Nos. 09-16246-FF & 10-13071-FF

In the United States Court of Appeals for the Eleventh Circuit

---

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.)

REPLY BRIEF OF APPELLANTS

JACK LANDMAN GOLDSMITH, III
1563 Massachusetts Avenue
Cambridge, MA 02138

KANNON K. SHANMUGAM
ANA C. REYES
ANNA-ROSE MATHIESON
N. MAHMOOD AHMAD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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 Local Rule 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

Ahmad, N. Mahmood (counsel for appellants)

Akin Gump Strauss Hauer & Feld LLP (counsel for appellees)

Apaza Cutipa, Hernan (appellee)

Baltazar Cerro, Teofilo (appellee)

Bernabe Callizaya, Hermogenes (appellee)

Bollinger, Jeremy F. (counsel for appellees)

Cavallaro, James Louis (counsel for appellees)

Center for Constitutional Rights (counsel for appellees)

Chomsky, Judith Brown (counsel for appellees)

Dershowitz, Alan M. (counsel for appellants)

Dorta & Ortega, P.A. (counsel for amici curiae)

Downey, Kevin M. (counsel for appellants)

Espejo Villalobos, Sonia (appellee)

Farbstein, Susan (counsel for appellees)

Fried, Frank, Harris, Shriver & Jacobson LLP (counsel for amici curiae)

Giannini, Tyler Richard (counsel for appellees)

Goldsmith III, Jack Landman (counsel for appellants)

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 Local Rule 26.1-1, the following persons have or may have an interest in the outcome of this case or appeal:

Ahmad, N. Mahmood (counsel for appellants)

Akin Gump Strauss Hauer & Feld LLP (counsel for appellees)

Apaza Cutipa, Hernan (appellee)

Baltazar Cerro, Teofilo (appellee)

Bernabe Callizaya, Hermogenes (appellee)

Bollinger, Jeremy F. (counsel for appellees)

Cavallaro, James Louis (counsel for appellees)

Center for Constitutional Rights (counsel for appellees)

Chomsky, Judith Brown (counsel for appellees)

Dershowitz, Alan M. (counsel for appellants)

Dorta & Ortega, P.A. (counsel for amici curiae)

Downey, Kevin M. (counsel for appellants)

Espejo Villalobos, Sonia (appellee)

Farbstein, Susan (counsel for appellees)

Fried, Frank, Harris, Shriver & Jacobson LLP (counsel for amici curiae)

Giannini, Tyler Richard (counsel for appellees)

Goldsmith III, Jack Landman (counsel for appellants)

Green, Jennifer M. (counsel for appellees)

Greenberg Traurig, LLP (counsel for appellants)

Greenblum, Benjamin M. (counsel for appellants)

Hansen, Eugene N. (counsel for amici curiae)

Hoffman, Paul L. (counsel for appellees)

Huanca Quispe, Felicidad Rosa (appellee)

International Human Rights Clinic of Human Rights Program, Harvard Law School (counsel for appellees)

Jordan, The Honorable Adalberto (Southern District of Florida)

Kairys, Rudovsky, Messing & Feinberg LLP (counsel for appellees)

Kurzban Kurzban Weinger Tetzeli & Pratt P.A. (counsel for appellees)

Kurzban, Ira Jay (counsel for appellees)

Mamani Aguilar, Gonzalo (appellee)

Mathieson, Anna-Rose (counsel for appellants)

McAliley, Magistrate Judge Chris Marie (Southern District of Florida)

Ortega, Omar (counsel for amici curiae)

Owen, Roberts B. (amicus curiae)

Pedrosa, Eliot (counsel for appellants)

Polebaum, Elliot E. (counsel for amici curiae)

Quispe Mamani, Juan Patricio (appellee)

Ramos Mamani, Etelvina (appellee)

Reyes, Ana C. (counsel for appellants)

Robinson, Davis R. (amicus curiae)

Rojas Mamani, Eloy (appellee)

Rubinoff, Andres Nicholas (counsel for appellants)

