No. 16-733

In the Supreme Court of the United States

GONZALO SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE, ET AL., PETITIONERS

v.

ELOY ROJAS MAMANI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Page

Cases:

Statute:

Miscellaneous:

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Respondents do not dispute that this case presents a clean legal question of exceptional importance. Under Section 2(b) of the Torture Victim Protection Act (TVPA), a plaintiff must exhaust all adequate and available remedies before proceeding in the courts of the United States. See 28 U.S.C. 1350 note. In the decision under review, the court of appeals held that, notwithstanding the TVPA's exhaustion requirement, plaintiffs may pursue TVPA claims even though they have already recovered adequate remedies in the course of exhausting local remedies. As a result, a group of Bolivian nationals

who have each received payments totaling approximately 23 times the average annual income in Bolivia may now pursue further relief in an American court from the former president and defense minister of Bolivia for alleged injuries that occurred in Bolivia. Respondents do not dispute that, if the case proceeds to trial, it will be the first time that a foreign head of state has stood trial in an American court for official actions he took while in office.

While respondents strive to defend the court of appeals' decision, they point to nothing in the language of the TVPA or its legislative history that indicates Congress intended such a counterintuitive result. To the contrary, the TVPA reflects Congress's intent to balance the need to provide redress to torture victims with the need to avoid burdening American courts with disputes that have no connection to the United States. The court of appeals' decision upsets that balance, making exhaustion a mere formality rather than a meaningful limitation on TVPA claims. Given the broad consequences and foreign-policy implications of the decision below, this case cries out for the Court's review or, at a minimum, a call for the views of the Solicitor General.

A. The Court Of Appeals' Decision Is Erroneous

Respondents contend (Br. in Opp. 16-20) that the court of appeals correctly held that, notwithstanding the TVPA's exhaustion requirement, they may pursue TVPA claims even though they have already recovered adequate remedies in Bolivia. That contention lacks merit.

1. As discussed in the petition, Section 2(b) of the TVPA requires a plaintiff to "exhaust[] adequate and available" local remedies before seeking relief in an American court. 28 U.S.C. 1350 note. That language incorporates the "cluster of ideas * * * attached" to the concept of exhaustion, unless the statute "otherwise in-

struct[s]." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (internal quotation marks omitted). Under settled principles of domestic and international law—principles respondents do not dispute—a plaintiff who has successfully obtained adequate relief in the local forum cannot ordinarily pursue additional relief in another forum. See, *e.g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 543-544 (1981); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 714 (2004) (Breyer, J., concurring). Far from supplying a contrary instruction, the TVPA is simply silent on that issue. The TVPA thus does not displace the background rule that adequate relief in a local forum precludes additional relief in another forum.

2. Respondents' efforts to defend the court of appeals' holding are unavailing.

a. Contrary to respondents' contention (Br. in Opp. 16-18), the text of the TVPA does not support the decision below. Parroting the court of appeals' reasoning, respondents contend that the TVPA is not silent on the relevant issue. See *id.* at 17-18. That is because, in the words of the court of appeals, "[t]he text of [the TVPA] speaks to the necessity of exhausting local remedies." Pet. App. 11a.

That is true, but it is also non-responsive. The TVPA says only what happens when a plaintiff *does not* exhaust his remedies. But it is entirely silent about what should happen when a plaintiff *does* exhaust his remedies and, in the process, obtains adequate relief. That silence "creates" but "does not resolve" ambiguity. *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002); see, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 388 (2000). And where, as here, a statute is silent on an issue otherwise governed by a background rule of law, that background rule applies. See, *e.g.*, *Burrage* v. *United States*, 134 S. Ct. 881, 889 (2014); *Microsoft Corp.* v. *i4i Limited*

Partnership, 564 U.S. 91, 101-102 (2011); *Neder* v. *United States*, 527 U.S. 1, 23 (1999). Here, settled background principles provide that a plaintiff who has successfully obtained adequate relief in the local forum cannot pursue additional relief in another forum.

Respondents try to salvage the court of appeals' reasoning by suggesting that it rested not on legislative silence, but rather on the concern that petitioners' interpretation would render superfluous the words "if" and "not" in the exhaustion provision. See Br. in Opp. 17. To the extent the court of appeals cited the rule against superfluity, however, its reliance on that canon was misplaced. By providing that a court should not consider a TVPA claim "if" the plaintiff had "not" exhausted adequate remedies, Congress did not provide that that was the *only* circumstance in which a court should not consider a TVPA claim. Again, there is simply no indication in the text of the TVPA that Congress intended to displace the background rule that a plaintiff who has successfully obtained adequate relief in the local forum cannot pursue additional relief in another forum.

b. Respondents fare no better with their reliance on the TVPA's legislative history (Br. in Opp. 18-20). As respondents (like the court of appeals) conspicuously fail to recognize, Congress made clear that the TVPA's exhaustion requirement was drawn from "common-law principles of exhaustion as applied by courts in the United States" and also from "general principles of international law." S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991). As discussed above, those bodies of law apply the same general principle: a plaintiff who has successfully obtained adequate relief in the local forum cannot pursue additional relief in another forum.

