Nos. 09-16246 & 10-13071

In the United States Court of Appeals for the Eleventh Circuit

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ELOY ROJAS MAMANI, ET AL.,
APPELLEES

v.

JOSE CARLOS SANCHEZ BERZAIN AND
GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE,
APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(NOS. 07-22459 & 08-21063) (THE HONORABLE ADALBERTO JORDAN, J.)

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CERTIFICATE OF INTERESTED PERSONS

Counsel for appellants certify that all parties to this appeal are natural persons, and thus no entity owns 10% or more of the stock of any party. Pursuant to 11th Cir. R. 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument would be helpful to the disposition of this appeal. This case presents important and novel questions concerning the political question doctrine, the scope of the Alien Tort Statute, and the immunity of former officials of foreign governments.

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STATEMENT OF JURISDICTION

Plaintiffs asserted that the district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1350. The district court denied defendants' motion to dismiss in relevant part on November 9, 2009, *see* R. 131,[1] and issued a corrected opinion on November 25, 2009, *see* R. 135. Defendants filed a timely notice of appeal on December 9, 2009, *see* R. 137, and also filed a motion for certification for interlocutory appeal, *see* R. 139. The district court granted the motion for certification on March 17, 2010, *see* R. 155, and this Court granted defendants' petition for certification in relevant part on July 8, 2010. The jurisdiction of this Court rests on 28 U.S.C. §§ 1291 and 1292(b).

STATEMENT OF THE ISSUES

1. Whether plaintiffs' lawsuit should be dismissed under the political question doctrine because it challenges the military and political judgments of a foreign government and its resolution would interfere with the Executive Branch's conduct of foreign relations.

2. Whether plaintiffs failed to allege the violation of an actionable international norm under the Alien Tort Statute, 28 U.S.C. § 1350, with regard to their claim that a foreign military responded to civil upheaval with disproportionate force.

[1] All citations are to the district court's docket in No. 07-22459.

3. Whether plaintiffs' lawsuit should be dismissed because defendants, the former president and defense minister of Bolivia, are immune from suit for their official actions while in office.

STATEMENT OF THE CASE

A. Proceedings Below

Appellees, ten Bolivian nationals, filed suit against appellants Gonzalo Sánchez de Lozada Sánchez Bustamante, the former president of Bolivia, and José Carlos Sánchez Berzaín, the former defense minister of Bolivia, claiming, as is relevant here, that defendants used disproportionate force in response to civil upheaval, in violation of the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and Bolivian or Florida law. Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court denied the motion in relevant part. Defendants appealed as of right from the district court's rejection of their argument that plaintiffs' lawsuit was barred by official immunity, and also sought certification for interlocutory appeal from, *inter alia*, the district court's rejection of their arguments that plaintiffs' lawsuit was barred by the political question doctrine and that plaintiffs had no valid claim under the ATS. The district court and this Court granted certification in relevant part. This Court also noted probable jurisdiction over defendants' appeal as of right and consolidated the two appeals.

B. Statement Of The Facts

1. Background

The following statement is based not only on the allegations in plaintiffs' complaint, but also on extensive documentation that the district court properly considered in ruling on defendants' motion to dismiss. *See* R. 135-6; *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010).

a. Defendant Gonzalo Sánchez de Lozada Sánchez Bustamante was the democratically elected president of Bolivia from 1993 to 1997 and again from 2002 to October 2003; defendant José Carlos Sánchez Berzaín was the defense minister from August to October 2003. President Lozada's government was a staunch ally of the United States; it worked closely with the Drug Enforcement Administration (DEA) to eradicate coca (the primary ingredient in cocaine). President Lozada's principal opponent in these efforts came to be Evo Morales, the leader of a socialist movement of coca growers and the runner-up to Lozada in the 2002 presidential election. R. 77-3 (¶ 5), 81-4 to 81-5, 81-5-1, 135-1 to 135-2.

b. In 2003, Bolivia was rocked by a campaign of civil unrest, instigated by Morales and others, that culminated in the forced resignation of President Lozada and his cabinet. The complaint in this case focuses on two incidents in that campaign. R. 81-2-6, 81-2-11, 81-10-4 to 81-10-49.

i. In September 2003, a group of armed insurgents occupied Sorata, a remote tourist destination in the Bolivian mountains north of the capital, La Paz. R. 81-2-11, 81-10-5. As part of the unrest, protesters blocked a number of major highways, including highways into La Paz. R. 77-7 (¶¶ 26, 28), 81-2-11. As a result, hundreds of tourists (including many Americans) were effectively taken hostage in Sorata, because they were unable to return to La Paz or access critically needed supplies. R. 77-7 (¶ 29), 81-5-8, 135-2 to 135-3.

In response, the Lozada government began negotiating for the hostages' release. R. 81-2-11. After more than a week of unsuccessful negotiations, the government undertook a rescue operation. *Id.* According to contemporaneous cables between the American Embassy in Bolivia and the State Department in Washington, the Lozada government took action out of concern that the hostages were running low on food and that some of the hostages had been threatened with physical violence. R. 81-10-6 to 81-10-7.

With regard to defendants, the complaint alleges that President Lozada "ordered the Bolivian [military] to form a task force and authorized the use of 'necessary force[]' to reestablish public order." R. 77-8 to 77-9 (¶ 36). The complaint further alleges that Minister Berzaín was "responsible for the implementation of this directive." *Id.* In relevant part, President Lozada's directive to the commander in chief of the armed forces stated as follows:

> There has been confirmation of a serious guerrilla attack on security forces in [Sorata]. This attack also endangers the physical integrity of hundreds of civilians that are being rescued from a road blockade in this area thanks to an operation organized by the government. I therefore instruct you . . . to mobilize the use of necessary force to restore public order and respect for the rule of law in the region.

R. 81-14-1.

On the morning of September 20, 2003, a Bolivian military task force entered Sorata and helped the hostages onto buses to escort them back to La Paz. R. 77-8 (¶ 34). Minister Berzaín attempted to establish a dialogue with the protesters in Sorata, but, after they forcibly drove him from the town, he had to oversee the rescue operation from a helicopter. R. 77-8 (¶¶ 34, 38), 81-10-6. According to the State Department, as the buses made their way out of Sorata, they were ambushed by armed insurgents. R. 81-6-5, 81-10-4 to 81-10-5, 81-10-12 to 81-10-13. The insurgents fired on the convoy from the surrounding hills; government forces first attempted to disperse the insurgents by firing teargas and rubber bullets. After the insurgents used live fire, however, government forces were compelled to return fire themselves. R. 81-2-11, 81-6-5, 81-10-6 to 81-10-7, 81-10-9, 81-10-11, 135-2 to 135-3.

During the incident, a number of people, including both soldiers and insurgents, were killed or injured. R. 77-9 (¶ 37), 81-2-11, 81-6-5, 81-10-13. At the time, State Department personnel in Bolivia reported that, "[f]rom all indications, the [Bolivian government] acted within its mandate to bring to

safety some 80 foreign tourists and 800 Bolivian nationals who were trapped in Sorata under deteriorating circumstances." R. 81-10-5.

ii. As the State Department noted, the events at Sorata had the effect of "unit[ing] a loose, nationwide coalition of opposition forces against the government." R. 81-2-11, 81-10-13. The insurgents proclaimed that the events at Sorata were "only the beginning" of "the armed struggle against the government." R. 81-10-8, 81-17-4. In an operation dubbed "Plan Torniquet," the insurgents next decided to attempt to blockade all of the routes into La Paz and thus to prevent any supplies from reaching the capital. R. 77-10 to 77-11 (¶¶ 43, 47), 81-5-8, 81-6-5, 81-10-11 to 81-10-14, 81-10-21, 81-10-27 to 81-10-29, 81-18-1.

The blockade began in early October and was immediately successful in preventing critically needed supplies from reaching La Paz. The State Department reported that "La Paz [was] virtually cut off from the rest of the country by the mob's application of [the] 'torniquet.'" R. 81-10-21. According to the State Department, three newborns died when their hospital ran out of oxygen, and ordinary citizens were forced to scramble for basic necessities. R. 81-10-11 to 81-10-12, 81-10-21 to 81-10-22, 81-10-27, 81-10-33, 81-19-1 to 81-19-4, 81-20-1 to 81-20-4.

