No. 14-15128

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
(CIV. NOS. 07-22459 & 08-21063)
(THE HONORABLE JAMES I. COHN, J.)

PETITION FOR REHEARING EN BANC BY APPELLANTS

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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 Eleventh Circuit Rule 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 OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a precedent-setting question of exceptional importance: whether plaintiffs may pursue claims against the former head of state and defense minister of a foreign country under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, when they have already recovered adequate remedies in the foreign country for their alleged losses.

s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

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STATEMENT OF THE ISSUE

Whether plaintiffs may pursue claims against the former head of state and defense minister of a foreign country under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, when they have already recovered adequate remedies in the foreign country for their alleged losses.

STATEMENT OF THE CASE

Appellees, nine Bolivian nationals, filed suit against appellants, the former president and defense minister of Bolivia. Appellees claimed, *inter alia*, that defendants authorized the use of disproportionate force in response to civil unrest, in violation of the Alien Tort Statute (ATS) and the TVPA. Defendants moved to dismiss the complaint. The district court dismissed the TVPA claim but permitted the ATS claims to proceed. After granting defendants' petition for certification for interlocutory review, this Court reversed in relevant part and remanded with instructions to dismiss.

On remand, plaintiffs amended their complaint, again asserting claims under the ATS and TVPA. Defendants again moved to dismiss. This time, the district court dismissed the ATS claims but permitted the TVPA claim to proceed. After granting defendants' petition for certification for interlocutory review, a panel of this Court affirmed in relevant part, holding that plaintiffs' TVPA claim was not precluded even though they had already recovered adequate remedies in Bolivia for their alleged losses. The panel's decision was erroneous, and rehearing is therefore warranted.

STATEMENT OF THE FACTS

1. 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 Bolivia's defense minister from August to October 2003. President Sánchez de Lozada's government was a staunch ally of the United States in eradicating drugs and in promoting democracy in the region. President Lozada's principal opponent in these efforts was Evo Morales, the leader of a socialist movement of growers of coca, the primary ingredient in cocaine. R. 174-3 (¶¶ 13-14), 174-8 (¶ 32), 183-2-6.

In 2003, Bolivia was rocked by a campaign of civil unrest, instigated by Morales and others, that culminated in the overthrow of the government. During this period, the government dispatched soldiers and police in an effort to rescue hundreds of travelers held hostage by armed insurgents and to restore order throughout the country. Over the course of two months of conflict, dozens of people died, including soldiers, police, and insurgents. As a result of the uprising, defendants were forced to resign and to leave Bolivia; they now reside in the United States. In an official report to Congress, the State Department concluded that "the [Bolivian] military and police acted with restraint and with force commensurate to the threat posed by protestors." R. 174-15 (¶ 60) to 174-36 (¶ 145), 183-5-13.

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. The Morales-led government sought the extradition of President Sánchez de Lozada and Minister Berzaín from the United States to face charges relating to the 2003 events. The United States has refused to take action on the Bolivian government's requests. *See* R. 174-42 (¶ 172).

2. In 2007, plaintiffs filed suit against defendants. As is relevant here, plaintiffs brought claims under the ATS and TVPA on behalf of relatives who died during the 2003 uprising. Plaintiffs alleged that defendants had violated the international norm against extrajudicial killing by allegedly authorizing the use of disproportionate force in response to the uprising, and that their decedents died as a result. R. 77.

Defendants moved to dismiss the complaint. Defendants argued that plaintiffs' allegations did not establish that they had violated an actionable international norm, as is required for jurisdiction to lie under the ATS. And defendants argued that the TVPA claim must be dismissed because plaintiffs had failed to exhaust local remedies in Bolivia, as the TVPA requires. The district court agreed with defendants on the exhaustion issue and dismissed plaintiffs' TVPA claim without prejudice. *See* 636 F. Supp. 2d 1326, 1332-1333 (S.D. Fla. 2009). The district court rejected defendants' other contentions and refused to dismiss the ATS claims. *See* R-135-40. Noting

the exceptional nature of the case, the court granted defendants' motion to certify its order for interlocutory review. *See* R-155-5.

3. This Court granted defendants' petition for certification for interlocutory review and reversed, holding that plaintiffs had failed to state a valid claim for relief under the ATS. 654 F.3d 1148 (2011). At the outset, the Court emphasized that courts "must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." *Id.* at 1150, 1152. The Court explained that, "in the face of significant conflict," defendants had "ordered the mobilization of a joint police and military operation to rescue trapped travelers" and "reestablish public order." *Id.* at 1154. The Court further noted that there is "no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute extrajudicial killing under international law." *Id.* at 1155 (citation omitted). In such circumstances, the Court continued, "the criteria to judge what is lawful and what is not lawful, especially for national leaders facing thousands of people taking to the streets in opposition, is largely lacking." *Id.* at 1156. The Court remanded to the district court with instructions to dismiss. *Id.*

4. While that appeal was pending, plaintiffs applied for and received substantial relief in Bolivia. Plaintiffs have now obtained relief under two government schemes specifically designed to compensate individuals for

losses in connection with the uprising. Each plaintiff received payments totaling approximately 23 times the average annual income in Bolivia, as well as a free education at a public university. *See* R-203-25; 636 F. Supp. 2d at 1328-1331.