Skirting that on-point legislative history, respondents more generically contend that a rule precluding them

from pursuing additional relief would be contrary to the TVPA's overall "perpetrator-directed purpose." Br. in Opp. 19 n.3. But that contention also fails. It bears remembering that "TVPA" stands for the Torture Victim Protection Act; the legislative history is replete with evidence that Congress intended to provide a judicial forum in the United States only for individuals who are unable to obtain relief in the country where the torture took place. See Pet. 16. And the exhaustion provision, in particular, was designed to "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. 367, 102d Cong., 1st Sess., pt. 1, at 4 (1991). Respondents would upset that balance by converting the Torture Victim Protection Act into the Torture Perpetrator Punishment Act, requiring courts to entertain TVPA claims without regard to whether the victim had already obtained adequate relief.

Attempting to minimize that concern, respondents suggest (Br. in Opp. 18-19) that claim-preclusion rules may bar double recovery when a plaintiff has already recovered from the alleged perpetrator. But claim preclusion does not ordinarily apply when the same defendant was not a party to both actions; not surprisingly, respondents do not concede that claim preclusion would be applicable here. Nor is this case atypical in that regard: as Congress recognized, defendants in TVPA cases will typically be present in the United States, see S. Rep. No. 249, *supra*, at 7, meaning that they will ordinarily not be amenable to suit in the country where the alleged misconduct occurred. Under the court of appeals' interpretation, therefore, plaintiffs in most TVPA cases would be able to recover adequate local remedies, then attempt to obtain further relief in American courts. That interpretation cannot be reconciled either with the specific pur-

pose of the exhaustion provision or the "limited nature" of the TVPA cause of action more generally. *Mohamad* v. *Palestinian Authority*, 132 S. Ct. 1702, 1710 (2012).

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review

There is no serious question that the potential for a former foreign leader to face trial in a United States court for acts taken in his official capacity raises foreign-policy concerns of exceptional importance. Respondents devote the bulk of their brief to arguing (Br. in Opp. 8-15) that the novelty of the question presented and its interlocutory posture present vehicle problems. But the unprecedented nature of the court of appeals' decision weighs in favor of immediate review, not against it.

1. a. Respondents contend that this Court should disregard the "identity of petitioners" and the "circumstances of the challenged actions" on the ground that they do not "ha[ve] any bearing on the question presented." Br. in Opp. 8-9. It is certainly true that the question presented is not *limited* to cases involving former heads of state, but instead reaches cases involving all former foreign officials. But that only illustrates the broad sweep of the court of appeals' holding and the importance of the question presented. At a minimum, the Court should consider the fact that *this case* involves a former head of state (and a former minister of defense) in assessing whether this case itself presents foreign-policy concerns of exceptional importance.

And there can be no serious dispute that it does. Petitioners were two of the top officials in a democratically elected government that the United States supported. Their political opponents—who were also staunch opponents of the United States—orchestrated the protests that led to the violence at issue in this case. The armed

and violent protesters took hundreds of tourists hostage, including many Americans, and cut off all access to La Paz. As the United States has recognized, the Bolivian government responded by using proportionate force to free the hostages and provide access to necessary supplies. See Pet. C.A. Br. 9-10. Petitioners' opponents ultimately overthrew the government and forced petitioners to leave the country; perhaps not surprisingly, they have continued to pursue petitioners through a variety of means, including waiving their immunity and seeking their extradition (which the United States has not granted). See Pet. 3-5.

As even that cursory account of the undisputed facts illustrates, an American court would need to resolve a host of intensely political issues in order to decide this case—with potentially profound implications for American foreign policy. This is precisely the sort of "sensitive * * * and possibly ill-founded or politically motivated suit[]" that counsels in favor of "prudence and restraint" in interpreting the TVPA's requirements. Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. of Pres. Doc. 465, 466 (Mar. 12, 1992). And as petitioners have explained, those considerations warrant certiorari even in the absence of a circuit conflict. See Pet. 17-19.

b. At a minimum, the Court should call for the views of the Solicitor General, as it routinely does in cases that implicate issues of foreign policy. See, *e.g.*, *Arab Bank, PLC* v. *Linde*, 134 S. Ct. 500 (2013); *Kingdom of Spain* v. *Estate of Cassirer*, 562 U.S. 1285 (2011); *Republic of Iraq* v. *Beaty*, 553 U.S. 1063 (2008).