Rudovsky, David (counsel for appellees)

Sánchez Berzaín, José Carlos (appellant)

Sánchez de Lozada Sánchez Bustamante, Gonzalo (appellant)

Schnapp, Mark Paul (counsel for appellants)

Schonbrun DeSimone Seplow Harris & Hoffman LLP (counsel for appellees)

Schulman, Steven H. (counsel for appellees)

Shanmugam, Kannon K. (counsel for appellants)

Small, Michael C. (counsel for appellees)

Sofaer, Abraham D. (amicus curiae)

Stephens, Beth (counsel for appellees)

Stewart, Beth A. (counsel for appellants)

Taft, IV, William (amicus curiae)

Valencia de Carvajal, Juana (appellee)

Williams & Connolly LLP (counsel for appellants)

Windom, Thomas P. (counsel for appellants)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

Cases—continued:

STATUTE

Page

MISCELLANEOUS

INTRODUCTION

Plaintiffs are Bolivian nationals who seek to sue former Bolivian officials for events that occurred only in Bolivia. They do not dispute that, if this lawsuit is allowed to go forward, it would represent the first time that a foreign head of state has stood trial in the United States under the Alien Tort Statute (ATS) for his official actions. They nevertheless contend that this case is justiciable; that their claims are valid; and that defendants are subject to suit. Plaintiffs are wrong in each respect. This case does not belong in an American court, and the district court erred by permitting it to go forward.

To begin with, plaintiffs' claims are barred by the political question doctrine. Plaintiffs' contrary arguments rest on the flawed premise that the political question doctrine applies only when the resolution of a case would implicate *domestic* separation-of-powers concerns and interfere with the actions of the political branches. The Supreme Court, however, has made clear that the doctrine also applies when a federal court is not equipped to resolve the issue presented by the case. That is precisely the situation here, because, however plaintiffs' claims are properly characterized, a court could not resolve those claims without second-guessing judgments made by a foreign military in dealing with a conflict in a foreign land. And in any event, this case also implicates domestic separation-of-powers concerns, because adjudication of the case would require a federal court to pass judgment on the actions of

the Executive Branch and also on the actions of the former and current Bolivian presidents. For that reason, dismissal was warranted under any conceivable understanding of the political question doctrine.

Even if plaintiffs' claims were justiciable, dismissal would still be warranted because plaintiffs have no valid claims under the ATS. Perhaps recognizing the invalidity of any asserted international norm prohibiting the disproportionate use of force, plaintiffs seek to invoke narrower international norms prohibiting extrajudicial killings and crimes against humanity. But to the extent their complaint can even be read to allege violations of those norms in the first place, it plainly fails to include sufficient allegations linking *defendants* to violations of those norms: *i.e.*, allegations that defendants were personally involved in the alleged targeted killings or that defendants knew or should have known of those alleged killings.

Finally, dismissal is also warranted because President Lozada and Minister Berzaín are immune from suit by virtue of their former positions as foreign government officials. The immunity of former government officials cannot be waived by a subsequent regime—at least where, as here, the Executive Branch has pointedly refused to give an express indication that it wishes the lawsuit to proceed. The district court instead cited the government's *refusal* to take a position on the immunity question as affirmative evi-

1. *There Is A Lack of Judicially Discoverable and Manageable Standards For Resolving The Issue Presented By This Case*

At the outset, plaintiffs do not dispute that, under the six-factor test for application of the political question doctrine established in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), a suit may be barred when just "one of the [*Baker*] characteristics is present." *Carmichael* v. *Kellogg, Brown & Root Servs. Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010). In analyzing the political question doctrine, the district court most clearly erred when it determined that there were judicially discoverable and manageable standards for resolving the issue presented by this case.

