No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Discretionary Function Rule within the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5)(A)—which preserves foreign 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"—applies to claims based upon a presidential security detail's use of force during an official state visit to the United States, when they are acting within the scope of their employment.

2. Whether the D.C. Circuit's Opinion conflicts with relevant decisions of this Court interpreting the policy prong of the Discretionary Function Rule by authorizing judges to second-guess whether a visiting presidential security detail's discretionary use of physical force was "plausibly" related to protecting their president, rather than determining whether a presidential security detail's decisions to physically engage with encroaching civilians is "susceptible to policy analysis."

3. Which party bears the burden of proving that the Discretionary Function Rule does not apply?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is the Republic of Turkey, a foreign sovereign state. It is not a corporation, does not have a corporate parent, and is not owned in whole or part by any publicly held company.

Respondents are:

- Lusik Usoyan, Lacy MacAuley, Mehmet Yuksel, John Doe I, and John Doe II, *Usoyan, et al. v. The Republic of Turkey*, No. 20-7017 (D.C. Cir.), and *Usoyan, et al. v. The Republic of Turkey*, No. 1:18-cv-1141-CKK (D.D.C.).

- Kasim Kurd, Stephen Arthur, Heewa Arya, 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, and Murat Yasa, in *Kurd, et al. v. The Republic of Turkey, et al.*, No. 20-7019 (D.C. Cir.), and in *Kurd, et al. v. The Republic of Turkey, et al.* No. 1:18-cv-1117-CKK (D.D.C.).

In addition, the following *amici curiae* appeared before the D.C. Circuit:

- The United States; and

- Chris Stanley, former Deputy Assistant Director at the United States Secret Service, Andrew Harris, former Special Agent in Charge of the United States Secret Service, and John Ryan,

former Special Agent in Charge at the United States Secret Service.

RELATED CASES

- *Usoyan, et al. v. The Republic of Turkey*, No. 1:18-cv-1141-CKK (D.D.C.). Order denying Turkey's Motion to Dismiss without prejudice entered on February 6, 2020.
- *Kurd, et al. v. The Republic of Turkey, et al.* No. 1:18-cv-1117-CKK (D.D.C.). Order denying Turkey's Motion to Dismiss without prejudice entered on February 6, 2020.
- *Usoyan, et al. v. The Republic of Turkey*, No. 20-7017 (D.C. Cir.) (consolidated). Judgment entered on July 27, 2021.
- *Kurd, et al. v. The Republic of Turkey, et al.*, No. 20-7019 (D.C. Cir.) (consolidated). Judgment entered on July 27, 2021.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

The District Court's orders denying Turkey's motions to dismiss are reported at *Usoyan, et al. v. Republic of Turkey*, 438 F. Supp. 3d 1 (D.D.C. 2020), and *Kurd, et al. v. Republic of Turkey, et al.*, 438 F. Supp. 3d 69 (D.D.C. 2020), and reproduced at App. 33-79. The D.C. Circuit consolidated *Usoyan* and *Kurd* on appeal, and the panel opinion of the Court of Appeals is reported at 6 F.4th 31 (D.C. Cir. 2021), and reproduced at App. 1-32. The D.C. Circuit's order denying rehearing *en banc* (D.C. Cir. Oct. 15, 2021) is unpublished and reprinted at App. 80-81.

JURISDICTION

The district court judgment was entered on February 6, 2020. App. 33-79. The D.C. Circuit issued its opinion on July 27, 2021. App. 1-32. Turkey filed a petition for rehearing *en banc* on September 27, 2021. The D.C. Circuit denied rehearing *en banc* on October 15, 2021. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1604, provides:

> [A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

The FSIA's "tortious acts exception" to foreign sovereign immunity, 28 U.S.C. § 1605(a)(5), provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> . . .
>
> > (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
> >
> > > (A) 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[.]

STATEMENT OF THE CASE

On May 16, 2017, the Republic of Turkey's ("Turkey") presidential security detail ("Turkish Security Detail") intervened physically to repel a group of protesters from in front of the Turkish Ambassador's residence ("Residence"), where the Turkish President, ambassador and other internationally protected Turkish officials had arrived. The protesters included supporters of a U.S.-designated foreign terrorist organization that poses a genuine national security threat to Turkey. Graphic videos of the incident stirred strong public and diplomatic criticism of Turkey. Nevertheless, the incident was steeped in national

security policy choices that co-equal sovereigns sending and receiving diplomatic missions make every day around the world. Co-equal sovereigns weigh these considerations without fear of civil liability because they rely on the presumption of immunity for their official acts.

This case presents an exceptionally important and recurring question that bears directly on the safety of heads of state, government leaders, and the security agents who protect them around the globe: whether a presidential security detail's discretionary use of physical force while acting within the scope of their employment during an official state visit is immunized from tort liability under the FSIA's Discretionary Function Rule. The United States Court of Appeals for the District of Columbia Circuit held that it is not, inventing a new rule outside of the narrow bounds of the FSIA to justify its decision. The D.C. Circuit ruled that if a trial judge perceives, in hindsight, that the specific actions alleged were too "repugnant" or not sufficiently justified to plausibly be related to protecting that president, then a foreign sovereign's immunity may be abrogated. *See Usoyan v. Republic of Turkey*, 6 F.4th 31, 47 (D.C. Cir. 2021).