Respondents contend (Br. in Opp. 10-11) that the Court need not take that step here because the government filed a notice in the district court in which it accepted the Bolivian government's waiver of immunity

and stated that it would "continue to monitor this litigation." Gov't Notice 2, 07-22459 D. Ct. Dkt. 107 (Oct. 21, 2008). But the government filed that notice *nine years ago*—long before the parties joined issue on the question presented. At that point in the litigation, the sole question concerning respondents' TVPA claim was *whether respondents had exhausted at all*. See 636 F. Supp. 2d 1326, 1328 (S.D. Fla. 2009) (subsequently dismissing the TVPA claim for failure to exhaust). And in that notice, the government took pains to emphasize that its acceptance of Bolivia's waiver of immunity "should not be construed as an expression that the United States approves of this litigation proceeding in the courts of this country." Gov't Notice 2. The government has never expressed a view on the question presented, and, before ruling on the petition, this Court should give it the opportunity to do so.

2. Respondents contend (Br. in Opp. 11-15) that this case also is an unsuitable vehicle because it is in an interlocutory posture. That contention lacks merit.

a. Respondents note that this Court's "usual practice" is to wait until final judgment before granting certiorari. Br. in Opp. 11-12. That is true enough in the mine run of cases. But the Court routinely grants review where, as here, denying review would deprive a party of a threshold defense—including exhaustion defenses. See, *e.g.*, *Woodford* v. *Ngo*, 548 U.S. 81 (2006); *Porter* v. *Nussle*, 534 U.S. 516 (2002). And it would be particularly appropriate to grant review here in light of the unprecedented nature and foreign-policy consequences of respondents' suit.

b. Respondents contend that interlocutory review would "increase the burdens respondents have already incurred in this protracted litigation." Br. in Opp. 12. As a preliminary matter, to the extent this litigation has

been "protracted," that is largely the fault of respondents, not petitioners. The district court dismissed respondents' TVPA claim for failure to exhaust in 2009. See 636 F. Supp. 2d at 1332-1333. Respondents did not seek to renew their TVPA claim until 2013, after their claims under the Alien Tort Statute had also been dismissed.

But in any event, any incremental delay for further proceedings before this Court would not cause respondents substantial prejudice—especially because the current Bolivian government has made clear that it supports respondents' claims. And even if a delay would cause some incremental prejudice to respondents, that burden pales in comparison to the burdens petitioners would have to shoulder if the court of appeals' decision were permitted to stand and the case allowed to proceed: namely, foreign discovery in a hostile country, potentially followed by a costly trial in the United States.

c. Respondents insist that resolution of the question presented would not put "the issue of exhaustion * * * to rest," because the adequacy of the relief they received remains an open question of fact. Br. in Opp. 13-15. That is flatly incorrect.

Respondents have already litigated, and lost, the adequacy issue. In 2009, the district court considered whether respondents had met their burden of rebutting petitioners' showing that respondents had failed to exhaust adequate remedies in Bolivia; respondents contended, *inter alia*, that they were not required to exhaust because the remedies were inadequate. But the district court disagreed. It held that, although the available local remedies "may not be as much as a plaintiff might be able to recover in an American court," respondents had failed to "show[] that such compensation is * * * inadequate." 636 F. Supp. 2d at 1331-1332.

Perhaps for that reason, in certifying its most recent decision on respondents' TVPA claim for interlocutory review, the district court stated that, if petitioners' interpretation of the statute were correct, it "would undoubtedly preclude [the] TVPA claim and would be dispositive of the case." Order 5, 07-22459 D. Ct. Dkt. 211 (Oct. 8, 2014).

Finally, even if the adequacy of the relief respondents have received were still a live issue in the case, it would be no barrier to the Court's review. As the district court explained, American courts "usually find a foreign remedy adequate unless it is no remedy at all." 636 F. Supp. 2d at 1331 (internal quotation marks and citation omitted). Here, there is no dispute about the relevant historical facts: specifically, that each respondent has received payments totaling approximately 23 times the average annual income in Bolivia, as well as a free education at a public university. See Pet. 6; Br. in Opp. 3.[*] Even if the lower courts had not already resolved respondents' arguments concerning the adequacy issue, therefore, this Court could readily determine for itself whether the compensation respondents concededly received was adequate as a matter of law (or leave that issue for the lower courts to address on remand). Cf. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 (1981) (holding, in the context of the doctrine of *forum non conveniens*, that the remedies available in Scottish courts were not inadequate as a matter of law).

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[*] The majority of those payments were made under a Bolivian statute that reflects a consensus reached between the Bolivian government and a group of relatives of victims of the protests; two respondents were the president and vice president of that group, respectively. See Minutes of Meeting of Agreement, 07-22459 D. Ct. Dkt. 94-5 (July 21, 2008).

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The petition for a writ of certiorari should be granted. At a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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