a. Plaintiffs all but concede that courts lack judicially discoverable and manageable standards to evaluate judgments made by the military—including judgments concerning the response to domestic civil unrest. That is wise, because both the Supreme Court and this Court have applied that principle to bar suits in a variety of different contexts. *See, e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Carmichael*, 572 F.3d at 1288-1289; *Aktepe* v. *United States*, 105 F.3d 1400, 1404 (11th Cir. 1997). Although plaintiffs suggest (Br. 35-36) that there may be exceptions to that principle, they cite no case in which a federal court has permitted an even arguably comparable

---

proper for assessing both the political question doctrine and the availability of official immunity. *See* R. 135-5 to 135-6.

claim to proceed against American government officials—much less against high-level officials such as the President or the Secretary of Defense.

b. Instead, plaintiffs argue that the foregoing principle does not govern, and the political question doctrine therefore does not apply, when a court is reviewing judgments made by a *foreign* military. If anything, however, an American court is even *less* competent to review foreign judgments, and plaintiffs' arguments to the contrary lack merit.

i. For the first time on appeal, plaintiffs contend (Br. 5, 16, 32) that whether a lawsuit permissibly requires a court to assess the judgment of a foreign government is the province of the act-of-state doctrine, not the political question doctrine. Plaintiffs thereby suggest that, because the district court held that the act-of-state doctrine was inapplicable and this Court refused to grant interlocutory review on that issue, it somehow follows that the political question doctrine is inapplicable as well. Plaintiffs, however, cite no authority for the proposition that those two doctrines are mutually exclusive. To the contrary, the two doctrines serve distinct if overlapping purposes, and courts (including the district court in this case) have long understood them to be discrete. *See, e.g., Doe I* v. *Israel*, 400 F. Supp. 2d 86, 113 (D.D.C. 2005); R. 135-7 to 135-16; R. 135-16 to 135-19. The potential availability of another doctrine that is designed to avoid judicial interference in the affairs of a for-

eign nation serves to reinforce, not undermine, the proposition that courts should exercise caution before assessing the judgments of a foreign military.

ii. In a similar vein, plaintiffs contend that "[t]he political question doctrine is fundamentally concerned with the maintenance of *domestic* separation of powers, not with the propriety of judicial review of acts by foreign states." Br. 32 (emphasis added). That contention, however, fundamentally misapprehends the scope and purpose of the political question doctrine. That doctrine is based not only on "the separation-of-powers concerns central in our system of government," but also on "[the] inherent limitations on the capabilities of judicial tribunals." *United States ex rel. Joseph* v. *Cannon*, 642 F.2d 1373, 1378-1379 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982). Accordingly, as the Supreme Court has explained, "the lack of satisfactory criteria for a judicial determination . . . [is a] dominant consideration[]" in assessing whether a question is "political" and therefore nonjusticiable. *Coleman* v. *Miller*, 307 U.S. 433, 454-455 (1939).

The second *Baker* factor directly addresses the competence of the Judicial Branch to review the conduct that is the subject of the claim. Consistent with that principle, the Supreme Court has held that, under the political question doctrine, a "controversy is nonjusticiable . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department[] *or* a lack of judicially discoverable and managea-

nate use of force, because such a norm is insufficiently specific and universal to support an ATS claim. *See, e.g., Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*, 517 F.3d 104, 122 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009). Instead, plaintiffs merely contend (Br. 45-46) that their complaint does not allege that defendants violated that norm.

Plaintiffs' contention lacks merit. Throughout their complaint, plaintiffs press the theory that defendants are liable because they ordered the Bolivian military to respond to the 2003 unrest with disproportionate force. *See* R. 77-1 (¶ 1), 77-6 (¶ 30), 77-7 (¶ 36), 77-10 (¶¶ 47-48), 77-15 (¶ 69), 77-18 (¶ 79), 77-19 (¶ 81). In particular, plaintiffs repeatedly contend that defendants either responded to protests with excessive force or failed to rein in the government's response. *See* R. 77-1 (¶ 1), 77-5 (¶¶ 21-23), 77-9 (¶ 42), 77-13 (¶¶ 59-61), 77-18 (¶¶ 81, 87), 77-22 (¶ 105). They repeatedly allege that the military used force, whereas the victims were unarmed. *See* R. 77-5 (¶¶ 1-2), 77-8 (¶ 39), 77-18 (¶ 81), 77-22 (¶ 105). And they repeatedly refer to defendants' alleged authorization of the "excessive use of force," "deadly force," and the "use[] of military force to silence opposition." *See* R. 77-5 (¶ 23), 77-8 (¶ 37), 77-9 (¶ 42), 77-10 (¶ 48), 77-18 (¶ 86), 77-22 (¶ 105).