Left with no other option, President Lozada, together with his cabinet, declared a state of emergency on October 11 and authorized the military to

escort trucks carrying essential supplies to La Paz. R. 77-11 (¶ 47), 81-10-22. Those efforts were met with further violence, as insurgents attacked the convoys using guns and dynamite. R. 81-2-11, 81-10-12, 81-10-22, 81-10-28, 135-3. Although the insurgents were armed, the State Department reported that Bolivian security forces "first exhausted non-lethal means" of dispersing the insurgents, R. 81-10-13, and only "returned fire" once live fire was directed at them, R. 81-10-12. In the violence that followed, a number of people, again including both soldiers and insurgents, were killed or injured. R. 77-2 to 77-4 (¶¶ 9-16), 77-12 to 77-14 (¶¶ 54-58), 77-16 (¶ 69).

On October 13, the State Department issued a public statement reaffirming that "[t]he American people and their government support Bolivia's democratically elected president, Gonzalo Sánchez de Lozada." R. 81-24-1. And with regard to the ongoing protests in La Paz, State Department personnel in Bolivia reported that the police had "exercised enormous restraint in dispersing the crowds, resorting to tear gas but neither to rubber bullets or more lethal force in carrying out their responsibilities." R. 81-10-44. State Department personnel further reported that, although President Lozada had offered "major concessions," the Morales-led insurgency had "stated that nothing short of the President's resignation would end the demonstration." R. 81-10-38. And they noted that Morales had "criticized the [United States] for supporting" the Lozada government. R. 81-10-27.

On October 17, as a result of his government's inability to control the insurgency, President Lozada was forced to resign, along with the remainder of his government, and President Lozada and Minister Berzaín left Bolivia for the United States. Even after President Lozada's resignation, the State Department reiterated its support, "commend[ing] President [Lozada] for his commitment to democracy and to the well being of his country" and expressing "regret [for] the circumstances including the loss of life that led to ex-President [Lozada's] resignation." R. 81-26-1. In November 2003, the American ambassador, David Greenlee, publicly stated that the Lozada government was a "constitutional government under threat and under siege" and asserted that "[g]overnments should be able to defend themselves." R. 81-3-2. In a 2004 report on human-rights practices in Bolivia, the State Department—with the full benefit of hindsight—reported to Congress that "[t]he Bolivian military and police generally respected human rights in 2003, despite two major incidents of social upheaval." R. 81-2-6. Referring specifically to the events at issue in this case, the State Department concluded that, "[d]espite unrest created by two episodes of major social upheaval, the military and police acted with restraint and with force commensurate to the threat posed by protestors." R. 81-2-12.

After two successive presidents were also forced to resign as a result of violence sparked by Morales-led insurgents, Morales became president of

Bolivia in 2005. Under the Morales regime, relations between the United States and Bolivia have sharply deteriorated. In 2008, Morales expelled the American ambassador and the DEA from Bolivia; Morales has aligned the Bolivian government with other hostile governments such as Venezuela and Iran. The Morales-led Bolivian government has sought the extradition of President Lozada and Minister Berzaín from the United States to face charges relating to the 2003 events; the United States, however, has granted asylum to Minister Berzaín and has to date refused to take action on the Bolivian government's requests.[2] News of Minister Berzaín's asylum sparked violent demonstrations in La Paz, during which thousands of protesters tried to storm the American embassy and had to be repelled by the police with tear gas. R. 81-4-25 to 81-4-29, 85-E-1; Eduardo E. Gamarra, *Washington Silent on Attack at U.S. Embassy*, Miami Herald, June 17, 2008, at A15.

2. Procedural History

a. In 2007, plaintiffs brought suit against President Lozada and Minister Berzaín; in the operative version of their complaint, filed in the United States District Court for the Southern District of Florida, plaintiffs alleged primarily that the Lozada government had used disproportionate force in suppressing the 2003 unrest, and that bystanders who were allegedly not in-

[2] President Lozada has not yet sought asylum in the United States.

volved in the unrest were killed or injured as a result, in violation of the ATS and Bolivian or Florida law.[3]

b. Defendants moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on three grounds relevant to this appeal. *First*, defendants contended that the complaint should be dismissed because it presents a nonjusticiable political question. Defendants argued that there are no judicially manageable standards to assess the actions of a foreign sovereign in responding to violent unrest. Defendants also contended that the district court could not pass judgment on the actions of the Bolivian government without also passing judgment on prior pronouncements of the United States government supporting the Lozada administration and the actions it had taken to quell the unrest. *See* R. 81-15 to 81-19.

Second, defendants contended that an ATS claim requires the violation of an actionable international norm, and that no such norm existed here. Specifically, defendants argued that, on the undisputed assumption that the Bolivian government was entitled to use some force in responding to an armed insurgency, there is no valid international norm prohibiting a government from using disproportionate force. *See* R. 81-22 to 81-43.

[3] Plaintiffs also brought a claim under the Torture Victim Protection Act, 28 U.S.C. § 1350 note, which was dismissed for failure to exhaust local remedies. *See* R. 124. That claim is not at issue in this appeal.

Third, defendants contended that they were entitled to immunity as a former head of state (President Lozada) and under the Foreign Sovereign Immunities Act (FSIA) (Minister Berzaín). Although the current Bolivian government purported to waive their immunity, defendants contended that those waivers were invalid because they were made by a hostile regime without defendants' consent. *See* R. 81-22 to 81-25.

c. The district court invited the Justice Department and the State Department to file briefs expressing their views. Several months later, however, the United States instead filed a "notice" in which it refused to do so. The government noted that it had received a waiver of defendants' immunity from the Bolivian government and that the State Department had "accepted" it. R. 107-1. But the government proceeded to caution that "[the fact] that [the government] has accepted the waiver should not be construed as an expression that the United States approves of the litigation proceeding in the courts of this country or that the United States takes a position on the merits of dispositive issues raised by the parties and now pending before this Court." R. 107-2. The government stated that it was "tak[ing] no position on those issues at this time," noting that "[t]he United States' relations with the current Government of Bolivia are complex and difficult" and citing the State Department's unwillingness to take positions at times when it "might be inopportune diplomatically." *Id.*

d. The district court denied defendants' motion to dismiss in relevant part, rejecting each of defendants' three primary contentions.

i. With regard to the political question doctrine, the district court applied the multifactor test set out in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), which considers (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; and (6) the potential of embarrassment from multifarious pronouncements by various departments on one question. R. 135-7 to 135-8.

The district court concluded that those factors did not support application of the political question doctrine to bar plaintiffs' suit. R. 135-8 to 135-16. The court reasoned that "resolution of the plaintiffs' claims would not require me to reexamine any military or political judgments of the Executive Branch," because "the plaintiffs do not challenge actions or decisions taken by the Executive Branch in the United States." R. 135-10. "The fact that the Executive Branch may have previously commented on the events in Bolivia," the court continued, "does not necessarily transform this case into a nonjus-

ticiable political question." *Id.* As to the existence of judicially discoverable and manageable standards, the court reasoned that "the plaintiffs' claims . . . have specific discernable elements, and the cases involving these claims provide manageable standards for assessing such claims." R. 135-12. The court added that it was "not [being] asked to pass any judgment on the United States' military or political actions, decisions, or policies." *Id.* The court next reasoned that the case involved "ordinary ATS claims," as to which "customary international law provides the appropriate standards for adjudicati[on]." R. 135-13. As to the remaining *Baker* factors, the district court heavily relied on the fact that "[t]he United States [had] declined to intervene in this case after it was invited to do so," which, in its view, "counsel[ed] against application of the political question doctrine." R. 135-14 to 135-15.

ii. With regard to the ATS, the district court cited two potentially actionable international norms that could support plaintiffs' ATS claims: (1) a norm prohibiting "extrajudicial killing," either where a political opponent has been specifically targeted or where innocent civilians have been attacked without provocation, and (2) a norm prohibiting "crimes against humanity," where a widespread or systematic attack is directed against a civilian population. R. 135-21 to 135-31. As to the first norm, the court reasoned that some of the plaintiffs had "alleg[ed] sufficient facts to plausibly suggest that the

killings were targeted." R. 135-25. The court rejected defendants' contention that "a claim for extrajudicial killing requires the showing of custody or control." R. 135-27. As to the second norm, the court reasoned that plaintiffs had sufficiently alleged that there had been large-scale attacks; that the attacks were directed against a particular civilian population; and that the victims were targeted because of their membership in that population. R. 135-29 to 135-31.

iii. Finally, with regard to official immunity, the district court summarily rejected defendants' arguments. As to President Lozada, the court reasoned that "[t]he current Bolivian government has waived any head-of-state immunity that [President] Lozada would have enjoyed in this litigation." R. 135-20. The court noted that the United States had indicated in its notice that the State Department had "accept[ed]" that waiver. *Id.* As to Minister Berzaín, the court reasoned that, assuming that the FSIA applied to individuals, his immunity had likewise been waived. R. 135-21.

e. Defendants appealed as of right from the district court's rejection of their argument on official immunity, and also sought certification for interlocutory appeal from, *inter alia*, the district court's rejection of their arguments on the political question doctrine and the ATS. The district court granted defendants' motion to certify those issues for interlocutory review. *See* R. 155-1 to 155-5. At the outset, the court noted that "[t]his case contains

several contentious controlling issues of law, any one of which could dispose of the case." R. 155-2. With regard to the political question doctrine, the court explained that "there are no cases directly on point[] and there are substantial grounds for disagreement as to whether judicially manageable standards exist in this context." R. 155-3. With regard to the ATS, the court reasoned that "substantial grounds for disagreement exist on this issue as well." R. 155-4. The court added that, "[s]hould the Eleventh Circuit determine no international norms exist in this context, the basis for federal jurisdiction would evaporate and the pendent [Bolivian or Florida law] claims could be dismissed." *Id.*

f. This Court noted probable jurisdiction over defendants' appeal as of right, granted defendants' petition for certification in relevant part, and consolidated the two appeals.