The D.C. Circuit Opinion was wrong because it conflicts with binding precedent from this Court, as well as the express language of the FSIA and the consensus view of the majority of Circuits, prohibiting trial courts from engaging in such judicial second-guessing of discretionary governmental acts. *See United States v. Gaubert*, 499 U.S. 315, 324-25 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988);

United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). Blanket immunity for policy choices is preserved by the Discretionary Function Rule to the FSIA's "tortious acts exception," 28 U.S.C. § 1605(a)(5), which immunizes from tort liability foreign sovereigns' discretionary, governmental acts that are theoretically susceptible to policy analysis, "***regardless of whether the discretion be abused***," *id.* (emphasis added). That immunity encompasses a vast range of tortious conduct, regardless of its perceived repugnance, perhaps other than a *jus cogens* violation, which did not occur here. *See Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (holding that a foreign sovereign lacks discretion to engage in conduct "clearly contrary to the precepts of humanity").

The D.C. Circuit Opinion also threatens a massive disruption to United States foreign policy by burdening foreign security agents' decision-making with the threat of vastly-expanded exposure to civil liability. The D.C. Circuit Opinion will significantly impact the incentives for a foreign head of state to travel to the United States and will reduce a head of state's safety while on United States soil. The D.C. Circuit Opinion also invites reciprocal erosion of immunity for U.S. security agents protecting American presidents, diplomats, and missions abroad. The U.S. Secret Service provided protection on visits to 421 foreign

locations in 2019,[1] 372 foreign locations in 2017,[2] 363 foreign locations in 2016,[3] and 391 foreign locations in 2015.[4] Thus, reciprocal erosion of sovereign immunity by other nations could endanger hundreds of United States foreign missions per year if U.S. Secret Service and other diplomatic security agents' immunities abroad are similarly abrogated. *See, e.g.*, D.C. Circuit Joint Appendix, Case No. 20-7017, filed Nov. 20, 2020 ("JA") 157 ¶ 15.

The Court should grant certiorari to settle the questions presented and clarify that under *Varig*, *Gaubert*, *Berkovitz*, and the plain language of the FSIA, a presidential security detail's discretionary use of physical force is protected by the Discretionary Function Rule, "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

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[1] U.S. Secret Service, *2019 Annual Report* at 1 (2019), https://www.secretservice.gov/annual-reports (last visited Jan. 13, 2022).

[2] U.S. Secret Service, *2017 Annual Report* at 6 (2017), https://www.secretservice.gov/annual-reports (last visited Jan. 13, 2022).

[3] U.S. Secret Service, *2016 Annual Report* at 8 (2016), https://www.secretservice.gov/annual-reports (last visited Jan. 13, 2022).

[4] U.S. Secret Service, *2015 Annual Report* at 17 (2015), https://www.secretservice.gov/annual-reports (last visited Jan. 13, 2022).

A. Factual Background

This case arises out of Turkey's decision, during an official state visit, to use physical force to repel people from its President, Ambassador, senior ministers and other internationally-protected persons. The people repelled included supporters of a U.S.-designated foreign terrorist organization, namely the Kurdistan Workers' Party ("PKK"), that is responsible for 40,000 deaths and that routinely targets and has attacked Turkish officials and diplomatic missions. And, Turkey has the sad distinction of having had four diplomats assassinated by members of terrorist organizations on United States soil. Therefore, the issue of security is an utmost priority during high-level visits.

The Turkish President and his delegation face monumental security threats. *See* JA116-18, 126-28, 138-40 ¶¶ 7-11, 33-34, 51-52, 55; JA160-63 ¶¶ 27, 31-32. Turkey borders some of the most dangerous geography in the world, including Syria, which at the relevant time was the center of the "ISIS caliphate." *See* JA121-26, 130-37 ¶¶ 19, 21-31, 34, 40-48. Frequent and deadly armed conflict occurs near the Turkish border. *Id.* Turkey is also under constant terrorist threat from the PKK—a designated Foreign Terrorist Organization by the United States, the European Union, Japan, and Australia, among other countries—and from the PKK's Syrian arm, the People's Protection Units ("YPG"). *See Usoyan, et al. v. The Republic of Turkey*, No. 1:18-cv-1141-CKK (D.D.C.), Docket Entry No. ("ECF") 56 at 14-16; JA121-26, 130-37 ¶¶ 19, 21-31, 34, 40-48. The PKK has committed scores of bombings and political

assassination attempts in Turkey and has violently attacked Turkish diplomatic mission buildings under the guise of so-called peaceful demonstrations. *Id.*

On May 16, 2017, while the United States and Turkish Presidents met at the White House, Pro- and Anti- Turkey Groups demonstrated in Lafayette Park. The Anti-Turkey Group displayed flags and signs supporting the PKK and YPG and its leaders. JA190 at File Nos. LS06-LS09; JA121-37 ¶¶ 19-31, 35-36, 40-47; JA192; JA194-97. Inexplicably, U.S. law enforcement later escorted and positioned the PKK/YPG-supporting Anti-Turkey Group less than fifty feet from the Residence, where a Pro-Turkey Group had gathered. The Turkish Ambassador, diplomats and visiting Turkish ministers were at the Residence.

Members of the Anti-Turkey Group advanced into traffic toward the Residence, yelling vitriol about the Turkish President over a megaphone while ignoring police commands to stay back. JA190 at File No. SC01 at 0:01-50. The Anti-Turkey Group's harassment escalated as the rival groups shouted at each other. *Id.* No barricades separated them and only a few overwhelmed police officers were on scene. *Id.*

Plaintiff-Respondent Jalal Kheirabadi sparked a first altercation by spitting on a Turkish security agent. *See* JA190 at File No. SC01 at 0:30-1:02; JA499 at File No. SC02 at 0:04-1:16; JA552-53; JA378. During this altercation, Plaintiff-Respondent Kasim Kurd committed assault with a dangerous weapon by smashing a bullhorn on the skull of a Pro-Turkey civilian, causing wounds that required sixteen stitches

to close. *See* JA190 at File No. SC01 at 0:52-57; JA 499 at File No. SC02 0:12-29. Kurd retreated temporarily, but then ran back toward the Residence twice, swinging his bullhorn as a weapon to assault the Turkish Security Detail and local police. Kurd also hurled a water bottle at the Pro-Turkey Group, narrowly missing the head of a local police officer and smashing another Pro-Turkey civilian in the face. *See* ECF 56 at 22; JA499 at File No. SC02 at 0:53-1:04, 2:08-14.