5. On remand, plaintiffs obtained leave from the district court to amend their complaint. In the amended complaint, plaintiffs again asserted claims for extrajudicial killing under the ATS and TVPA. *See* R-174.

Defendants moved to dismiss the amended complaint. *First*, defendants argued that plaintiffs' ATS claims should be dismissed in light of the Supreme Court's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). *Second*, defendants argued that the TVPA claim should be dismissed under the Act's exhaustion provision because plaintiffs had received adequate relief in Bolivia. *Third*, defendants argued that the ATS and TVPA claims should be dismissed because plaintiffs had failed sufficiently to allege secondary liability under the doctrine of command responsibility for the deaths of their decedents. *See* R-183.

The district court granted in part and denied in part the motion to dismiss. *See* R-203. The court agreed that the ATS claims should be dismissed under *Kiobel*. R-203-15 to 203-22. But the court declined to dismiss the TVPA claim, holding, first, that the TVPA claim was not precluded by plaintiffs' recovery in Bolivia, R. 203-23 to 203-31, and second,

that plaintiffs had sufficiently alleged secondary liability under the doctrine of command responsibility for the deaths of their decedents, R. 203-31 to 203-40.

6. The district court granted defendants' motion to certify its order for interlocutory review. *See* R. 211. As to the exhaustion issue, the court reasoned that "there is no case law directly on point and that there are substantial grounds for disagreement as to how the exhaustion provision should be interpreted." R. 211-5. As to the command-responsibility issue, the court explained that the case "presents an issue of first impression: 'whether allegations such as [p]laintiffs[']' are sufficient to satisfy the elements of command responsibility in the context of a modern military operation.'" R. 211-6 (citations omitted).

7. This Court granted defendants' petition for certification for interlocutory review. In the decision under review, however, a panel of this Court affirmed in part, vacated the Court's earlier order, and denied the petition for certification in part.

As is relevant here, on the exhaustion issue, the panel acknowledged at the outset that "[n]o court of appeals has addressed this issue." Slip op. 10. The panel proceeded to conclude that the exhaustion provision "does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state." *Id.* at 16. In its view, the text of the provision—which

states that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred," 28 U.S.C. § 1350 note—was dispositive. Slip op. 16. The panel reasoned that, "[a]s written, the provision provides a prerequisite a plaintiff must satisfy before the court will hear his TVPA claim," but is silent as to whether plaintiffs who have successfully obtained local remedies may pursue claims under the TVPA. *Id.* at 11, 13. Based on that silence, the panel held that, once plaintiffs have sought relief in the foreign country, the provision "no longer bars their claims," even where they obtained adequate relief as a result of that effort. *Id.* at 11.

Critically, in so holding, the panel rejected defendants' argument that the TVPA's exhaustion provision should be interpreted to incorporate common-law principles of exhaustion, including the principle that a plaintiff who has successfully obtained adequate local remedies is precluded from seeking further relief. Slip op. 15-16. The panel determined that "the canon of imputed common-law meaning does not apply where the plain language of the statute provides an 'indication' that Congress did not intend to incorporate the common-law meaning that the defendants advocate." *Id.* at 15. In this case, the panel reasoned, Congress's framing of the exhaustion provision as a "negative condition" supplied the requisite "indication." *Id.*

The panel declined to address the second question certified by the district court: specifically, whether plaintiffs had sufficiently alleged that defendants are secondarily liable under the doctrine of command responsibility for the deaths of their decedents. Slip op. 21. The panel reasoned that considering that question would require it to "scrutinize the scores of factual allegations that support all the plaintiffs' claims"—even though an earlier panel of this Court, on defendants' previous interlocutory appeal, had done precisely that in dismissing plaintiffs' ATS claims. *Id.* at 20.

ARGUMENT

If this lawsuit proceeds, it would be the first time that a foreign head of state has stood trial in the United States under the TVPA for his official actions. And it would be the first time that plaintiffs have been permitted to seek relief in any TVPA action where they have already received adequate compensation for their alleged losses in their home country. In permitting plaintiffs' claim to go forward, the panel in this case reached a counterintuitive result that Congress could not possibly have intended when it created TVPA's narrow cause of action for extraterritorial misconduct.

While the panel's opinion is long on colorful rhetoric about textualism, even the most diehard textualist recognizes the settled canon that, absent an affirmative indication to the contrary, a statute should be read to incorporate common-law principles. *See, e.g.*, *Sekhar* v. *United States*, 133 S. Ct. 2720,

2724 (2013) (Scalia, J.). And under familiar background principles of exhaustion, which the TVPA can readily be read to incorporate through its exhaustion provision, this case does not belong in an American court. The panel erred on a question of exceptional importance involving the interpretation of a federal statute. Rehearing is therefore warranted.

A. The Panel's Decision Is Incorrect

1. The panel's erroneous interpretation of the TVPA's exhaustion provision rested entirely on its text. By its terms, that provision requires plaintiffs to seek "adequate and available" local remedies before bringing a claim under the TVPA. 28 U.S.C. § 1350 note. By the panel's acknowledgment, however, the provision is silent as to whether a plaintiff who has successfully *obtained* such remedies is precluded from pursuing a TVPA claim. Slip op. 13. The panel nevertheless construed that silence as equivalent to an affirmative statement that a plaintiff who has successfully obtained adequate relief may still pursue a claim under the TVPA.