C. Standard Of Review

This Court reviews a district court's decision whether to grant a motion to dismiss under Rule 12(b)(1) or Rule 12(b)(6) de novo. *See, e.g.*, *Clark* v. *Riley*, 595 F.3d 1258, 1264 (11th Cir. 2010); *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

SUMMARY OF ARGUMENT

Even by the standards of litigation involving the Alien Tort Statute, this is an extraordinary case. The plaintiffs here, Bolivian nationals, seek to sue former Bolivian officials for events that occurred solely in Bolivia. To the best of our knowledge, if this lawsuit is permitted to go forward, it would represent the first time that a foreign head of state has stood trial in the United States under the ATS for his actions while in office. The adjudication of such a lawsuit would require an American court to review not only the military and political judgments of a foreign government, but also the actions of the United States government in its conduct of foreign policy. For three independent reasons, this lawsuit cannot proceed in an American court, and the district court's decision not to dismiss the lawsuit should be reversed.

A. The district court principally erred when it held that the political question doctrine did not bar plaintiffs' lawsuit. Specifically, the district court incorrectly held that there were judicially discoverable and manageable standards for resolving the issue presented by this case: *viz.*, whether defendants used disproportionate force in responding to civil upheaval. It is well established that, under the political question doctrine, American courts are not equipped to evaluate judgments made by the American military. *A fortiori*, they are even less equipped to evaluate judgments made by a *foreign* military in dealing with a conflict on foreign soil several years ago.

The district court compounded that error by holding that it could resolve this case in a manner that fully respects the coordinate branches. Resolution of this case would require a federal court to pass judgment on the actions of Executive Branch, which repeatedly ratified the actions of the Lozada government both during and after the events in question. And it would also require the court to pass judgment on the actions of the current president of Bolivia, who, according to the State Department's contemporaneous assessment, instigated the unrest in question. In doing so, the court would inevitably interfere with the State Department's ability to conduct relations with the current and former Bolivian regimes as it sees fit. By any standard, this case does not belong in an American court, and the district court should have ordered dismissal.

B. The district court also erred when it held that plaintiffs had identified actionable international norms that would support jurisdiction under the ATS. As other courts and the government have recognized, there is no specific or universal norm of international law prohibiting the disproportionate use of force. Recognition of such a norm, moreover, would have a disruptive effect, because it would impair the ability of foreign officials to carry out their duties; affirmatively trench upon the sovereignty of other nations; and flood the American courts with claims from civilians killed or injured in foreign conflicts. To the extent that plaintiffs rely on narrower international

norms prohibiting extrajudicial killing and crimes against humanity, that reliance is unavailing because plaintiffs' complaint contains insufficient allegations linking defendants to violations of those norms. And in any event, plaintiffs' ATS claims should have been dismissed because plaintiffs failed to exhaust their local remedies and because recognition of plaintiffs' claims would violate the presumption against the extraterritorial application of domestic law.

C. Finally, the district court further erred when it rejected defendants' contention that they were entitled to official immunity. President Lozada is entitled to immunity as a former head of state, and Minister Berzaín is entitled to immunity as a former government official for his official conduct. Although this Court has never squarely addressed the question, the better view is that the immunity of a former government official cannot be waived by a subsequent regime. Such a rule is particularly justified where, as here, the Executive Branch has previously signaled its disapproval of the regime and has failed to give an express and unambiguous indication that it wishes the lawsuit to proceed. In this case, the State Department, citing the political sensitivities, refused to take a position on the immunity question. That should have indicated to the district court that the case should *not* go forward—not that it should. In short, this nonjusticiable and unprecedented action should be dismissed.

ARGUMENT

THE DISTRICT COURT ERRED BY DENYING IN RELEVANT PART DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' LAWSUIT

A. Plaintiffs' Lawsuit Is Barred By The Political Question Doctrine

The district court principally erred when it held that the political question doctrine did not bar plaintiffs' lawsuit. That error warrants reversal.

The political question doctrine is grounded in the principle that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Aktepe* v. *United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (quoting *Haig* v. *Agee*, 453 U.S. 280, 292 (1981)), *cert. denied*, 522 U.S. 1045 (1998). As the district court correctly recognized, the application of the political question doctrine is governed by the six-factor test established by the Supreme Court in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). *See* p. 12, *supra* (listing factors). Notably, in order for a case to be dismissed under the political question doctrine, it is not necessary for all six of the *Baker* factors to be satisfied; instead, a case may be dismissed as long as "at least one of the [*Baker*] characteristics is present." *Carmichael*, 572 F.3d at 1280.

This case involves the unusual situation of a claim by foreign nationals against former officials of the same country for their actions in connection with the exercise of military and political power while in office. Yet this case

in many respects presents the paradigmatic example of a political question that Article III courts lack the ability and capacity to resolve. As this Court has noted, "[f]oreign policy and military affairs figure prominently among the areas in which the political question doctrine has been implicated." *Aktepe*, 105 F.3d at 1403. This case directly implicates both of those areas, and, in refusing to apply the political question doctrine, the district court committed reversible error.

1. There Is A Lack Of Judicially Discoverable And Manageable Standards For Resolving The Issue Presented By This Case

a. Under the second factor of the *Baker* test, it is well established that courts lack judicially discoverable and manageable standards to evaluate judgments made by the military—including judgments concerning the response to domestic civil upheaval. The Supreme Court most prominently recognized that principle in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). In *Gilligan*, a group of plaintiffs alleged that the National Guard "act[ed] . . . without legal justification" in suppressing the 1970 Kent State riots, and, specifically, that the National Guard's actions rendered inevitable the use of lethal force to suppress the unrest. *Id.* at 3; *see also id.* at 12-13 (Blackmun, J., concurring) (summarizing allegations). The Court concluded that the plaintiffs' claims were barred by the political question doctrine. *Gilligan*, 413 U.S. at 10. The Court reasoned that "it is difficult to conceive of an area of

governmental activity in which the courts have less competence," on the ground that "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments" (as to which, in the context of the American military, the political branches have ultimate control). *Id.*

This Court has applied the principle that courts lack judicially discoverable and manageable standards to evaluate military judgments in a variety of different contexts. For example, in *Aktepe*, *supra*, a miscommunication caused the American military to fire several live missiles at a friendly Turkish warship during a NATO training drill, resulting in several deaths and numerous injuries. *See* 105 F.3d at 1401-1402. This Court held that no judicially manageable standards existed because the conduct occurred in the course of a military exercise. *Id.* at 1404. Citing *Gilligan*, the Court explained that judgments on how to conduct such exercises "result from a complex, subtle balancing of many technical and military considerations, including the trade-off between safety and greater combat effectiveness." *Id.* The Court noted that "[c]ourts will often be without knowledge of the facts or standards necessary to assess the wisdom of the balance struck." *Id.* And critically for purposes of this case, the Court added that "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Id.*

Similarly, in *Carmichael*, *supra*, a service member brought a claim against a military contractor for injuries suffered in a road accident in Iraq. 572 F.3d at 1275. Once again, this Court held that the claim was barred by the political question doctrine because of the lack of judicially manageable standards. *Id.* at 1288-1289. The Court reasoned that, "[g]iven the circumstances under which the accident in this case took place, we are without any manageable standards for making reasoned determinations regarding these fundamental elements of negligence claims." *Id.* at 1288. For example, the Court noted, "the dangerousness of the circumstances . . . renders problematic any attempt to answer basic questions about duty and breach." *Id.* at 1289. Notably, the Court explained that, "[i]n the typical negligence action, judges and juries are able to draw upon common sense and everyday experience in deciding whether [the defendant] has acted reasonably," but that "these familiar touchstones have no purchase here, where any decision to [act differently] could well have jeopardized the entire military mission and could have made [military personnel] more vulnerable to an insurgent attack." *Id.*

b. In holding that there were judicially discoverable and manageable standards for resolving the issue presented by this case, the district court distinguished the foregoing cases on the ground that, in those cases, "a court would be compelled to second-guess the United States' military judgments," whereas here the court was "not [being] asked to pass any judgment

on the United States' military or political actions, decisions, or policies." R. 135-12. With respect, however, the district court had it exactly backwards. To the extent that the district court was being asked to evaluate judgments made by a *foreign* military in dealing with a conflict in a foreign land, it was even *less* equipped to evaluate those judgments than it would be to evaluate judgments made by the American military—judgments that this Court and others have uniformly held are not subject to judicial review.