Following the first altercation, Turkey asked U.S. law enforcement to move the Anti-Turkey Group away from the Residence because the Turkish President was about to arrive. *See, e.g.,* JA166; JA499 at File No. SC09 at 4:35-53 (Turkish security agent telling U.S. Secret Service agent: "We are waiting you [sic] to take them out, because President [Erdogan] is coming. If you don't take, I will take. Okay?"); JA499 at File No. SC12 at 1:50-2:11, 3:00-20, 6:10-43; JA245 ¶ 26. Turkey's Ambassador implored local law enforcement to move the Anti-Turkey Group farther away as required by treaty and federal law protecting internationally protected persons from assault and harassment. JA190 at File Nos. SC07 at 2:08-20; JA499 at File Nos. SC08 at 0:01-25, SC12 at 2:00-10; *see also* 18 U.S.C. § 112 (implementing the United States' treaty obligations under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Feb. 20, 1977, 28 U.S.T. 1975, to protect visiting dignitaries from assaults and harassment by criminalizing gatherings within 100 feet

of diplomatic premises that intend to assault, threaten, or harass visiting dignitaries).

When the Turkish President arrived, his security detail was forced to delay his exit from his car while the highly-agitated Anti-Turkey Group continued to tout symbols of PKK/YPG support and voice threats against the Turkish President less than 100 feet from the Residence where the Turkish President's vehicle had arrived. *See* JA169-71 ¶¶ 51-57; JA190 at File No. SC05 at 1:01-2:28; JA499 at File No. SC02 at 5:10-25; JA243-44 ¶ 22. Facing a compromised security environment, the Turkish Security Detail physically confronted and dispersed the Anti-Turkey Group. *See* JA164-65, 169-71 ¶¶ 35, 40, 51-57.

B. Procedural History

On May 15, 2018, the *Usoyan* and *Kurd* Respondents filed their respective Complaints, invoking, *inter alia*, the FSIA's tortious acts exception as the jurisdictional basis for assault, battery, and various other common-law claims. Turkey asserted its sovereign immunity from suit in the United States courts and moved to dismiss all claims for lack of subject matter jurisdiction. The district court denied Turkey's motion without prejudice, holding that the FSIA's tortious acts exception conferred jurisdiction because Turkey's actions did not satisfy the Discretionary Function Rule. App. 47-68. In applying the two-pronged test developed in *Berkovitz*, which interprets the Federal Tort Claims Act's ("FTCA") analogous Discretionary Function Rule, 28 U.S.C. § 2680(a), the district court concluded that although the first prong of this test—whether the acts were

discretionary—was satisfied, the Turkish Security Detail's actions did not satisfy the second prong because they were not grounded in social, economic, or political policy of a nature and quality that Congress intended to shield because the Turkish Security Detail engaged in a "violent physical attack." App. 64. Turkey timely appealed to the D.C. Circuit.

On appeal, Turkey argued that the district court committed reversible error by inventing a new "violent acts" exception to the Discretionary Function Rule because such an exception directly conflicts with both the FSIA's clear preservation of immunity for discretionary acts, "regardless of whether the discretion be abused," 28 U.S.C. § 1605(a)(5)(A), and relevant decisions of this Court interpreting the statute. Turkey also argued the district court invented this new "violent acts" exception to avoid what it perceived would be a distasteful result under a proper application of *Berkovitz* prong two, which, without alteration, required dismissal for lack of jurisdiction.

After oral argument on January 25, 2021, the D.C. Circuit panel invited the United States to file an amicus brief to address the source and scope of any discretion afforded to foreign security personnel with respect to taking physical actions against domestic civilians on public property. The United States rejected the district court's conclusion that the Discretionary Function Rule does not immunize a "violent physical attack," but it supported affirmance on a different and even less predictable ground: a foreign sovereign only has discretion to physically intervene against civilians on United States territory

if the use of force "reasonably appears necessary." No court has ever applied the United States' proposed "reasonableness" test to a foreign sovereign, and the D.C. Circuit did not adopt this test.

On July 27, 2021, a panel of the D.C. Circuit affirmed, without adopting the "violent physical attack" exception the district court had invented. Rather, it found the Turkish Security Detail's actions were not "plausibly grounded in considerations of security-related policy" because they were "not plausibly related to protecting President Erdogan." *Usoyan*, 6 F.4th at 47. In so ruling, the D.C. Circuit created a new rule authorizing trial courts to make fact-specific determinations about the justification, or lack thereof, of presidential security agents' use of physical force based on the particular circumstances facing that particular president.

