which to resolve the circuit conflict on the TVPA.

3. The D.C. Circuit's ruling is significant enough that minor vehicle flaws, like the ones identified by respondent, should not preclude this Court's review. In light of the decision below, plaintiffs may begin to seek

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went on to say that, in any event, the TVPA does not displace foreign-official immunity. *Ibid.*

out Washington, D.C. as a forum for suits against foreign officials, because plaintiffs need only name those officials in their personal capacities or state TVPA claims in order to overcome conduct-based immunity in the D.C. Circuit. The D.C. Circuit's holdings also undermine the Executive's position on foreign-official immunity, which poses an ongoing risk to our Nation's foreign relations for as long as the decision below stands. In light of those substantial concerns, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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