In committing that error, the district court effectively conflated the second *Baker* factor (*viz.*, whether there were judicially discoverable and manageable standards) with the first (*viz.*, whether there was a textually demonstrable constitutional commitment of the issue to a coordinate political department). The district court held that the first *Baker* factor did not apply because "resolution of the plaintiffs' claims would not require [it] to reexamine any military or political judgments of the Executive Branch" and because "the plaintiffs do not challenge actions or decisions taken by the Executive Branch in the United States." R. 135-10.

Even assuming that the district court's assessment of the first *Baker* factor was correct, *but see* pp. 28-33, *infra*, the second *Baker* factor does not specifically address whether the involvement of the Judicial Branch would interfere with the decisions of the Executive Branch; instead, it addresses whether the Judicial Branch is *competent* to review the underlying conduct

at issue. As the D.C. Circuit has explained, "so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature." *United States ex rel. Joseph* v. *Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981) (citations omitted), *cert. denied*, 455 U.S. 999 (1982). Put simply, an American court is no more competent to assess the military decisions of foreign leaders than a foreign court would be to consider a claim against the President for the accidental killing of civilians in Iraq or Afghanistan—and, for that reason, plaintiffs' lawsuit should not have been allowed to proceed.

Indeed, it would be especially difficult for an American court to evaluate judgments made by the foreign military in this case in light of the difficulties in developing the factual record necessary for proper adjudication of plaintiffs' claims. The potential witnesses in this case would include not only numerous civilians, but also other members of the Bolivian cabinet and military and police officers involved in quelling the unrest and defending the democratically elected government of Bolivia.

Under the best of circumstances, transnational discovery is expensive, burdensome, and time-consuming. This case, moreover, does not arise under the best of circumstances. To the contrary, ironically in part because of the

events at issue in this case, Bolivia is now controlled by a regime that is extremely hostile both to defendants and to the United States government. As a result, the already complex process of conducting international discovery will be vastly more complicated and potentially even dangerous; counsel would have to travel to locations throughout Bolivia to conduct fact development and discovery regarding extremely sensitive events amid a tense political situation and strong anti-American sentiments. And even discovery in the United States would be complicated, to the extent that defendants will be required to seek to depose State Department officials present in Bolivia at the relevant times and to obtain information (potentially including classified information) concerning the United States government's positions and actions. The difficulties in conducting factual development simply highlight that a federal court lacks the capacity to resolve this dispute.

c. The district court offered two other reasons in support of its conclusion that there were judicially discoverable and manageable standards for resolving the issue presented by this case. Both of those reasons are invalid.

i. The district court first suggested that there were judicially manageable standards on the ground that plaintiffs' claims "have specific discernable elements": specifically, by virtue of its conclusion that plaintiffs had alleged the violation of an actionable international norm under the ATS. R. 135-12. For purposes of the manageable-standards prong of the *Baker*

analysis, however, the central inquiry is not whether a cause of action possesses discernable elements as a general matter. Rather, it is whether a court has the capacity to apply those elements *to the controversy at hand*. Thus, in *Carmichael*, this Court concluded that, although the elements of a negligence claim were well-established, it lacked judicially manageable standards "[g]iven the circumstances under which the accident in this case took place." 572 F.3d at 1288. Similarly, in *Aktepe*, the Court held that there was an absence of judicially manageable standards notwithstanding "[the plaintiffs'] effort to cast their suit as a common negligence action directed at [military personnel]." 105 F.3d at 1404. If manageable standards do not exist for a garden-variety negligence claim in the military context, it is hard to see how they can exist for a claim under the ATS—a statute that is hardly a model of clarity in the first place.

This Court's decision in *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), is not to the contrary. In that case, the Court did permit claims to proceed against a military contractor that operated a transport plane that crashed in Afghanistan. *Id.* at 1336-1337. In concluding that there were judicially manageable standards, however, the Court stressed that "[t]he allegations [at issue] do not involve combat, training activities, or any peculiarly *military* activity at all." *Id.* at 1363. In *McMahon*, therefore, the critical distinction was that the activity at issue was fundamentally non-

military in nature. Here, by contrast, the claims at issue concern the activities of Bolivian government forces in response to violent unrest, and the military dimension of the underlying events is central to those claims. *McMahon* is therefore inapposite, and there is no valid justification for carving out an exception to the general principle that courts lack judicially discoverable and manageable standards to evaluate military judgments.

ii. The district court also suggested that there were judicially manageable standards on the ground that plaintiffs were "seek[ing] damages for the allegedly targeted killings of [particular] family members": *i.e.*, because plaintiffs were alleging discrete incidents of killing, rather than challenging defendants' conduct during the entire insurgency. R. 135-12. In advancing that argument below, plaintiffs principally relied on this Court's decision in *Linder* v. *Portocarrero*, 963 F.2d 332 (11th Cir. 1992), which permitted claims to proceed against individual defendants who allegedly murdered an American in Nicaragua on the ground that the case involved only a "single incident" and did not "require the court to pronounce who was right and who was wrong in the Nicaraguan civil war." *Id.* at 337.

In this case, however, the allegations specific to each plaintiff simply cannot be divorced from the broader context of the unrest during which the deaths at issue occurred. Indeed, plaintiffs' own complaint broadly alleges that defendants were responsible for the deaths of some 67 persons, and in-

juries to 400 others, over a four-week period in cities across Bolivia. *See* R. 77-1 (¶ 1). Plaintiffs, moreover, do not allege that defendants directly ordered (or were even aware of) any of the specific killings at issue, but instead broadly allege that defendants used excessive force more generally in responding to an insurgency—an insurgency staged by Bolivia's current president and contemporaneously condemned by the United States government. *See* R. 77-1 (¶ 1), 77-6 (¶ 30), 77-7 (¶ 36), 77-10 (¶¶ 47, 48), 77-15 (¶ 69), 77-17 (¶ 79), 77-18 (¶ 81). And plaintiffs cannot avoid the conclusion that no judicially manageable standards exist simply by recharacterizing their claims as a challenge to the manner in which those responses were implemented. *See*, *e.g.*, *Gonzalez-Vera* v. *Kissinger*, 449 F.3d 1260, 1262-1264 (D.C. Cir. 2006); *Bancoult* v. *McNamara*, 445 F.3d 427, 436-437 (D.C. Cir. 2006). In sum, because plaintiffs' claims inevitably require a court to pass judgment on the Bolivian government's response to the 2003 unrest, there are no judicially discoverable and manageable standards to resolve them.

2. The Issue Presented By This Case Cannot Be Resolved In A Manner That Fully Respects The Coordinate Branches

Although the remaining factors of the *Baker* test are framed in different ways, each of those factors focuses on the need to avoid judicial interference with the actions of other branches of the government. *See Baker*, 369 U.S. at 217. In this case, the State Department both publicly and privately

supported the Lozada government before, during, and after the events at issue. Further adjudication of this case would therefore require a federal court to pass judgment on the actions of the Executive Branch—and, indeed, would place a federal court squarely in the middle of United States-Bolivia relations by putting the former head of state and defense minister of Bolivia on trial for their actions while in office. For that additional reason, the district court erred by allowing this lawsuit to proceed notwithstanding the political question doctrine.

a. The State Department has consistently taken the position that the Lozada government acted appropriately in response to the 2003 unrest. *See* R. 81-2-6, 81-2-11, 81-5-8, 81-6-5. As noted above, throughout September and October 2003, officials at the United States embassy and other State Department officials were unequivocal in their support of the actions taken by President Lozada and his government. *See* pp. 3-9, *supra*; R. 81-10-4 to 81-10-49. Both in the immediate aftermath of Mr. Lozada's forced resignation and in subsequent reports, the State Department specifically found that the Bolivian military and police had acted with restraint, used force commensurate to the threat posed by protesters, and generally respected human rights. *See* p. 8, *supra*; R. 81-2-6, 81-2-12, 81-3-3, 81-26-1. In 2007, moreover, the United States granted Minister Berzaín's request for asylum, notwithstanding the efforts by the current Bolivian government to extradite Presi-

dent Lozada and Minister Berzaín to face charges relating to the events at issue in this case. *See* R. 81-4-25 to 81-4-29.

b. Those repeated statements of Executive Branch policy implicate each of the remaining *Baker* factors. With regard to the first factor—a textually demonstrable constitutional commitment of the issue to a coordinate political department—it is a familiar principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government." *Baker*, 369 U.S. at 211 n.31 (internal quotation marks omitted). Accordingly, "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.*

Applying that principle, courts routinely dismiss cases, including cases involving alleged human-rights abuses, that would call into question the foreign policy of the Executive Branch. For example, the Ninth Circuit upheld the dismissal of claims brought against an American manufacturer of bulldozers that the United States government approved for sale to Israel and that were used by the Israeli military to demolish homes in the Palestinian territories. *See Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 977-979, 983 (9th Cir. 2007). The court reasoned that "[a]llowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel." *Id.* So too

here, given the Executive Branch's repeated endorsement and ratification of the actions of the Lozada government, the resolution of this lawsuit would require "reexamination of a decision" taken by one of the political branches. *McMahon*, 502 F.3d at 1359.