Turkey sought rehearing *en banc* based on the D.C. Circuit Opinion's conflicts with binding precedent from this Court and the D.C. Circuit. Turkey's petition for rehearing *en banc* was denied on October 15, 2021. App. 80-81.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's Opinion conflicts with binding precedent of this Court by holding that the FSIA's Discretionary Function Rule does not extend to a presidential security detail's discretionary decision to use physical force while protecting their head of state and other internationally-protected persons. By inventing a new rule of law that permits a fact-specific analysis of whether specific actions were "plausibly

related to protecting" their president, the D.C. Circuit Opinion flouts this Court's mandates in *Varig*, *Berkovitz* and *Gaubert* that courts consider only whether decisions by visiting presidential security details to use physical force are theoretically susceptible to social, economic, political, or national security policy analysis, and that they avoid second-guessing the legitimacy or reasonableness of the choices made. The D.C. Circuit Opinion abrogates Congress's clear intent to preserve immunity over a foreign sovereign's governmental acts, even if such acts offend United States sensibilities or the discretion is abused.

The questions presented are exceptionally important because the D.C. Circuit Opinion will immediately impact United States foreign relations and the safety of all foreign heads of state traveling to the United States. The D.C. Circuit Opinion's vast expansion of civil liability for actions taken by visiting sovereigns to protect their president also invites reciprocal abrogation of immunity for U.S. Secret Service and other U.S. diplomatic security agents and the hundreds of American missions they protect abroad. The D.C. Circuit Opinion usurps United States foreign policy decisions from the Executive Branch, overrules Congressional intent in enacting the FSIA's Discretionary Function Rule, and vests new authority in the judiciary to evaluate the legitimacy of decisions made by foreign sovereigns over which the trial courts presumptively have no jurisdiction in the first place. This upending of the restrictive theory of sovereign immunity should not stand without review of the questions presented by this nation's highest Court.

Finally, this petition presents an opportunity for the Court to state which party bears the burden of establishing that the Discretionary Function Rule does not apply, a question that divides the federal courts of appeals.

I. THE D.C. CIRCUIT INCORRECTLY DECIDED A VITALLY IMPORTANT QUESTION OF SOVEREIGN IMMUNITY IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT.

A. The Discretionary Function Rule Codifies The FSIA's Restrictive Theory Of Immunity.

Under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts. *See* 28 U.S.C. § 1604; *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The FSIA codifies a limited number of exceptions to immunity, which are "the sole basis for obtaining jurisdiction over a foreign state." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act codifies "the 'restrictive theory' of sovereign immunity, under which 'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not . . . private acts (*jure gestionis*).'" *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976)). Consistent with this restrictive theory, Congress narrowly defined the scope of the "tortious acts exception" by preserving a foreign state's 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).

The legislative history of the tortious acts exception supports the judicial interpretation that blanket immunity extends to a sovereign's public, but not private, discretionary decisions. The exception was largely meant to address the specific issue of providing a private remedy against a foreign sovereign for persons injured in traffic accidents. H.R. Rep. 94-1487, at 20-21 (1976). Thus, the exception "should be narrowly construed so as not to encompass the farthest reaches of common law." *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1997). Indeed, this Court has admonished that it "take[s] seriously the Act's general effort to preserve a dichotomy between private and public acts." *Fed. Rep. of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021); *see also Permanent Mission of India*, 551 U.S. at 195 (same).

For decades, courts have interpreted this Discretionary Function Rule as preserving immunity over a foreign sovereign's discretionary decisions grounded in social, economic, or public policy, regardless of whether such decisions are subjectively "repugnant" or could be perceived as an abuse of discretion. This interpretation respects Congress's intent that United States courts avoid second-guessing the legitimacy of the policy choices of other co-equal sovereigns. *See Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 496 U.S. at 537) ("[T]he purpose of the [Discretionary Function Rule] is to 'prevent judicial

"second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'"); *Varig*, 467 U.S. at 814 (same).

B. *Varig*, *Berkovitz* and *Gaubert* Establish A Mandatory Framework For The Discretionary Function Rule That, Consistent With The FSIA's Restrictive Theory of Immunity, Forbids Judicial Second-Guessing Of Discretionary, Governmental Choices.

Varig, *Berkovtiz*, and *Gaubert* established a mandatory framework in FTCA cases for analyzing the FTCA's "discretionary function" provision, which is "analogous" to, and "served as a model for," the FSIA's Discretionary Function Rule. *MacArthur*, 809 F.2d at 922. The lower courts thus apply this framework in FSIA cases, too.

In *Varig*, this Court "isolate[d] several factors useful in determining when the acts of a Government employee are protected from liability . . . ." *Varig*, 467 U.S. at 813. First, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id*. "Thus, the basic inquiry . . . is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." *Id*. Second, the discretionary function rule applies to discretionary decisions connected with the government's need to establish its policy objectives that balance competing interests. *See id*. at 813-14, 820. In

Varig, that meant balancing "air transportation safety and the reality of finite agency resources" through a program of "spot-checking" aircraft manufacturers' compliance with minimum safety standards. *Id*. at 820. "Judicial intervention in such decisionmaking through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments" of government regulators and legislators, which was not Congress' intent when it drafted the Rule. *Id*. at 820. This Court in *Varig* held that the discretionary function rule precluded claims against the government for property damage and wrongful death allegedly caused by its negligence in setting standards for safety inspections and certifications and applying them to a commercial aircraft that later caught on fire during flight killing almost all on board. *Id*. at 800-01. In sum, the challenged acts fell within the range of choices accorded by federal policy, regardless of the catastrophic results.

Next, in *Berkovitz*, this Court solidified *Varig*'s "established principles" for determining when the Discretionary Function Rule preserves sovereign immunity and bars suit against the government. *See Berkovitz*, 486 U.S. at 536-39. *Berkovitz* arose out of another tragedy—an infant who contracted polio after taking a vaccine that the United States had, in its exercise of discretion, approved, leaving the baby paralyzed and hardly able to breathe. *Id.* at 534. Though heartbreaking, this Court nevertheless "restat[ed] and clarif[ied]" that the scope of the Discretionary Function Rule is not limited to regulatory functions, but extends to "discretionary"

functions. *Id*. at 538. This conclusion is dictated by the plain language of the Rule. *Id*.