The text of the exhaustion provision by no means compels that bizarre result. To the extent the text is silent as to the preclusive effect of obtaining adequate local remedies, that silence actually supports the contrary interpretation to the panel's, by virtue of the presumption that the provision incorporates common-law principles of exhaustion. As the Supreme Court has explained, the inclusion of a term in a statute necessarily "impl[ies] ele-

ments that the common law has defined [the term] to include." *Field* v. *Mans*, 516 U.S. 59, 69 (1995).

There can be no serious dispute that it is a background principle of exhaustion that, where a plaintiff has successfully obtained local remedies, he is precluded from seeking further relief. The TVPA's exhaustion requirement is drawn not only from "common-law principles of exhaustion as applied by courts in the United States," but also from "general principles of international law." S. Rep. No. 102-249, at 10 (1991); *accord Jean* v. *Dorelien*, 431 F.3d 776, 781-782 (11th Cir. 2005). Both of those bodies of law illustrate the foregoing background principle.

With respect to domestic common-law principles: it is axiomatic that a plaintiff who has successfully obtained adequate remedies from a state or local government may not pursue further relief in a due-process claim under Section 1983. *See Parratt* v. *Taylor*, 451 U.S. 527, 544 (1981). The legislative history of the TVPA specifically cites the exhaustion requirement for Section 1983 due-process claims as illustrative of the operation of the TVPA's exhaustion requirement. *See* S. Rep. No. 102-249, at 10 & n.20; *Doe* v. *Drummond Co.*, 782 F.3d 576, 606 (11th Cir. 2015).

With respect to general principles of international law: an individual who has sucessfully obtained local remedies is similarly precluded from pursuing a claim in international proceedings. *See* Nsongurua J. Udombana,

So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights, 97 Am. J. Int'l L. 1, 9 (2003); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring); *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 243 n.12 (1983) (Kozinski, C.J.), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985). Indeed, as a law-review article cited in the TVPA's legislative history explains, *see* S. Rep. No. 102-249, at 10 n.19, where individuals have received adequate local remedies, a cognizable claim does not even exist under customary international law. *See* Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 Colum. Hum. Rts. L. Rev. 223, 233, 236-237 (1987).

2. The panel did not challenge the background principle that, where a plaintiff has successfully obtained local remedies, he is precluded from seeking further relief. Instead, the panel refused to interpret the TVPA's exhaustion requirement consistent with common-law principles of exhaustion because it concluded that there was affirmative evidence to rebut the presumption that those principles were incorporated. *See* slip op. 15. The panel's purported affirmative evidence, however, consisted of nothing more than the statute's silence on the issue: the panel asserted that the exhaustion provision, through its "negative condition," expressly precluded only "cases where the claimant ha[d] not exhausted her remedies in the foreign state,"

and was silent as to cases where the claimant had successfully obtained adequate remedies. *Id.* at 13-15.

As the Supreme Court has explained, the presumption that Congress intends to incorporate common-law principles is so strong that it applies even where, as here, a statute is silent on the relevant issue. *See, e.g.*, *Neder* v. *United States*, 527 U.S. 1, 23 (1999) (explaining that, despite the absence of an express reference to materiality in various fraud statutes, "we must *presume* that Congress intended to incorporate materiality unless the statute otherwise dictates" (internal quotation marks and citation omitted)); *Microsoft Corp.* v. *i4i Limited Partnership*, 564 U.S. 91, 102 (2011) (noting that, "[u]nder the general rule that a common-law term comes with its common-law meaning, we cannot conclude that Congress intended to 'drop' the heightened standard [of] proof from the presumption simply because § 282 fails to reiterate it expressly"); *Osorio* v. *State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014) ("presum[ing] from the TCPA's silence regarding the means of providing or revoking consent that Congress sought to incorporate 'the common law concept of consent'"). For that reason, the panel erred in refusing to interpret the TVPA's exhaustion requirement in a manner consistent with the common-law principles of exhaustion.

3. Although resort to the legislative history is unnecessary here, it bears noting that the panel's interpretation of the exhaustion provision also

belies the provision's specific purpose. Congress intended the exhaustion requirement to "[s]trik[e] a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts." H.R. Rep. No. 102-367(I), at 4 (1991). Thus, the provision was meant to ensure that the TVPA provides an American forum only to individuals who "are unable to obtain redress in the country where [the] torture took place." 134 Cong. Rec. 28,613-28,614 (1988) (Rep. Fascell); *see also id.* at 28,613 (1988) (Rep. Maszoli) (explaining that, "[u]nder the bill, only those who have no adequate recourse in the situs country could bring suit"); *id.* at 28,614 (Rep. Broomfield) (stating that the TVPA provides an American forum "as a last recourse to justice").

The panel glibly suggested that, under defendants' interpretation, "when it comes to exhaustion, you're barred if you do and barred if you don't." Slip op. 2. But the foregoing legislative history confirms that, under the TVPA, you're barred if you don't exhaust and barred if you do exhaust *and adequately recover*. The panel's interpretation was based on an improperly cramped view of textualism, and rehearing is therefore warranted.