The resolution of this case, moreover, would not only require a court to pass judgment on the past statements and actions of the United States government. It would also insert the court directly into present-day United States-Bolivia relations, because it would require the court directly to pass judgment on the actions of the current president of Bolivia in his capacity as the leader of the insurgency. If this case were resolved in defendants' favor, it would unquestionably have a negative effect on relations with the current Bolivian regime, which are already at best strained; conversely, if this case were resolved in plaintiffs' favor, it would undermine the United States government's consistent support for the prior Lozada government. Indeed, in refusing to take a position on this litigation before the district court, the government cited the "complex and difficult" nature of relations with the current Bolivian regime and the State Department's unwillingness to take positions at times when it "might be inopportune diplomatically." R. 107-2. If the resolution of this case would have no effect on United States-Bolivia relations, that justification for the government's refusal to take a position would have been inapposite. The mere fact that the government advanced that justifica-

tion confirms that the resolution of this case would interfere with the Executive Branch's conduct of foreign relations.

With regard to the remaining *Baker* factors, all of those factors focus in different ways on the need for courts to defer to, not contradict, the decisions and statements of the political branches. In this case, the district court did not question the authenticity or sincerity of the United States' contemporaneous statements of support for the Lozada government's handling of the 2003 unrest; instead, the court attached substantial weight to the United States' refusal to take a position when the court called for its views on this litigation. *See* R. 135-14 to 135-15. Specifically, the court concluded that "the government's decision not to take a position indicates the absence of 'pronouncements' by the political branches regarding the resolution of the plaintiffs' international law claims." R. 135-16.

In so concluding, however, the district court simply misapprehended the import of the government's "notice." In that document, the government did not disavow any of the Executive Branch's numerous statements of support for the Lozada government. Instead, citing the State Department's unwillingness to take positions at times when it "might be inopportune diplomatically," the government refused to take any position on whether the claims should be allowed to go forward—and in fact expressly instructed that its "notice" should not be construed as reflecting the government's assent to

the case's proceeding. *See* R. 107-2. Despite that express instruction, the district court construed the government's non-response as a basis for rejecting defendants' political question defense. *See* R. 135-15.

At a minimum, the district court should have treated the government's refusal to take a position as just that, and accorded it no weight in its analysis of the political question doctrine. *See*, *e.g.*, *Alperin* v. *Vatican Bank*, 410 F.3d 532, 557 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). At least one court has squarely held that dismissal under the political question doctrine is appropriate, even in the absence of a brief or statement of interest from the government, on the ground that allowing the lawsuit to proceed would interfere with prior Executive Branch policies. *See Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007). And here, the government's refusal to take a position actually reflects its affirmative concern that the resolution of this case would interfere with the Executive Branch's conduct of foreign relations, *see* R. 107-2—a concern that counsels in favor of, not against, the application of the political question doctrine. In sum, both because the issue presented by this case cannot be resolved in a manner that respects the Executive Branch's conduct of foreign relations and because there are no judicially discoverable and manageable standards to resolve that issue, the district court erred when it permitted plaintiffs' lawsuit to go forward.

B. Plaintiffs Failed To Allege The Violation Of An Actionable International Norm Under The Alien Tort Statute

Although the district court should have dismissed plaintiffs' lawsuit under the political question doctrine, it also erred when it held that plaintiffs had identified two actionable international norms that would support jurisdiction under the Alien Tort Statute. As the Supreme Court has stressed, a plaintiff may pursue a claim under the ATS only to enforce a norm of international law that is "specific, universal, and obligatory," and the recognition of new actionable international norms requires "judicial caution" and is "subject to vigilant doorkeeping." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727, 729, 732 (2004). The allegations contained in plaintiffs' complaint implicate no such actionable norm, and fail to state a claim under either of the two norms on which plaintiffs relied. The district court should have held that plaintiffs' ATS claims (and therefore their complaint) fail on that additional basis.

1. In Order To Assert A Claim Under The ATS, Plaintiffs Must Identify An Actionable Norm Of International Law Implicated By Their Complaint

In *Sosa*, *supra*, the Supreme Court held that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. The Court explained that the ATS was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [of the ATS's

enactment (*i.e.*, 1789)]." *Id.* The Court warned that, beyond those international norms recognized at the time of enactment, there were only a "very limited set" of additional norms that could give rise to ATS liability. *Id.* at 725. The Court reasoned that "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens." *Id.* at 727. On that basis, the Court announced the requirement that a federal court could recognize an additional actionable norm of international law only if the norm at issue is "specific, universal, and obligatory." *Id.* at 732.

Notably, *Sosa* made clear that, in exercising their "doorkeeping" responsibility with regard to ATS suits, courts must consider not only whether a plaintiff has identified a specific and universal norm, but whether the conduct that forms the basis of the plaintiffs' claim would actually violate that norm. *See* 542 U.S. at 736-738 & n.27. In *Sosa* itself, the Court held that, although a consensus against arbitrary detention may have existed "at a high level of generality," *id.* at 737 n.27, the specific detention at issue "violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738. As the government has explained, under *Sosa*, "the proper focus of the Court is on the conduct in question and not on the legal claim alleged." U.S. Statement of Interest at 36 n.26, *In re*

Agent Orange Prod. Liab. Litig., No. 04-400 (E.D.N.Y. filed Jan. 12, 2005) (R. 81-35-36 n.26). It is therefore insufficient for a plaintiff simply to label a claim as a claim of "war crimes" or "crimes against humanity"; in the government's view, the fact that it is widely accepted that "war crimes" or "crimes against humanity" may constitute violations of customary international law "says nothing about whether [the conduct at issue] violated customary international law." *Id.*

2. A Norm Of International Law Prohibiting The Disproportionate Use Of Force Is Not Actionable Because It Is Not Sufficiently Specific And Universal

As discussed above, the gravamen of plaintiffs' complaint in this case is that defendants ordered the Bolivian military to respond to the 2003 unrest with disproportionate force, with the result that innocent civilians were killed or injured. *See* R. 77-1 (¶ 1), 77-6 (¶ 30), 77-7 (¶ 36), 77-10 (¶¶ 47, 48), 77-15 (¶ 69), 77-17 (¶ 79), 77-18 (¶ 81); pp. 27-28, *supra*. Although this Court has never addressed the issue, other courts have held that there is no actionable norm of international law prohibiting the disproportionate use of force, on the ground that such a norm is insufficiently specific and universal to satisfy the requirements of *Sosa*.

a. With regard to specificity, the Second Circuit has held that an alleged norm of disproportionate use of force was "simply too indefinite to satisfy *Sosa*'s specificity requirement." *Vietnam Ass'n for Victims of Agent*

Orange v. *Dow Chemical Co.*, 517 F.3d 104, 122 (2d Cir. 2008). And in a similar vein, in a decision ultimately upheld by the Ninth Circuit on political question grounds, one district court held that there is no "clear, specific norm" prohibiting "[the] destruction of personal property . . . except where such destruction is rendered absolutely necessary by military operations." *Corrie*, 403 F. Supp. 2d at 1025 (internal quotation marks omitted).