Berkovtiz also established a two-part test for determining when the Discretionary Function Rule preserves sovereign immunity and bars suit against the government. *Id*. at 536-37. First, the conduct must be discretionary in that it involves an element of judgment or choice, *Berkovitz*, 486 U.S. at 536.[5] Second, the "nature of the conduct" must be fundamentally governmental and "based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37. *Gaubert* then applied the *Berkovitz* test to again find governmental immunity from tort claims preserved by the Discretionary Function Rule. 499 U.S. at 334. In doing so, it explained that the focus of the prong two analysis is "not on the agent's subjective intent . . . but on the nature of the actions taken and whether they are susceptible to policy analysis." *Id*. at 325.

The D.C. Circuit's Opinion has completely eviscerated and rewritten this second element in a way that departs from a majority of other circuits. It rejects two important principles this Court established in *Gaubert* to clarify how courts must analyze *Berkovitz* prong two. First, where the conduct at issue is discretionary because it "allows a Government agent to exercise discretion, ***it must be presumed*** that the agent's acts are grounded in policy when exercising

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[5] In this case, the district court and the D.C. Circuit correctly held the challenged conduct was "discretionary." *See Usoyan*, 6 F.4th at 43-45; App. 18-23 (same).

that discretion." *Gaubert*, 499 U.S. at 324 (emphasis added). This presumption ensures that courts avoid going down the path of second-guessing the legitimacy of the policy choice made, or in other words, determining that it was an abuse of discretion, which would swallow the rule.

The second key principle that the D.C. Circuit Opinion rejects is that, under the second element of the *Berkovitz* test, the controlling question is whether the type of decision at issue is "susceptible to," or theoretically could involve policy considerations. *Gaubert*, 499 U.S. at 325. Indeed, the Ninth Circuit recently explained that:

> *Gaubert*'s directive [is] that the second element of the test turns on whether the challenged actions are '***the kind of conduct*** that can be said to be grounded in the policy of the regulatory regime.' As that phrasing confirms, the inquiry is framed 'at a higher level of generality' by 'asking categorically (rather than case specifically) whether the kind of conduct at issue can be based on policy concerns.'

Miller v. United States, 992 F.3d 878, 889 (9th Cir. 2021) (alteration in original) (citations omitted) (first quoting *Gaubert*, 499 U.S. at 325, thereafter quoting *Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008) (Gorsuch, J.)). Whether the specific actions alleged in any particular case were actually motivated by policy considerations is not relevant. *Gaubert*, 499 U.S. at 324-25. "[T]he Supreme Court has emphasized . . . that the issue is not the [actual] decision as such, but whether the 'nature' of the

decision implicates policy analysis." *Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995). The D.C. Circuit disregarded this theoretical question by second-guessing the legitimacy and reasonableness of the Turkish presidential security detail's choices.

Varig, *Berkovitz* and *Gaubert* are FTCA cases. This Court has never evaluated the Discretionary Function Rule under the FSIA, which makes granting certiorari all the more important because the immunity for tortious acts that sovereigns are afforded under the FSIA is, by design, broader than that of the United States under the FTCA. For example, the FSIA's statutory mandate of presumed immunity for foreign sovereigns, 28 U.S.C. § 1604, which derives from principles of international comity, has no analog in the FTCA, which concerns the federal government's relationship with private individuals. Nor is foreign sovereign immunity diminished by alleged violations of the United States Constitution. Moreover, "courts must consider the additional risk of interfering with foreign relations" when interpreting the FSIA. *Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1166 n.10 (N.D. Cal. 1989); *Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d 173, 188 (D.P.R. 2001) (same). The FSIA is meant to ensure reciprocal treatment in foreign relations. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017).

Thus, while *Gaubert* and *Berkovitz* are good guides, foreign states have greater immunity under the FSIA than the United States has under the FTCA, a principle the D.C. Circuit Opinion overlooks and a

dynamic this Court should address. Affirming that this Court's theoretical, policy-based analysis under *Berkovitz* prong two must be applied in cases brought under the FSIA, as dispassionately as the Court has done in FTCA cases, is necessary to implement the FSIA's statutorily-mandated presumption that discretionary, governmental decisions of a foreign sovereign are immune under the restrictive theory. Without it, courts will, and have in the case of the D.C. Circuit Opinion, stray beyond the limits of their delegated power and second-guess a foreign sovereign's discretionary conduct based on subjective perceptions by individual judges that a sovereign act is distasteful or an abuse of discretion. *Gaubert*, 499 U.S. at 323; *Varig*, 467 U.S. at 814.

C. The D.C. Circuit Opinion On *Berkovitz* Prong Two Conflicts With This Court's Precedent Requiring Courts To Presume Discretionary Decisions Are Susceptible To Policy Analysis And Refrain From Second-Guessing Government Decisions.

Since *Gaubert*, the theoretical, policy-based interpretation of *Berkovitz* prong two has been the consensus view among the First, Second, Fourth, Fifth, Sixth, Eighth Ninth, Tenth, and Eleventh Circuits. *See, e.g.*, *Reyes-Colón v. United States*, 974 F.3d 56, 59 (1st Cir. 2020); *Cangemi v. United States*, 13 F.4th 115, 133 (2d Cir. 2021); *Clendening v. United States*, 19 F.4th 421, 435 (4th Cir. 2021); *Gonzalez v. United States*, 851 F.3d 538, 544 (5th Cir. 2017); *Jude v. Comm'r of Social Security*, 908 F.3d 152, 159 (6th Cir.