B. The Panel's Decision Involves A Precedent-Setting Question Of Exceptional Importance

The Court should grant rehearing because the panel's decision involves a precedent-setting question of exceptional importance. As the panel acknowledged, the preclusive effect of the exhaustion provision is a question of

first impression. *See* slip op. 10. Indeed, the district court certified its order for interlocutory appeal because "there is no case law directly on point and . . . there are substantial grounds for disagreement as to how the exhaustion provision should be interpreted." R. 211-5. And opposing counsel apparently agrees, touting in a press release that the panel's decision "sets an important legal precedent because no federal appellate court had previously considered the defendants' argument on exhaustion of remedies abroad." Human Rights Program at Harvard Law School, Press Release (June 17, 2016) <tinyurl.com/harvardpressrelease>.

What is more, it is imperative that the Court carefully maintain the limitations on the extraordinary cause of action created by the TVPA. That statute provides a civil remedy in American courts for alleged acts of torture or extrajudicial killing regardless of the nationality of the parties and regardless of where the alleged conduct took place. *See* S. Rep. No. 102-249, at 3-5; H.R. Rep. No. 102-367(I), at 3-4. As such, the TVPA's cause of action comes with significant attendant costs, including burdening American courts with litigation unrelated to the United States and embroiling them in politically sensitive disputes that require them to pass judgment on the actions of a foreign sovereign. *See, e.g.*, H.R. Rep. No. 102-367(I), at 5. In signing the TVPA, President George H.W. Bush cautioned that "[t]he expansion of litigation by aliens against aliens is a matter that must be approached with pru-

dence and restraint," and noted the "danger" that "U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States." Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. of Pres. Doc. 465, 466 (Mar. 12, 1992).

This case epitomizes precisely that danger. If the case proceeds, it will be the first time that a foreign head of state stands trial in the United States under the TVPA for his official actions—much less one who commanded the support of the United States Government. And as this Court emphasized in its opinion in the prior appeal, courts "must exercise particular caution" where, as here, they consider "a claim that a former head of state acted unlawfully in governing his country's own citizens." 654 F.3d at 1150, 1152.

No plaintiff has ever been permitted to seek relief under the TVPA where he has already received adequate compensation for his alleged losses in his home country. In this case, plaintiffs have already obtained local remedies totaling approximately *23 times* the average annual income in Bolivia. *See* pp. 4-5, *supra*. They should not be permitted to seek further relief for their alleged injuries in an American court under the TVPA. This Court should grant rehearing and decide whether they have the right to do so.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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JULY 7, 2016

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellants and a member of the Bar of this Court, certify that, on July 7, 2016, a copy of the attached Petition for Rehearing En Banc was filed with the Clerk through the Court's electronic filing system. In addition, I certify that copies of the attached petition were sent, by third-party commercial carrier for delivery overnight, to the Clerk and to the following counsel:

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I further certify that all parties required to be served have been served.

s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-15128

D.C. Docket No. 1:07-cv-22459-JIC; 1:08-cv-21063-JIC

ELOY ROYAS MAMANI,
ETELVINA RAMOS MAMANI,
SONIA ESPEJO VILLALOBOS,
HERNAN APAZA CUTIPA,
JUAN PATRICIO QUISPE MAMANI, et al.,

Plaintiffs-Appellees,

versus

JOSE CARLOS SANCHEZ BERZAIN,
GONZALO SANCHEZ DE LOZADA,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 16, 2016)

Before ED CARNES, Chief Judge, TJOFLAT and SENTELLE,* Circuit Judges.

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

ED CARNES, Chief Judge:

The plaintiffs who brought this Torture Victim Protection Act (TVPA) lawsuit are heirs to eight civilians killed in 2003 by Bolivian troops acting under the direction of the President and Minister of Defense at the time. The TVPA bars courts from hearing claims brought under it "if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). These plaintiffs have exhausted all of their available Bolivian remedies. They received some compensation through those remedies but not nearly as much as they claim is necessary to fully compensate them for their losses. The defendants contend that the fact the plaintiffs received some compensation through the local remedy bars them from any compensation under the TVPA. In other words, they would have us construe the TVPA so that when it comes to exhaustion, you're barred if you do and barred if you don't. We won't.

I.

Because this is an appeal from the denial of a Federal Rule of Civil Procedure 12(b)(6) motion, we take the facts as stated in the second amended complaint, accepting them as true and construing them in the light most favorable

to the plaintiffs. See United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist., 739 F.3d 598, 600 n.2 (11th Cir. 2014).

A.

Defendant Gonzalo Sánchez de Lozada Sánchez Bustamante (Lozada) was twice elected President of Bolivia, serving from 1993 to 1997 and again from August 2002 to October 2003. Defendant José Carlos Sánchez Berzaín (Berzaín) served as Minister of Defense of Bolivia from August 2002 to October 2003. This case arises from actions they took during Lozada's second term to quash opposition to their administration.

Before they even took office, Lozada and Berzaín knew that certain economic programs they planned to implement, particularly their plan to export natural gas, would probably trigger political protests. They agreed that if their programs provoked widespread protest, they would use military force to kill as many as 2,000 or 3,000 civilians in order to squelch the opposition.