Those decisions rest on a firm foundation. In the military context, the concept of disproportionate use of force is an inherently elusive one. As the committee that reviewed NATO's bombing campaign against Yugoslavia explained, "[t]he main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied." United Nations International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.), *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* ¶ 48 (June 13, 2000) <www.icty.org/x/file/Press/nato061300.pdf> (*Final Report to the Prosecutor*). The committee added that "[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances," on the ground that "[o]ne cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective." *Id.*

Notably, for the same reasons, the government has taken the position that the disproportionate use of force cannot constitute an actionable international norm. In taking that position, the government reasoned that, "while all agree in the abstract that military force should not be 'disproportionate' to military objectives, this moral clarity tends to dissipate in the application of principle to practice." U.S. Statement of Interest at 40, *Matar* v. *Dichter*, No. 05-10270 (S.D.N.Y. filed Nov. 17, 2006) (R. 81-34-40). The government further explained that "the very nature of the principles def[ies] specificity, for they require the balancing of competing considerations and are inherently imprecise"; "[t]hat is, the rules do not proscribe any particular conduct that is readily identifiable." U.S. Statement of Interest at 34, *Agent Orange, supra* (R. 81-35-34).

b. With regard to universality, plaintiffs likewise cannot show that a norm prohibiting the disproportionate use of force is universally accepted. To begin with, at least as they are framed here, plaintiffs' claims would not be recognized under American law if they were made against comparable American officials such as a former president or secretary of defense—and a norm that is not recognized under American law "perforce" cannot qualify as a universally accepted norm of international law. *Saleh* v. *Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009), *petition for cert. pending*, No. 09-1313 (filed Apr. 26, 2010); *see also Sosa*, 542 U.S. at 737 n.28 (same).

It is well established, of course, that American presidents have broad authority to take actions to suppress violence that threatens the public order. *See*, *e.g.*, 10 U.S.C. § 332. No American court has ever permitted a case to go to trial alleging that a current or former president is civilly liable for the exercise of his statutory authority to suppress such violence, nor could a court tenably do so given doctrines such as absolute immunity that protect the actions of individuals in those positions. *See*, *e.g.*, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 756-757 (1982). And subject only to the constraints of the Fourth Amendment, even lower-level officials are immune from suit where, as here, the officials use force to respond to violent rioting—and, where the rioting threatens death or serious bodily harm, officials may use a correspondingly greater degree of force in order to protect the public welfare. *See*, *e.g.*, Restatement (Second) of Torts § 142(2) (1965).

Plaintiffs, moreover, offer not a single example of a comparable claim by a foreign plaintiff against a foreign official being recognized in the courts of any other country, notwithstanding the fact that foreign governments frequently use force to suppress civil disturbances (with the use of force often resulting in the deaths of civilians). Similar episodes have recently occurred again in Bolivia and in Mexico, Venezuela, Peru, Georgia, Turkey, Congo, Kenya, Libya, Egypt, Israel, Pakistan, Nepal, China, and (in an episode that involved United Nations security personnel) Kosovo. *See* R. 94-15 (¶ 51). As

far as we are aware, however, "foreign governments and international bodies have not accused these governments of violating international law by using violence against protestors[] or claimed that the individuals responsible for these actions, including presidents and ministers, are individually liable for having violated international criminal law." *Id.* The apparent absence of such claims thus "suggests that it is not widely accepted that civilian killings that occur during an operation to restore civil order violate international law." *Id.*

3. Practical Considerations Weigh Heavily Against Recognizing An Actionable Norm Of International Law Prohibiting The Disproportionate Use Of Force

As the Supreme Court noted in *Sosa*, the determination of whether a norm is sufficiently specific and universal to support a claim under the ATS "should (and indeed inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732-733. Here, the practical consequences of permitting foreign officials to be sued for their military decisions in American courts are breathtaking, and decisively counsel against recognition of a norm of international law prohibiting the disproportionate use of force.

To begin with, recognition of such a norm would impair the ability of foreign officials to carry out their duties. In the domestic context, the Supreme Court has long recognized "the prospect that damages liability may

render an official unduly cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752 n.32. That concern is equally applicable in the case of foreign officials as it is in the case of domestic ones. Foreign officials should not be deterred from taking actions that they deem to be appropriate by the prospect of being held liable in an American court.

Recognition of such a norm, moreover, would not only chill the conduct by foreign officials of their official duties; it would affirmatively trench upon the sovereignty of other nations. It is the prerogative of foreign governments to determine the extent to which, if at all, their officials are to be held accountable in their courts (or by the electorate) for their official acts. Permitting the imposition of liability in an American court for those acts would represent the very judicial overreaching into the affairs of foreign governments against which the Supreme Court warned in *Sosa*. *See* 542 U.S. at 727-728. As a bipartisan group of four former Legal Advisers to the Department of State explained in an amicus brief in the district court, "[t]he insertion of a United States court into the purely internal affairs of another sovereign nation may, and likely would, inflame international tensions, hamper the ability of the Executive Branch to speak with one voice, and indeed, potentially embarrass the Executive Branch." R. 62-7 to 62-8.

Once a norm prohibiting the disproportionate use of force is recognized, moreover, there can be no doubt that a flood of claims from civilians

killed or injured in foreign conflicts will follow. As the government has explained, recognition of such a norm "threaten[s] to enmesh the courts in policing armed conflicts across the globe." U.S. Statement of Interest at 3, *Matar*, *supra* (R. 81-34-3). Any former official who lives in, or even travels to, the United States would run the risk of being slapped with an ATS suit—and, if the official's immunity can validly be waived, would run the risk of being held personally liable for damages. *See* pp. 55-59, *infra*. In the government's own words, the federal courts would "become embroiled as referees of [armed] conflicts around the world, called upon whenever civilian casualties occur to adjudge the legitimacy of the military action that caused them." U.S. Statement of Interest at 42, *Matar*, *supra* (R. 81-34-42). Claims by foreign civilians against foreign officials would inevitably clog the American courts—notwithstanding the tenuous connection of those claims to the United States.

Finally on this point, it would be incongruous to permit a foreign citizen to sue a foreign leader in an American court when an American citizen cannot sue an American president for the same conduct. *See* pp. 38-39, *supra*. That cannot have been the result Congress intended when it enacted the ATS in 1789. Absent some affirmative indication that claims of this variety can go forward, this Court should be extremely reluctant to recognize such a cause of action in the first instance. Because there is no valid international

norm that supports the allegations in plaintiffs' complaint, the district court erred by refusing to dismiss plaintiffs' ATS claims.

4. The Norms Of International Law Prohibiting Extrajudicial Killings And Crimes Against Humanity Are Not Implicated By Plaintiffs' Complaint

Perhaps recognizing that there is no valid international norm prohibiting the disproportionate use of force more generally, plaintiffs primarily relied below on narrower international norms prohibiting extrajudicial killings and crimes against humanity. Under the Supreme Court's recent decisions in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), however, plaintiffs' complaint contains insufficient allegations linking defendants to violations of those norms. Because plaintiffs fail to state a claim against defendants that is "plausible on its face" for violations of those norms, plaintiffs' reliance on those norms is unavailing. *Iqbal*, 129 S. Ct. at 1949 (citation omitted).

a. With regard to the asserted norm prohibiting extrajudicial killing, the district court held that a claim for violation of that norm is validly stated "when a political opponent has been specifically targeted (most commonly through assassinations) or when innocent civilians have been attacked without provocation." R. 135-24. The district court then determined that many of the plaintiffs had sufficiently alleged that the victims had been tar-

geted by soldiers and that they had not been involved in the civil upheaval. *See* R. 135-25 to 135-26.

The district court critically erred, however, because it made no effort to analyze whether plaintiffs had alleged sufficient facts to support the contention that *defendants* knew or should have known of the alleged targeted killings. Beyond an introductory allegation (hastily added to the amended complaint) that defendants "order[ed] Bolivian security forces . . . to attack and kill scores of unarmed civilians," R. 77-1 (¶ 1), the complaint does not contain a single specific allegation linking the claim of intentional targeting to an actual direction from either defendant. For his part, President Lozada is not alleged to have had *any* direct contact with the conflict other than ordering "the mobilization of a joint police and military operation that they asserted was intended to 'rescue' the group of travelers in Sorata," R. 77-6 (¶ 30); issuing a decree allowing the use of "'necessary force' to reestablish public order," R. 77-7 (¶ 36); and issuing related formal government documents, R. 77-5 (¶ 23(b)), 77-10 (¶¶ 47-48). And while Minister Berzaín was alleged to have been present in the air above the events at Sorata (and to have "directed military personnel in the helicopter where to fire their weapons"), R. 77-8 (¶ 38), 77-15 (¶ 69), there is no claim that he ordered specific targeting—only a generic claim that he "knew or reasonably should have known" about alleged misconduct by persons under his command, R. 77-16 to 77-19

(¶¶ 76-89), and an even more generic claim that he was "widely believed to have been closely involved with the violence," R. 77-5 (¶ 21).