It is therefore clear that, notwithstanding the complaint's passing references to the circumstances under which individual bystanders were killed or injured, plaintiffs' complaint was directed at defendants' general handling

of the 2003 unrest. Because there is no actionable norm of international law that corresponds with the gravamen of plaintiffs' complaint, plaintiffs' ATS claims should not be allowed to proceed.

2. *Plaintiffs' Complaint Fails Sufficiently To Allege Violations Of The Norms Of International Law Prohibiting Extrajudicial Killings And Crimes Against Humanity*

As they did in the district court, plaintiffs primarily invoke (Br. 46-54) narrower international norms prohibiting extrajudicial killings and crimes against humanity. Plaintiffs, however, have failed to make out plausible allegations that defendants are personally responsible for violations of those norms. Plaintiffs' complaint contains insufficient allegations linking defendants to the asserted violations—and, indeed, contains insufficient allegations that those violations even occurred.

a. In their brief, as in their complaint, plaintiffs conspicuously do not allege that defendants were personally involved in the alleged targeted killings. Nor do they allege sufficient facts to support the contention that defendants knew or should have known of those alleged killings—a contention that is central to any of plaintiffs' potential theories of secondary liability for violations of either norm. As noted in defendants' opening brief (at 44), aside from a generic introductory allegation that defendants "order[ed] Bolivian security forces . . . to attack and kill scores of unarmed civilians," R. 77-1 (¶ 1), plaintiffs do not allege that President Lozada had *any* direct contact

with the conflict, other than directing the military to take action to restore order (and holding meetings with military leaders thereafter). *See* R. 77-5 (¶ 23(b)), 77-6 (¶ 30), 77-7 (¶ 36), 77-10 (¶¶ 47-48). Those allegations do not provide a plausible basis from which to infer that President Lozada conspired to commit, aided and abetted in committing, or was otherwise personally responsible for the individual killings at issue. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949-1950 (2009); *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 556 (2007). If those allegations were sufficient, it would imply that a national leader could be sued for any alleged misconduct that occurs in the course of his government's response to civil unrest, as long as the leader ordered the response in the first place. That simply cannot be, and is not, the law.

Plaintiffs' claims against Minister Berzaín fare no better. Plaintiffs allege only that Minister Berzaín was "widely *believed* to have been closely involved with the violence." R. 77-5 (¶ 21) (emphasis added). Although plaintiffs heavily rely (Br. 9, 51, 54) on their allegation that Minister Berzaín was present in the air above the events at Sorata, *see* R. 77-5 (¶ 21), plaintiffs never allege that he instructed the military to target civilians or that he witnessed the specific alleged killings. And even assuming that plaintiffs sufficiently alleged that Minister Berzaín was present at the scene of those killings, knowledge cannot be inferred from such "presence." *See, e.g.*, *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248-1250 (11th Cir.

2005), *cert. denied*, 549 U.S. 1032 (2006). As with the allegations against President Lozada, therefore, the allegations against Minister Berzaín do not provide a plausible basis from which to infer that he was personally responsible for the individual killings at issue. *See Twombly*, 550 U.S. at 556.