In mid-September 2003, Lozada announced that the government was finalizing a contract to sell natural gas to Mexico and the United States. As he and Berzaín anticipated, the announcement triggered widespread opposition and protest. The protestors, among other things, blocked roads by digging trenches in them or covering the roads with rocks or other impediments. One road they blocked ran between La Paz and Sorata, which is a small town in the mountains

several hours from La Paz. Hundreds of foreign tourists were trapped in Sorata by the roadblocks. The Lozada government decided to use the foreign tourists as a justification for military force against the protestors blocking the roads. On September 19 in a meeting of military officials chaired by Berzaín, plans were made to use military force to carry out Lozada's order to clear the road and rescue the tourists. What followed was a series of operations in September and October 2003 designed to suppress opposition to the Lozada administration. In those operations, troops killed 58 civilians and injured over 400. Eight of those killed were relatives of the plaintiffs.

On October 17, 2003, the United States embassy issued a statement withdrawing support for Lozada and his administration. He resigned the presidency that same day and fled, along with Berzaín, to the United States. That night the commander of the army "issued a statement in which he acknowledged that members of the Armed Forces had successfully complied with the orders of their superiors."

In November 2003 the new Bolivian government passed a "Humanitarian Assistance Agreement" that provided "humanitarian assistance compensation" to the heirs of those killed by the Lozada government's use of military force. The agreement provided payments of 55,000 bolivianos as general compensation and 5,000 bolivianos for funeral expenses. The total amount provided, 60,000

bolivianos, was equivalent to about eight times the average annual income in Bolivia. See Mamani v. Berzain, 636 F. Supp. 2d 1326, 1329 (S.D. Fla. 2009) ("Mamani I"). All the plaintiffs have received the full amount of compensation available under the agreement.

In 2007 the prosecutor for a specially convened Trial of Responsibilities filed a formal indictment charging the defendants and 15 other high-ranking former government officials with various crimes. The ones who had not fled Bolivia were all found "guilty of the crime of genocide through mass killings." Lozada and Berzaín had fled, the United States has refused to extradite them, and Bolivia does not permit trials in absentia. As a result, the two of them have not been tried. Bolivia has declared them fugitives from justice.

B.

The amended complaint sought relief under: (1) the Alien Tort Statute (ATS), 28 U.S.C. § 1350; (2) the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes); and (3) state law.[1] It alleged that in the military operations of September and October 2003, Lozada and Berzaín caused disproportionate force to be used against civilians in order to quell opposition to their administration, which

[1] The plaintiffs originally filed two suits, one against Berzaín in the Southern District of Florida, and one against Lozada in the District of Maryland. They later had their lawsuit against Lozada transferred to the Southern District of Florida. The district court consolidated the two cases, and the plaintiffs filed an amended complaint, followed by a second amended complaint.

resulted in the extrajudicial killings of eight of the plaintiffs' relatives. Plaintiffs sought compensatory, punitive, and exemplary damages (in amounts to be determined at trial), as well as costs and attorneys' fees. The defendants filed a motion to dismiss the amended complaint, which the district court disposed of in two separate orders.

The first order dismissed the plaintiffs' TVPA claims for failure to satisfy the exhaustion requirement in § 2(b) of that act. Mamani I, 636 F. Supp. 2d at 1332–33. The court reasoned that the plaintiffs had failed to exhaust a newly available local remedy created in 2008 by Bolivian Law No. 3955, which provided further compensation to the heirs of those killed by the Lozada government, and that they were required to exhaust that remedy before they could proceed with their TVPA claims. Id. at 1329–33. The second order dismissed some of the plaintiffs' ATS claims and one of their state-law claims but refused to dismiss others.

The district court granted the defendants' motion to certify an interlocutory appeal of that second order involving the issue of whether the complaint failed to state ATS claims, and we granted them permission to appeal that order. See 28 U.S.C. § 1292(b). On appeal, we held that the plaintiffs had not alleged sufficient facts to make out claims for relief under the ATS, reversed the denial of the motion to dismiss, and remanded with instructions to dismiss. Mamani v. Berzain, 654 F.3d 1148, 1152–57 (11th Cir. 2011) ("Mamani II"). Which the district court did.

While their interlocutory appeal from the district court's second order was pending, the plaintiffs did what that court's first order on the motion to dismiss, which involved the TVPA claims, had required them to do. They sought compensation under Bolivian Law No. 3955. As heirs of the victims, they received the benefits they were entitled to under that law: (1) a free public university education to obtain a bachelor's degree; and (2) a payment of about 145,000 bolivianos. At the time, the 145,000 bolivianos, which equaled USD $19,905.56, was about 15 times the average annual income in Bolivia. Mamani I, 636 F. Supp. 2d at 1329–30. When the award under Bolivian Law No. 3955 was combined with the payment they had already received under the 2003 Humanitarian Assistance Agreement, each plaintiff received from their Bolivian remedies total compensation worth 205,000 bolivianos, which is about 23 times the average annual income in Bolivia. That is the equivalent of USD $28,264.17 (based on the 2008 exchange rate), not counting the value of the free education, which is not disclosed in the record. See id.