Those allegations are indistinguishable from the ones held to be deficient in *Iqbal*. There, the Supreme Court held that conclusory allegations that senior government officials "knew of, condoned, and willfully and maliciously agreed to subject the [plaintiff]" to unlawful conduct did not suffice to state a claim against those officials. 129 S. Ct. at 1951. Even when those allegations were coupled with allegations that a defendant was the "principal architect" or was "instrumental" in adopting an unlawful *policy*, the Court held that those "bare assertions . . . amount[ed] to nothing more than a formulaic recitation of the elements" and therefore were "not entitled to be assumed true." *Id.* (internal quotation marks and citation omitted). Similarly, plaintiffs here fail to allege sufficient facts to implicate the asserted norm prohibiting extrajudicial killing, and that norm therefore cannot serve as the basis for plaintiffs' ATS claims.[4]

[4] Indeed, it is questionable whether plaintiffs' complaint contains sufficient allegations that *any* intentional targeting occurred—much less that defendants knew, or should have known, about it if it did. The mere fact that some bystanders were shot in the vicinity of a gun battle between insurgents and the military is "more likely explained by lawful, independent . . . behavior," *American Dental Ass'n* v. *Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (citations omitted), and does not support a plausible inference that the bystanders were intentionally targeted. *Compare, e.g.*, R. 77-2 (¶ 8), 77-8 (¶ 38), 77-19 (¶ 91) (alleging that Marlene Ramos was intentionally killed), *with* R. 81-2-28 (State Department report noting that Marlene Ramos was

b. With regard to the asserted norm prohibiting crimes against humanity, the district court held that, in order to state a claim for violation of that norm, "the plaintiffs must sufficiently allege a widespread or systematic attack directed against any civilian population." R. 135-28. As a preliminary matter, it is questionable whether plaintiffs' complaint contains sufficient allegations to assert a claim for crimes against humanity. Courts have labeled as crimes against humanity such massive and notorious atrocities such as the Holocaust, the Rwandan genocide, and ethnic cleansing in the former Yugoslavia. That category is best understood, therefore, to encompass only "crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind." *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Judgment ¶ 644 (I.C.T.Y. May 7, 1997), *available at* 1997 WL 33774656. Plaintiffs' allegations—that 67 persons died (including members of the military and police) and over 400 were injured during the 2003 unrest—do not rise to that extraordinarily high level. *See* R. 77-1 (¶ 1), 77-16 (¶ 75).

In any event, plaintiffs fail to allege sufficient facts to implicate the asserted norm prohibiting crimes against humanity because they merely allege

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"shot in chest by [a] *stray* bullet as she looked out a window") (emphasis added).

that defendants bore animus against and targeted the Aymara population, *see* R. 77 (¶ 98)—a self-evidently "speculative" allegation that is devoid of any more specific allegations to support it. *See Twombly*, 550 U.S. at 555. And in fact, it is unsurprising that victims of the violence were Aymaran because, as plaintiffs concede, the unrest that precipitated their deaths or injuries involved large numbers of Aymarans. *See* R. 77-6 (¶¶ 26, 28), 77-9 (¶ 43). Like the asserted norm prohibiting extrajudicial killing, therefore, the asserted norm prohibiting crimes against humanity is simply not at issue here. At most, plaintiffs' general allegations would support a claim of a violation of a norm prohibiting the disproportionate use of force—and because that norm is not actionable, plaintiffs' ATS claims should be dismissed.

5. Plaintiffs' ATS Claims Should Have Been Dismissed Because Plaintiffs Failed To Exhaust Their Remedies

The district court should have dismissed plaintiffs' ATS claims not only because they failed to allege the violation of an actionable international norm, but also because plaintiffs failed to exhaust their local remedies.

To be sure, this Court has previously held, albeit without extended discussion, that the ATS does not incorporate an exhaustion requirement. *See Jean* v. *Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). We address the issue here, however, both in the event that the Court wishes to consider the issue en banc, *see* Fed. R. App. P. 35(b)(1)(B), and in order to preserve the issue for subsequent Supreme Court review. And we would respectfully submit

that the holding in *Jean* was erroneous. In *Sosa*, the Supreme Court indicated that it would "certainly consider [an exhaustion] requirement in an appropriate case." 542 U.S. at 733 n.21. Since *Sosa*, two other circuits have suggested—looking by analogy both to the Torture Victim Protection Act (TVPA), which contains an express exhaustion requirement, and to other sources of law—that the ATS may incorporate a similar requirement. *See Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 827-833 (9th Cir. 2008) (en banc), *on remand*, 650 F. Supp. 2d 1004 (C.D. Cal. 2009), *appeal pending*, Nos. 02-56256, 02-56390 & 09-56381 (9th Cir.); *Enahoro* v. *Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

If this Court were to conclude that the ATS does incorporate an exhaustion requirement, moreover, such a requirement would plainly not be satisfied here. The district court dismissed plaintiffs' TVPA claim for failure to exhaust, *see* R. 124, and there is no conceivable basis for reaching a different conclusion with regard to plaintiffs' ATS claims. Plaintiffs' failure to exhaust constitutes an independent ground for reversing the district court's decision to allow the ATS claims to go forward.

6. Plaintiffs' ATS Claims Should Have Been Dismissed Because They Violate The Presumption Against Extra-territorial Application

Finally, the district court should have dismissed plaintiffs' ATS claims on the additional independent ground that they violate the presumption against extraterritorial application of domestic law.

As the Supreme Court has noted, "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). That presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Nieman* v. *Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1129 (11th Cir. 1999) (citation omitted). Thus, as the Supreme Court noted as recently as earlier this year, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).

Nothing in the text of the ATS, a generally worded statute, overcomes the presumption against extraterritoriality, and the ATS should therefore be read consistent with that presumption: *i.e.*, not to reach violations of the law of nations committed on foreign soil. Such a reading is consistent with the original understanding of the ATS, which, as the Supreme Court has noted,

was enacted largely in order to provide redress for assaults on foreign ambassadors *in the United States*. *See Sosa*, 542 U.S. at 716-717. It was unimaginable at the time of the ATS's enactment that the statute would be used to "sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).

For many of the same reasons that justify application of the political question doctrine, it would contravene fundamental principles of sovereignty if the ATS were construed to apply to extraterritorial claims like the ones at issue here. Indeed, the United States has made precisely that point in arguing that the ATS does not apply to extraterritorial claims. *See* U.S. Br. at 5-12, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, No. 07-0016 (2d Cir. filed May 16, 2007) (R. 81-40-5 to 81-40-12). The Court should reach the same conclusion in this case and order the dismissal of plaintiffs' ATS claims.

C. Plaintiffs' Lawsuit Is Barred Because Defendants Are Immune From Suit

The district court further erred when it summarily rejected defendants' contention that they were entitled to official immunity. The district court incorrectly relied on the current Bolivian government's waiver of defendants' immunity, which is entitled to no weight here. Because defendants are immune from suit, plaintiffs' lawsuit should be dismissed.

1. As A Former Head of State, President Lozada Is Entitled To Immunity From Suit

As a preliminary matter, there is no question that President Lozada, as the former head of state of Bolivia, is entitled to immunity from suit. The principle of head-of-state immunity dates from the beginning of the Republic. *See*, *e.g.*, *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). And it has been applied to foreclose claims under the ATS like those at issue here. *See*, *e.g.*, *Abiola* v. *Abubakar*, 267 F. Supp. 2d 907, 916 (N.D. Ill. 2003), *aff'd*, 408 F.3d 877 (7th Cir. 2005); *A* v. *Jiang Zemin*, 282 F. Supp. 2d 875, 882-883 (N.D. Ill. 2003), *aff'd*, 383 F.3d 620 (7th Cir. 2004).

The better view, moreover, is that official immunities such as head-of-state immunity protect former as well as current foreign government officials from suit for their actions while in office. *See*, *e.g.*, *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008) (noting that "[t]he common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit"). That is because a rule that an official who would get immunity for certain actions while in office "loses that protection on the day he resigns or reaches the expiration of his term . . . makes no practical sense." *Id.*; *see also A*, 282 F. Supp. 2d at 883 (explaining that "the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued").

2. As A Former Official Of A Foreign Government, Minister Berzaín Is Entitled To Immunity From Suit For His Official Conduct

As a former official of a foreign government, Minister Berzaín, like President Lozada, is entitled to immunity from suit for his official conduct.

a. Earlier this year, in *Samantar* v. *Yousuf*, the Supreme Court held that foreign government officials were not entitled to immunity under the FSIA, but that they could be entitled to common-law immunity. *See* 130 S. Ct. 2278, 2285, 2290-2292 (2010).[5] In so concluding, the Supreme Court adopted the longstanding position of the United States government, which had repeatedly argued that "Congress did not intend the FSIA to govern . . . the immunity of current and former officials." U.S. Br. at 7, *Samantar*, *supra*, No. 08-1555 (filed Jan 27, 2010).

b. For purposes of this case, therefore, the relevant question is whether the common law would have recognized immunity for Minister Berzaín under the circumstances presented here. There can be no doubt about the answer.