It is precisely because plaintiffs cannot plausibly allege that defendants were connected with the specific killings at issue, we respectfully submit, that plaintiffs lard their complaint with allegations that defendants were more generally responsible, in their capacities as national leaders, for overseeing the response to the 2003 unrest. But plaintiffs cannot have it both ways. Either plaintiffs are claiming that defendants are liable because they ordered the Bolivian military to respond to the unrest with disproportionate force (in which case plaintiffs may have sufficiently alleged defendants' involvement, but failed to allege a violation of an actionable norm of international law), or they are claiming that defendants are liable because soldiers and police under their command committed individual acts of misconduct in the course of that response (in which case plaintiffs may have alleged violations of actionable norms of international law, but failed sufficiently to allege defendants' involvement). In either case, plaintiffs' ATS claims are not actionable, and the district court erred when it refused to dismiss them.

b. In any event, even if plaintiffs' allegations of defendants' involvement were sufficient, their reliance on the international norms prohibit-

ing extrajudicial killings and crimes against humanity is unavailing because plaintiffs fail sufficiently to allege that anyone in the Bolivian military or police engaged in violations of those norms.

In order to allege violations of those norms, plaintiffs would have to establish, *inter alia*, (1) that the victims were shot by sharpshooters; (2) that the sharpshooters were members of the military or police; (3) that the military or police could distinguish in the heat of fighting between civilians involved in the unrest and innocent bystanders; and (4) that, facing armed insurgents, the military or police intentionally targeted innocent bystanders instead. The allegations that plaintiffs make in support of those propositions are deficient in numerous respects.

At the outset, numerous allegations in the complaint are based on "information and belief"—most notably, the allegations that the victims were targeted by sharpshooters. *See, e.g.*, R. 77-8 (¶ 40), 77-10 (¶ 46), 77-12 (¶ 55), 77-14 (¶ 64). And even when plaintiffs do not explicitly rely on information and belief, their allegations often rely on attenuated inferences—such as the inference that the sharpshooters must have been members of the military, *see* R. 77-8 (¶ 38); the inference that individual victims were in fact shot by the military when evidence merely "suggests" that that was so, *see* R. 77-9 (¶ 41), 77-14 (¶ 67); and the inference that the victims were intentionally targeted by the military, when it appears that many if not all of the victims were

shot shortly after emerging into plain sight (and therefore could readily have been mistaken for insurgents), *see* R. 77-8 (¶ 40), 77-11 (¶ 54), 77-12 (¶ 55), 77-13 (¶ 58), 77-15 (¶ 72).

As in other cases in which this Court has rejected ATS claims, plaintiffs' claims are ultimately based on a chain of unsupported allegations and unwarranted inferences and deductions. *See Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009); *Aldana*, 416 F.3d at 1248-1250. For that reason, and because plaintiffs have failed sufficiently to allege that defendants are personally responsible for violations of the narrower international norms on which they rely, plaintiffs' ATS claims should be dismissed.

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

The district court should have dismissed plaintiffs' ATS claims for the additional reason that plaintiffs failed to exhaust their local remedies. Although this Court has held, without extended discussion, that the ATS does not incorporate an exhaustion requirement, *see Jean* v. *Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005), it may wish to reconsider that holding in light of the subsequent decisions suggesting the existence of such a requirement. *See* Defts. Br. 48 (citing cases).

In addressing the question of whether the ATS incorporates an exhaustion requirement, plaintiffs merely cite *Jean* and do not dispute the proposition that, if the ATS does incorporate such a requirement, it would

not be satisfied here. *See* Pltfs. Br. 56 n.26. If the holding of *Jean* is incorrect—and defendants respectfully submit that it is—there can thus be no dispute that plaintiffs' failure to exhaust constitutes an independent basis for reversal.

4. Plaintiffs' ATS Claims Should Have Been Dismissed Because They Violate The Presumption Against Extraterritorial Application

The district court should also have dismissed plaintiffs' ATS claims because those claims violate the presumption against extraterritorial application of domestic law. This Court has never explicitly addressed whether the ATS reaches the conduct of a foreign state against its own citizens. Although plaintiffs assert (Br. 55) that "a series of decisions" from this Court have "applied the ATS to claims arising outside the United States," none of the cases plaintiffs cite expressly considers the issue of extraterritoriality. And plaintiffs do not dispute the principle 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) (internal quotation marks omitted).