On remand from the interlocutory appeal of the second order, involving the ATS claims, the plaintiffs sought and received leave to amend their complaint again in light of this Court's decision in that appeal. Their second amended complaint added close to one hundred paragraphs of allegations. It once again sought relief under the ATS, the TVPA, and state law; the defendants once again

moved to dismiss; and the district court once again granted the motion to dismiss in part and denied it in part. Mamani v. Berzaín, 21 F. Supp. 3d 1353, 1364, 1379 (S.D. Fla. 2014) ("Mamani III"). The district court dismissed the ATS claims on the ground that, under the Supreme Court's Kiobel decision, it lacked subject matter jurisdiction over those claims. Mamani III, 21 F. Supp. 3d at 1365–69 (applying Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ___, 133 S. Ct. 1659 (2013)).

The district court, however, refused to dismiss the plaintiffs' TVPA and state-law claims. Id. at 1378–80. On the TVPA claims, the district court rejected the defendants' argument that the exhaustion requirement in § 2(b) of the TVPA barred those claims because the plaintiffs had already received substantial local remedies in Bolivia. Id. at 1369–73. The court also decided that the second amended complaint contained sufficient factual allegations to state plausible claims for relief under the TVPA based on the command-responsibility doctrine. Id. at 1373–78; see generally Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283, 1287–93 (11th Cir. 2002).

The defendants sought certification for an interlocutory appeal of the decision on two issues: (1) whether the exhaustion requirement in § 2(b) of the TVPA bars the plaintiffs' claims, and (2) whether the plaintiffs have failed to state claims for relief under the TVPA. After the district court certified both issues for

appeal under 28 U.S.C. § 1292(b), the defendants filed in this Court a petition for permission to appeal the rulings on those two issues. A motions panel granted the petition as to both issues.

Although the motion panel's order granting permission to appeal pointed to the exhaustion issue as the reason for doing so, it also noted that interlocutory jurisdiction under § 1292(b) "applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the district court." See Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 205, 116 S. Ct. 619, 623 (1996). For that reason, the panel stated, "the parties may wish to address the other certified issue in their briefs to this Court, but we leave to the merits panel whether to address that issue on appeal." The last clause of that statement is appropriate, although not necessary. See 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it."); McFarlin v. Conseco Servs., 381 F.3d 1251, 1253 (11th Cir. 2004); Jones v. United States, 224 F.3d 1251, 1256 (11th Cir. 2000).

II.

The defendants contend that the exhaustion requirement contained in § 2(b) of the TVPA bars a plaintiff from bringing a claim under the TVPA after obtaining

some compensation through the remedies available in the foreign state where the wrongful conduct occurred. See Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). No court of appeals has addressed this issue.

"In construing a statute we must begin, and often should end as well, with the language of the statute itself." United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (quotation marks omitted); accord Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947 (2000) ("[W]hen the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.") (quotation marks omitted); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54, 112 S. Ct. 1146, 1149 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("We begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.").

Subsection 2(b) of the TVPA plainly states: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes). As written, the provision provides a prerequisite a plaintiff must satisfy before the court will hear his TVPA claim. The plaintiffs' failure to initially satisfy that prerequisite by exhausting their Bolivian remedies is why the district court dismissed the TVPA claims in the first amended complaint.

Since then the plaintiffs have exhausted all of their Bolivian remedies, so it can no longer be said of any of them that "the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Id. Plainly each of the plaintiffs has fulfilled the exhaustion prerequisite. Plainly the § 2(b) bar no longer bars their claims. Plainly the defendants' contention to the contrary is wrong.

The defendants would render the plain unplain by reading the statutory language to say what it does not say and mean what it does not mean. They argue that we should read, interpret, and construe § 2(b) to say that a court must decline to hear a claim under the TVPA if the claimant has "sought and obtained adequate remedies" in the place where the conduct occurred and has received substantial compensation there. Putting aside the vagueness problem with the term

"substantial compensation," what the defendants would have us do is not actually read, interpret, or construe statutory language but amend, modify, or revise it.

To conform the statutory language to the defendants' liking we would have to strike the words "has not" before "exhausted" and write in their place the words "has successfully," and we would also have to write in a clause about the claimant having received "substantial compensation." We could do all of that without any problem — if only we were Congress. But unless and until the first and third branches of government swap duties and responsibilities, we cannot rewrite statutes. See Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618, 112 S. Ct. 2160, 2168 (1992) ("The question . . . is not what Congress 'would have wanted' but what Congress enacted in the [statute]."); see also Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, constructions must eschew interpolation and evisceration.").

Seeking to avoid the no-no of judicial revision of statutory language, the defendants argue that what they want § 2(b) to mean is nothing more than "the necessary import" of the language. Not so. The necessary import of "if plaintiffs don't do X they lose" is not "if plaintiffs do X and get Y, they also lose." The import of statutory language is what it says, not what it ought to say. Lawyers

frequently argue for an "interpretation" of plain statutory language that would be better — better for one policy end or another and, not coincidentally, better for their clients as well. The Supreme Court's observation last year describes the flaw in that approach as "the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe [the statute's] silence as exactly that: silence." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___, 135 S. Ct. 2028, 2033 (2015); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it."). And as we have said in similar situations before, the "absence of legislative language restricts our interpretation, as we are not allowed to add or subtract words from a statute. Because our task is merely to apply statutory language, not to rewrite it." Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1334 (11th Cir. 2013) (citation and quotation marks omitted). The text of § 2(b) speaks to the necessity of exhausting local remedies, not to whether exhausting local remedies and recoveries bars TVPA claims. See Ebert v. Poston, 266 U.S. 548, 554, 45 S. Ct. 188, 190 (1925) ("The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed. A casus omissus does not justify judicial legislation.").