Before the enactment of the FSIA, "common law expressly extended immunity to individual officials acting in their official capacity." *Chuidian* v.

[5] Head-of-state immunity has long been understood as a discrete doctrine from the immunity of government officials more generally; the former immunity, unlike the latter, was never thought to be governed by the FSIA. *See*, *e.g.*, *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990). As early as 1794, Attorney General Bradford expressed the opinion that, if the action of a foreign government official was "admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that . . . will of itself be a sufficient answer to the plaintiff's action." *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794). Courts consistently held that foreign government officials possessed immunity for actions taken in their official capacities, *see*, *e.g.*, *Underhill* v. *Hernandez*, 65 F. 577, 583 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897), and the State Department, under its so-called "restrictive theory" of sovereign immunity, took the position that officials of friendly foreign governments were entitled to immunity for actions in their public, official capacities (but not for actions taken in a "strictly commercial" capacity). *See Samantar*, 130 S. Ct. at 2285.

In their complaint, plaintiffs concede that the acts at issue "were committed under actual or apparent authority, or color of law, of the government of Bolivia." R. 77-19 (¶ 88). Indeed, they affirmatively allege that President Lozada and Minister Berzaín acted in furtherance of their official duties. *See*, *e.g.*, R. 77-2 (¶ 7), 77-4 (¶ 19), 77-6 (¶ 30), 77-7 (¶¶ 34, 36), 77-8 (¶ 38), 77-10 (¶ 47), 77-15 (¶ 69). In light of those allegations, defendants are squarely entitled to immunity under well-established common-law principles. *See*, *e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. at 46 (explaining that "the defen-

dant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."). That is particularly true because the allegations in this case involve conduct that implicates the core justifications for official immunity: *i.e.*, "acts concerning the armed forces," which are the type of "strictly political or public acts about which sovereigns have traditionally been quite sensitive." *Heaney* v. *Government of Spain*, 445 F.2d 501, 503 (2d Cir. 1971) (citation omitted); *see also Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993) (noting that "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature").

c. It is of no moment that the State Department has not filed a formal "suggestion of immunity" in this case. To be sure, the issuance of a formal suggestion of immunity would be dispositive of the immunity question. *See Samantar*, 130 S. Ct. at 2284-2285. But the practical effect of the State Department's failure to issue such a suggestion was simply to leave the immunity question in the district court's hands: the district court "had authority to decide for itself . . . whether the ground for immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 2284 (internal quotation marks and citations omitted; alterations in original). Be-

cause the State Department has taken the general position that foreign government officials are entitled to immunity for their official actions, the ineluctable conclusion is that Minister Berzaín, like President Lozada, is entitled to immunity from suit here. The sole remaining question, therefore, is whether the current Bolivian government can (and did) validly waive defendants' immunity.

3. The Morales Regime's Attempt To Waive Defendants' Immunity Should Have Been Rejected

The district court erred when it held that, assuming that defendants are entitled to official immunity, the Morales regime's waiver of that immunity was valid. *See* R. 135-19 to 135-21. That error warrants reversal.

Whether a later government can waive the immunity of democratically elected officials in a previous government without their consent is a question of first impression in this circuit, and there is little jurisprudence on which to draw. *Cf. In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir.) (upholding waiver in the context of a grand-jury proceeding, but noting that prior cases "do not make clear . . . whether a state can waive one of its former rulers' head-of-state immunity"), *cert. denied*, 484 U.S. 890 (1987). Pre-FSIA cases dealing with official immunity "were few and far between," *Samantar*, 130 S. Ct. at 2291; there were even fewer cases addressing the common-law principles governing official immunity after the FSIA was enacted and before *Samantar*; and none of those cases addressed the effec-

tiveness of a waiver by a current foreign government of the immunity from civil suit of officials in a previous government.

The better view is that a former government official's immunity cannot be waived by a subsequent regime. The immunity of a former official of a foreign government is rooted in the premise that, when the official took the actions in question, he was acting as an agent of a sovereign nation. The official's immunity is therefore properly understood to attach to the official himself and cannot be waived by another. *See*, *e.g.*, *Hatch* v. *Baez*, 14 N.Y. Sup. Ct. 596, 600 (App. Div. 1876) (explaining that an official's "immunity . . . springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government").

Allowing a lawsuit to go forward based on a waiver from a subsequent government would have an impact on "the peace and harmony of nations"—even where, as here, the defendant official is no longer even present in the country at issue. *See Hatch*, 14 N.Y. Sup. Ct. at 598, 600. Moreover, if the United States were to sit in judgment on the actions of a former government official in those circumstances, it would not simply implicate foreign affairs; it would potentially chill the conduct of foreign officials *ex ante*. Principles of sovereignty and comity demand that the United States not sit in judgment on a foreign official's actions regardless of the vagaries of relations between the

foreign nation's present and past regimes. Put another way, the Morales regime has no more right to waive the immunity of President Lozada or Minister Berzaín in an American court than a later president could waive the immunity of a former president or defense secretary if they were sued in a foreign court for the accidental killing of civilians in Iraq or Afghanistan or other alleged misconduct in their official duties.

The foregoing analysis is consistent with this Court's decision in *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). In that case, the Court considered whether to recognize immunity in a criminal case for former Panamanian leader Manuel Noriega. 117 F.3d at 1211-1212. Although the Court ultimately permitted the claim against General Noriega to go forward, that case critically differed from this one because the Executive Branch had "manifested its clear sentiment" that General Noriega's claim of head-of-state immunity should be denied. *Id.* at 1212. The Court further suggested that, if it had been required to make its own "independent" judgment on immunity, it would have considered, *inter alia*, (1) the fact that General Noriega never served as the constitutional leader of Panama and (2) the fact that the charged acts related to General Noriega's private pursuit of personal enrichment. *Id.* Although the Court noted that Panama had not sought immunity for General Noriega, the Court never suggested that the conduct of the Panamanian government was dispo-

sitive. *See id.* The Court's analysis in *Noriega* therefore cannot be reconciled with the district court's approach in this case, under which a purported waiver from a subsequent regime is a sufficient basis for rejecting a former government official's claim to immunity.[6]

c. At a minimum, this Court should hold that a former government official's immunity cannot be waived by a subsequent regime without an express indication of approval of the Executive Branch—particularly where, as here, the Executive Branch has previously signaled its disapproval of that regime. Critically, there has been no such express indication of approval here. Although the government noted, in the "notice" it filed in the district court, that the State Department had received and "accepted" a waiver, *see* R. 107-1, the government took pains to stress that "[the fact] that [the government] has accepted the waiver should not be construed as an expression that the United States approves of the litigation proceeding in the courts of this country or that the United States takes a position on the merits of dispositive issues raised by the parties and now pending before this Court." R. 107-2.

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[6] In addition, even if a subsequent regime could waive a former government official's immunity, the waiver in this case appears to have been invalid as a matter of Bolivian law. The waiver came from Bolivia's Minister of Justice, who appears to have lacked the authority to issue it. *See* Ley de Organizacion del Poder Ejecutivo, Ley 3351, Art. 4, 21 de Febrero de 2006 (Bol.).

This case well illustrates the dangers of permitting a waiver of immunity absent a more affirmative expression of approval. The waiver of official immunity by a subsequent regime is a strong indicator of political disagreement between that regime and the prior regime of which the former official was a part. And that is particularly true where, as here, the subsequent government is the very government that effectively overthrew the government over which the former official presided. By permitting a lawsuit against the former official to go forward and proceeding to adjudicate it, an American court would effectively take sides in that dispute and thereby thrust itself into foreign affairs. An American court should not make that decision without the blessing of the branch of government to which responsibility for foreign affairs is primarily committed. In this case, even the question of immunity (much less the ultimate question of liability) was so politically sensitive that the State Department *itself*, citing those sensitivities, refused to take a public position on the immunity question. *See* R. 107. That should signal to a court that it should act with caution—not abandon it.

The district court erred by giving effect to the Morales regime's waiver and permitting this nonjusticiable and unprecedented action to go forward. This Court should correct that error and order dismissal.

CONCLUSION

The district court's order denying defendants' motion to dismiss in relevant part should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4; and

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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellants and a member of the Bar of this Court, certify that, on October 1, 2010, copies of this Brief of Appellants were sent, by third-party commercial carrier for delivery overnight, to the Clerk of the Court and to the following counsel:

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