2018); *Willis v. Boyd*, 993 F.3d 545, 550 (8th Cir. 2021); *Miller*, 992 F.3d at 889; *Ball v. United States*, 967 F.3d 1072, 1076 (10th Cir. 2020); and *Foster Logging, Inc. v. United States*, 973 F.3d 1152, 1165 n.9 (11th Cir. 2020).

And, until now the D.C. Circuit also followed the consensus view. *See, e.g.*, *Cope*, 45 F.3d at 448-50, and *MacArthur*, 809 F.2d at 921-22.

The D.C. Circuit rejected the consensus view, and instead, invented a new rule authorizing the kind of fact-specific analysis the district court undertook in contravention of this Court's binding precedent. Though the D.C. Circuit said it did not base its decision on whether Turkey's conduct was justifiable as a factual matter, it did precisely that. *Usoyan*, 6 F.4th at 47. It found the Turkish Security Detail's "[d]iscrete injury-causing actions" were not "plausibly grounded in considerations of security-related policy" ***because*** they were "not plausibly related to protecting President Erdogan." *Id.* at 46-47. In other words, the D.C. Circuit adopted the district court's subjective perception that, in the isolated moments before the second altercation, there was no imminent threat. The D.C. Circuit then sidestepped the policy analysis required under *Berkovitz* prong two. *See id.* at 37, 45-46. This new, fact-based "plausibility" test amounts to an "abuse of discretion" standard that completely rebukes *Berkovitz*, and conflicts with Congress's intent that the Discretionary Function Rule preserve immunity for sovereign acts "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

The D.C. Circuit's Opinion conflicts with this Court's precedent in at least four, equally significant respects.

First, the D.C. Circuit Opinion conflicts with *Gaubert's* instruction that courts must presume that the second prong is satisfied if the first prong is satisfied. *See Gaubert*, 499 U.S. at 324 (where the conduct at issue is discretionary because it "allows a government agent to exercise discretion, ***it must be presumed*** that the agent's acts are grounded in policy when exercising that discretion") (emphasis added). To overcome this presumption, the "complaint must either allege facts demonstrating that the challenged actions are not grounded in public policy considerations or base its claims on government agents' mandatory obligations." *Ignatiev v. United States*, 238 F.3d 464, 466-67 (D.C. Cir. 2001) (citing *Gaubert*, 499 U.S. at 324-25). Neither circumstance is present here. In fact, the Complaints expressly allege that Turkey's conduct was based on supposed governmental policies that disfavor ethnic and political dissidents and was aimed at silencing their opposition to the Turkish President. *See* JA37-39 ¶¶ 1-9; JA60 ¶ 147; JA59 ¶143; JA72-77 ¶¶ 37-50; JA109 ¶¶ 254-55. And, the D.C. Circuit held that Turkey satisfied prong one because the Turkish Security Detail's decision to use physical force was within their discretion, expressly rejecting each of the Respondents' arguments to the contrary. *See Usoyan*, 6 F.4th at 39-45.

Second, the D.C. Circuit Opinion conflicts with *Gaubert's* instruction under the second *Berkovitz* prong that courts not inquire into an agent's subjective

intent, but ask only whether the general nature of the challenged decision is categorically, not case-specifically, susceptible to policy analysis. *Gaubert*, 499 U.S. at 325; *Hajdusek v. United States*, 895 F.3d 146, 150 (1st Cir. 2018) ("The word 'susceptible' is critical here; [courts] do not ask whether the alleged tortfeasor was in fact motivated by a policy concern, but only whether the decision in question was of the type that policy analysis could inform."). The D.C. Circuit inquired into the Turkish presidential security agents' subjective intent and labeled their acts "***malicious*** conduct [that] cannot be recast in the language of a cost-benefit analysis." *Usoyan*, 6 F.4th at 45 (emphasis added).

The D.C. Circuit then relied on its subjective interpretation to conclude summarily that the Turkish Security Detail's "[d]iscrete, injury-causing actions," "[w]hen viewed up close, . . . were not the kind of security-related decisions that are 'fraught with economic, political, or social judgments.'" *Id.* at 46–47. The "viewed up close" language expressly indicates that the D.C. Circuit was scrutinizing the facts and circumstances unique to protection of the Turkish President on that particular day, which is antithetical to this Court's precedent firmly establishing that prong two is a theoretical analysis. *Compare id. with Cangemi*, 13 F.4th at 133 (emphasis added) (rejecting plaintiff's argument that the sovereign "***in this case*** did not actually undertake a policy analysis").

Third, the D.C. Circuit Opinion conflicts with *Varig's* instruction that courts not second-guess a foreign sovereign's discretionary decisions. The D.C.

Circuit's Opinion sanctions the substitution of a district court's subjective perception that there was no actual or perceived threat to a foreign head of state, in place of the judgment of the foreign sovereign's own presidential security detail. *See Varig*, 467 U.S. at 814. However, Congress intended that any claim based upon a sovereign's discretionary conduct—including physical intervention by a presidential security detail—that is fundamentally governmental in nature (as opposed to fundamentally "private" conduct, like a traffic accident) is shielded from judicial second-guessing via tort law. *Id.*; *Permanent Mission of India*, 551 U.S. at 195.