Another way to look at it is that the defendants' reading of § 2(b) would nullify two words in the provision: "if" and "not." See Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation marks omitted). Subsection 2(b) states that it bars claims "if the claimant has not exhausted adequate and available remedies." Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes) (emphases added). The word "if" makes the clause a condition for applying the exhaustion bar, and the word "not" makes the condition a negative one. So § 2(b)'s plain language makes the exhaustion bar applicable only where a claimant fails to pursue her remedies in the foreign state. In contrast, the defendants' interpretation of § 2(b) would extend the exhaustion bar to exactly the opposite situation, making it applicable where the claimant has (successfully) exhausted her remedies in the foreign state. In effect, they would have us read § 2(b) to bar claims when there is a local remedy regardless of whether the plaintiff has exhausted her local remedies. It is that interpretation which would render superfluous the words "if" and "not" in § 2(b). Our duty to enforce the law as written by Congress prevents us from interpreting the TVPA in a manner that strikes out some of the words Congress wrote in. See Duncan, 533 U.S. at 174, 121 S. Ct. at 2125.

The defendants attempt to avoid the straightforward language of § 2(b) by asserting the canon of imputed common-law meaning. See, e.g., Sekhar v. United States, 570 U.S. ___, 133 S. Ct. 2720, 2724 (2013) ("It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.") (quotation marks omitted). They urge us to presume that Congress intended the term "exhausted" to import into § 2(b) the "common-law principles of exhaustion as applied by courts in the United States." Those common-law principles, according to the defendants, include a well-settled rule that, "where plaintiffs have successfully obtained local remedies, they are precluded from seeking further relief." But that is not what Congress said.

Putting aside the question of whether that is a well-settled rule, the canon of imputed common-law meaning does not apply where the plain language of the statute provides an "indication" that Congress did not intend to incorporate the common-law meaning that the defendants advocate. See Sekhar, 133 S. Ct. at 2724 (requiring the "absen[ce of] other indication" for the presumption to apply). Because Congress used the words "if" and "not" to frame § 2(b)'s exhaustion bar as a negative condition, the provision limits § 2(b)'s exhaustion bar to cases where the claimant has not exhausted her remedies in the foreign state. That is contrary to the meaning defendants advocate. See Gilbert v. United States, 370 U.S. 650,

655, 82 S. Ct. 1399, 1402 (1962) (stating that the canon applies only "in the absence of anything to the contrary"). We will not presume that Congress intended to imply a meaning that undercuts the explicit words it chose to use.

For these reasons, we conclude that § 2(b)'s exhaustion requirement does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state. Because the plain language is decisive, we will not resort to the TVPA's legislative history. See Harris, 216 F.3d at 976–77. Nor will we entertain the defendants' attempts to use the legislative history to manufacture ambiguity in the text. See id. at 976 ("When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language."). We are a nation governed by the rule of law — not by legislative committee reports. See Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 498 (C.C.D. Me. 1843) (No. 9,662) (Story, J.) ("What passes in congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed, that the opinions of a few members . . . are to be considered as the judgment of the whole house . . . ."). A court therefore must "read the statute according to its text." Hui v. Castaneda, 559 U.S. 799, 812, 130 S. Ct. 1845, 1855 (2010). As Justice Holmes put it: "Only a day or two ago — when counsel talked

of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."[2]

Finally, we note the limited reach of our holding. We do not decide whether the recoveries the plaintiffs received in Bolivia have any preclusive effect under principles of res judicata. Neither claim preclusion nor issue preclusion was raised in this appeal. And we don't decide whether the defendants are entitled to have deducted from any compensation that may be awarded to the plaintiffs in this lawsuit the amount of compensation they received in Bolivia. What we do decide is that successful exhaustion of foreign remedies does not operate under § 2(b) to bar a TVPA claim.

III.

The defendants also urge us to reverse on the ground that the second amended complaint fails to state claims for relief under the TVPA. See Fed. R. Civ. P. 12(b)(6). They argue that the factual allegations (1) do not establish two of the three elements of the command-responsibility doctrine, and (2) fail to show that the eight decedents' deaths were the result of extrajudicial killings.[3] As the motions panel correctly noted, our jurisdiction under 28 U.S.C.

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[2] See Frankfurter, supra, at 538 (quoting a letter from Oliver W. Holmes, Jr., to an unidentified recipient).

[3] To state a TVPA claim under the command-responsibility doctrine, a plaintiff must allege facts establishing that the defendant is culpable for the wrongdoing at issue and that the wrongdoing is the kind of action prohibited by the TVPA. The Ford decision identified three

§ 1292(b) is discretionary, and we therefore are not obligated to consider this issue. See McFarlin, 381 F.3d at 1253. We have identified five conditions that generally must be met before we will consider an issue on interlocutory appeal under § 1292(b). Id. at 1264. They are: (1) the issue is a pure question of law, (2) the issue is "controlling of at least a substantial part of the case," (3) the issue was specified by the district court in its order, (4) "there are substantial grounds for difference of opinion" on the issue, and (5) "resolution may well substantially reduce the amount of litigation necessary on remand." Id.

The defendants' Rule 12(b)(6) issue fails to meet the first condition. To be a pure question of law for purposes of § 1292(b), an issue must be "an abstract legal issue" that "the court of appeals can decide quickly and cleanly." Id. at 1258 (quotation marks omitted). In McFarlin, which involved a proposed § 1292(b) appeal from a partial summary judgment, we drew the following distinction: A pure question of law is an issue the court can resolve "without having to delve beyond the surface of the record in order to determine the facts," as opposed to a

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essential elements for culpability under the command-responsibility doctrine: (1) "a superior-subordinate relationship" with the wrongdoer, (2) knowledge of the wrongdoing, and (3) a failure to prevent or punish the wrongdoing. 289 F.3d at 1288. And the text of the TVPA requires that the wrongdoing for which the defendant is responsible qualify as "torture" or "extrajudicial killing" under the TVPA. See Pub. L. No. 102-256, 106 Stat. 73, § 2(a) (1992) (codified at 28 U.S.C. § 1350, historical and statutory notes); cf. Mamani II, 654 F.3d at 1155 (stating, in the context of reviewing an ATS claim, that "the minimal requirement for extrajudicial killing [is] that [the] plaintiffs' decedents' deaths were 'deliberate' in the sense of being undertaken with studied consideration and purpose").

case-specific question of "whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence of a particular case." Id. at 1259.

Applying that distinction here in the Rule 12(b)(6) context, we conclude that this issue falls into the group of case-specific questions. While the issue of whether a complaint states a claim for relief is a legal determination, see Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997), the issue raised here is not the kind of pure or abstract question of law contemplated in McFarlin. Instead of asking us to decide a pure or abstract question about the TVPA itself, the defendants ask us to decide whether the specific facts alleged by these particular plaintiffs state eight claims for relief under the TVPA. That is the Rule 12(b)(6) equivalent of deciding whether the district court properly applied settled law to facts, the facts being those alleged in the complaint. See McFarlin, 381 F.3d at 1259; see also 16 Charles Alan Wright et al., Federal Practice and Procedure § 3931, 526–27 (3d ed. 2012) (explaining that appeals under § 1292(b) are improper where they involve "a mere matter of properly pleading a claim sought to be brought within a recognized and generally sufficient legal theory"). And we could not decide that question "quickly and cleanly." McFarlin, 381 F.3d at 1258. The second amended complaint contains 224 paragraphs of allegations spanning 55 pages. To decide the Rule 12(b)(6) issue would require us not only to

scrutinize the scores of factual allegations that support all the plaintiffs' claims, but also to assess the clusters of allegations that support each of the plaintiffs' individual claims to relief against the two defendants.

Deciding these Rule 12(b)(6) issues would require us to say much about these particular plaintiffs' allegations and little about the TVPA's general standard for liability.[4] For these reasons we exercise our discretion not to decide the second certified issue, which is actually a cluster of multiple issues involving the claims of multiple plaintiffs against the two defendants.

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[4] The defendants do at one point attempt to dress up their Rule 12(b)(6) issue as raising a pure question of law. Though they dedicate the majority of their Rule 12(b)(6) argument to critiquing the factual allegations in the second amended complaint under Ford's standard, see supra note 3, the defendants do spend a couple of pages of their opening brief arguing that the district court should have applied a heightened knowledge standard. They contend that Ford established the elements of a command-responsibility claim against military commanders, but not the elements of such a claim against civilian officials. They argue that, instead of alleging facts establishing that the defendants "knew or should have known" of the extrajudicial killings, the plaintiffs had to allege facts establishing that the defendants "knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit" the extrajudicial killings. See Rome Statute of the International Criminal Court, art. 28, July 17, 1998, 2187 U.N.T.S. 90.

The defendants' briefs to the district court in support of their motion to dismiss never presented the issue of what knowledge element is required to hold civilian officials liable under the TVPA. In fact, their briefs on the motion did not mention Ford or the knowledge element of the command-responsibility doctrine. The first time they raised the issue was in their reply brief filed in the district court in support of their motion to certify an interlocutory appeal — which was after the court had denied their motion to dismiss. Even assuming that this is an issue suitable for interlocutory appeal under § 1292(b), it would be inappropriate to permit review here given that it was raised at such a late hour in the district court. Cf. Fils v. City of Aventura, 647 F.3d 1272, 1284 (11th Cir. 2011) ("To prevail on a particular theory of liability, a party must present that argument to the district court.").

We answer the first certified question in the negative and affirm the part of district court's order denying the defendant's motion to dismiss the TVPA claims on exhaustion grounds. We decline to answer the second certified question concerning the part of the district court's order denying the motion to dismiss the second amended complaint for failure to state a claim, vacate our previous order granting permission to appeal that part of the district court's order, and deny the petition for permission to appeal it.

Certified question no. 1 **ANSWERED**.

Certified question no. 2 **DECLINED**, order granting permission to appeal as to it **VACATED**, and petition for permission to appeal as to it **DENIED**.