Fourth, the D.C. Circuit's Opinion conflicts with *Gaubert's* instruction that the Discretionary Function Rule immunizes "decisions made at the operational level," *Gaubert*, 499 U.S. at 325, by incorrectly distinguishing between the Turkish Security Detail's on-the-ground s and higher-level planning functions. *See Usoyan*, 6 F.4th at 46. The D.C. Circuit reasoned that only planning-level decisions like "how many security officers to deploy and how to train and arm them" fall within the Discretionary Function Rule, but operational-level decision like "how the Turkish security detail used those resources here is not a policy tradeoff." *Id.* Yet, under *Gaubert*, the "'implementation' or 'execution' of policy decisions" ***does*** fall within the discretionary function rule. *Cope*, 45 F.3d at 449. "No matter the level at which the decision was made," the Discretionary Function Rule applies when "the nature of the decision" is susceptible to questions of 'social wisdom' or 'political practicability.'" *Id.* at 449–50.

D. Other Recent FSIA Decisions Illustrate The D.C. Circuit's Radical Departure From The Restrictive Theory Of Immunity Embraced By This Court's Precedent.

Recent decisions applying the Discretionary Function Rule in FSIA cases brought under the tortious acts exception and involving similar allegations of malicious and discriminatory treatment illustrate how radical and far-reaching the D.C. Circuit's departure from *Berkovitz's* policy-based prong two analysis is.

In *Broidy Capital Mgmt., LLC v. State of Qatar*, the plaintiffs alleged that Qatar illegally hacked their computer servers without authorization and then leaked confidential information in a retaliatory effort to silence the plaintiffs from criticizing the Qatari government and to influence public opinion in the United States as to its alleged support of terrorism. 982 F.3d 582, 586 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2704 (2021). The Ninth Circuit held that the Discretionary Function Rule applied to the plaintiffs' claims for damages because "there can be little doubt that Qatar's alleged actions involved considerations of public policy that are sufficient to satisfy" *Bekovitz* prong two. *Id.* at 593.

Consistent with *Broidy*, the district court in *Ghazarian, et al. v. Republic of Turkey*, Civ. No. 2:19-cv-04664-PSG, 2021 WL 5934471 at *1 (C. D. Cal. Nov. 16, 2021), recently held that the Discretionary Function Rule immunized Turkey from claims stemming from Turkey's decision not to issue an entry visa to a traveler from the United States. The

plaintiffs falsely alleged that the visa was denied because Turkey maintained a policy to discriminate against the applicant's religious beliefs and ethnicity. *Id*. at *5. In dismissing the plaintiffs' claims, the court found that, "[a]lthough reprehensible if true, Defendant's choice . . . is grounded in public policy because it could have been based on any number of social, economic, or political considerations—*i.e.*, to promote a different religion, to curry favor with specific interest groups, or to apply pressure on another country." *Id*.

The D.C. Circuit Opinion's contradictory outcome should not be dismissed as a single, anomalous misapplication of a properly-stated *Berkovitz* prong two analysis. To the contrary, it represents the D.C. Circuit's radical abrogation of the consensus view that, under *Berkovitz* prong two, courts ask only whether the nature of the challenged decision, as a class, is theoretically susceptible to policy analysis in an objective or general sense. Furthermore, the D.C. Circuit's erroneous, fact-specific plausibility analysis under *Berkovitz* prong two will become a de facto national rule. Forum-shopping plaintiffs everywhere will sue in D.C. to take advantage of the D.C. Circuit's new rule of law that eviscerates the Discretionary Function Rule as interpreted by *Varig*, *Gaubert* and *Berkovitz*, simply by casting the government agent's specific actions as "offensive," "excessive," "repugnant," or "unjustified."

II. THE D.C. CIRCUIT'S OPINION REINFORCES A CIRCUIT SPLIT ON THE EXCEPTIONALLY IMPORTANT QUESTION OF WHICH PARTY BEARS THE BURDEN OF PROVING THE APPLICABILITY OF THE DISCRETIONARY FUNCTION RULE.

The D.C. Circuit's Opinion exacerbates a circuit split over which party bears the burden of proving that the Discretionary Function Rule does, or does not, apply. This Court should take this opportunity to resolve the lower courts' disagreement about this exceptionally important question, and to answer that the FSIA does not saddle foreign nations with the burden of proving that the Discretionary Function Rule applies.

"[A] foreign state is presumptively immune from the jurisdiction of United States courts." *Nelson*, 507 U.S. at 355; *see also* 28 U.S.C. § 1604. Turkey thus argued below that placing the burden of persuasion on a foreign sovereign to establish its immunity is inappropriate and in conflict with the statutorily-mandated presumption of sovereign immunity. The District Court rejected this reasoning, and instead held that "[t]he burden of proof is on the defendant to demonstrate by a preponderance of the evidence that the discretionary exception applies." *Usoyan*, 438 F. Supp. 3d at 11 (quoting *Maalouf v. Swiss Confederation*, 208 F. Supp. 2d 31, 35 (D.D.C. 2002)). The Ninth Circuit shares the D.C. Circuit's burden-shifting framework for the FSIA's Discretionary Function Rule. *See Broidy*, 982 F.3d at 591 (holding that "Qatar ultimately has the burden to establish that

the exclusion applies"). Yet the Seventh Circuit has rejected this approach, and holds that the plaintiff bears the burden of establishing that an exception to the FSIA applies, which—with respect to the non-commercial tort exception, 28 U.S.C. § 1605(a)(5)—includes proving that the government's conduct does not fall within the Discretionary Function Rule. *See Nwoke v. Consulate of Nigeria*, 729 F. App'x 478, 479 (7th Cir. 2018) ("The Act preserves immunity for 'tortious acts' based on 'discretionary functions,' *id.* § 1605(a)(5)(A). Nwoke has not met her burden to show that immunity does not apply here."), *cert. denied*, 138 S. Ct. 1172 (2019).

Naturally, this circuit split over who bears the burden of proof also has developed in cases analyzing the FTCA's analogous discretionary function rule. *See Hart v. United States*, 630 F.3d 1085, 1089 n.3 (8th Cir. 2011) (collecting cases) ("Our sister circuit courts of appeals are divided on the burden-of-proof issue."); *compare Esquivel v. United States*, --- F.4th ----, 2021 WL 5984331, at *8 (9th Cir. 2021) (holding that the government has the "burden of establishing that [plaintiff's] claims fall within the scope of the discretionary function exception"), *with Cangemi*, 13 F.4th at 130 (holding that "plaintiffs also bear the initial burden of showing that their claims are not barred by the discretionary function exception"), *Sanders v. United States*, 937 F.3d 316, 327 (4th Cir. 2019) ("FTCA plaintiffs have the burden of showing that the discretionary function exception does not foreclose their claim."), *and Carroll v. United States*, 661 F.3d 87, 100 n.15 (1st Cir. 2011) ("Our precedent places the burden on the plaintiff to show that

discretionary conduct was not policy-driven and, hence, falls outside the exception.").

This Court should clarify that a sovereign nation does not bear the burden of proving that it is immune under the Discretionary Function Rule. The FSIA entitles sovereigns to a presumption that their actions are discretionary, and thus, immune. *See Nelson*, 507 U.S. at 355.

III. THE D.C. CIRCUIT'S OPINION WILL HAVE GRAVE FOREIGN-RELATIONS CONSEQUENCES.

The Court should grant certiorari because the D.C. Circuit Opinion will yield foreign relations consequences that warrant consideration by this nation's highest Court.

This Court has long recognized that United States interests "will be better served [ ] if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943). More recently, this Court has recognized that United States law "does not rule the world," and it must

> interpret the FSIA as [it does] other statutes affecting international relations: to avoid, where possible, 'producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'

Philipp, 141 S. Ct. at 714 (quoting *Helmerich*, 137 S. Ct. at 1322). Affirming foreign sovereigns' presumptive immunity from suit in United States courts is vital to inducing all nations to respect each other's independence and dignity, including the reciprocal independence the United States expects. *See Helmerich*, 137 S. Ct. at 1319. The U.S. Department of State, which helped draft the FSIA, also expected the Act to ensure reciprocal treatment in foreign relations, advising Congress:

> that the Act was drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely . . . to our accepted international standards . . . . The Department added that, by doing so, we would diminish the likelihood that other nations would each go their own way, thereby 'subject[ing]' the United States 'abroad' to more claims 'than we permit in this country . . . .

Id. at 1320 (internal quotation marks and citation omitted).

"[T]o run interference in such a delicate field" as the security of a head-of-state, "there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident . . . ." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Clearly expressed congressional intent here was for the FSIA to codify the restrictive theory of sovereign immunity, and to extend immunity to a

sovereign's public but not private acts, a dichotomy this Court "take[s] seriously." *See Philipp*, 141 S. Ct. at 713. Nothing in the language (or legislative history) of the FSIA expresses any intent for trial judges to meddle in the manner in which visiting presidential protective services carry out their public missions. *See Varig*, 467 U.S. at 820 (second-guessing a government's political, social, and economic judgments is "precisely [the] sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.")

The D.C. Circuit's opinion has shattered this Court's longstanding preservation of the restrictive theory of sovereign immunity by now subjecting sovereigns' unquestionably public, governmental acts to factual scrutiny concerning their legitimacy. Doing so will transform the Discretionary Function Rule "into an all-purpose jurisdictional hook" for tortious acts committed by a foreign sovereign that may offend United States sensibilities or be considered reprehensible relative to United States social or moral norms. *See Philipp*, 141 S. Ct. at 713. Permitting such a "radical departure" from the "basic principles" of the restrictive theory presents immediate threats to foreign relations and the United States' national security. *See Helmerich,* 137 S. Ct. at 1320.

The D.C. Circuit Opinion sets new standards by which the United States will be judged globally for its evisceration of the presumption of sovereign immunity for public acts of security details accompanying diplomatic missions, and nations may respond in kind,

upsetting the delicate balance of international relations and impacting all states' national security interests.

CONCLUSION

Whether foreign sovereigns are immune from suit for alleged torts committed by their presidential security details while visiting the United States is a question of exceptional importance that presents itself in many contexts and will be a recurring issue. Moreover, the ability of the United States and co-equal sovereigns to protect their national security interests through presidential security services that are imperative to conducting diplomatic relations abroad, without fears of civil liability impacting their policy choices, is of paramount importance warranting review by the Court. This is especially so in the current climate of frequent and unpredictably violent protests seen around the world, including in the United States, coupled with threats of terrorism by those attracted to the chaos of large, uncontrolled crowds. Turkey's tragic experience with terrorism—four diplomats killed on United States soil and tens of thousands of innocents killed in Turkey by members of terrorist organizations—is illustrative.

It has been over thirty years since the Court decided *Gaubert* and it has never squarely addressed immunity of foreign sovereigns under the FSIA's Discretionary Function Rule. This case is, therefore, a proper vehicle for this Court to not only correct the D.C. Circuit's erroneous creation of a new rule of law that substitutes this Court's *Berkovitz* prong two policy analysis with a new fact-based plausibility analysis, but also to affirm that the Discretionary Function Rule protects foreign

sovereigns, and in particular here presidential protective details, from private tort liability for their public acts, "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

Respectfully submitted,

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