Instead, plaintiffs merely contend (Br. 56) that the "presumption against extraterritoriality . . . is irrelevant when it comes to the ATS" because the ATS "expressly instructs the federal courts to apply *international* law." That contention, however, fundamentally misapprehends the issue.

The ATS is indisputably an act of Congress; while Congress incorporated principles of the law of nations into the substantive law of the United States, it provided no affirmative indication that it intended the ATS to *apply* extra-territorially. To the contrary, the incidents that led to the enactment of the ATS occurred in the United States, *see Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716-717 (2004), and the presumption against extraterritoriality was just as vital then as it is now, *see* U.S. Br. at 17, *Mujica* v. *Occidental Petroleum Corp.*, No. 05-56175 (9th Cir. filed Mar. 17, 2006).

The mere fact that the ATS incorporates principles of the law of nations into domestic law thus should not affect the analysis. *See Sarei* v. *Rio Tinto, PLC*, 625 F.3d 561, 563-564 (9th Cir. 2010) (Kleinfeld, J., dissenting from remand for mediation). Consistent with the position of the United States, this Court should hold that the ATS may not be used to "challeng[e] the conduct of a foreign government against its own citizens and within its own territory." U.S. Br. at 16, *Mujica*, *supra*.

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

Finally, the district court erred when it summarily rejected defendants' contention that they were entitled to official immunity. Plaintiffs contend (Br. 20-30), first, that defendants were not entitled to immunity at all, and second, that the current Bolivian government validly waived any immunity that defendants possessed. Plaintiffs are incorrect on both scores.

1. *Defendants Are Entitled To Immunity From Suit For Their Official Conduct*

As a preliminary matter, plaintiffs do not dispute the centuries-old principle that, under the common law, heads of state are entitled to immunity from suit for their actions while in office, and other foreign officials are entitled to immunity from suit for their official conduct. Plaintiffs instead contend (Br. 27-28) that, simply because defendants were out of office by the time plaintiffs brought suit, they were no longer entitled to the immunity they previously possessed. At least as to their official actions, however, it has long been understood that foreign government officials are protected by immunities such as head-of-state immunity even after they have left office. *See, e.g.*, 1 *Oppenheim's International Law* 1043-1044 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008).

Plaintiffs alternatively contend (Br. 28-29) that foreign government officials are not entitled to immunity for "acts taken outside the scope of their lawful authority." Under the common law, however, heads of state are entitled to immunity for *all* of their actions except for "strictly commercial" acts taken for personal gain. *See Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010). Where (as here) foreign government officials were concededly acting in furtherance of their official duties, they are entitled to immunity, *see, e.g.*, *Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794), and a plaintiff may

not circumvent that immunity simply by alleging that the officials were acting beyond their authority or contrary to the law of nations, *see Belhas*, 515 F.3d at 1286-1288.

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

The only remaining question is whether the Morales regime's attempt to waive defendants' immunity was valid and dispositive of the immunity issue. The district court erred when it held that it was.

a. Plaintiffs do not dispute that this Court has never directly addressed the question whether a later government can waive the immunity of democratically elected officials in a previous government without their consent. The closest this Court has come to addressing that question was in *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). Contrary to plaintiffs' contention (Br. 25-26), however, *Noriega* actually supports defendants' position.

In *Noriega*, the United States government "manifested its clear sentiment" that the foreign official's claim of immunity should be denied—and this Court relied on that fact in holding that the official was not entitled to immunity. 117 F.3d at 1212. Critically, however, the Court went on to suggest that, if the government had not expressly taken a position on immunity and the Court made its own *independent* judgment on that issue, it would have relied on two considerations distinctive to that case in holding that the

official in question, General Noriega, was not entitled to immunity: (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.* Even though Panama had itself sued General Noriega in a parallel proceeding, the Court in no way suggested that a waiver by a later foreign government would in and of itself be a sufficient basis for rejecting a former government official's claim to immunity. *See id.*

So too here, the Morales regime's attempt to waive defendants' immunity should not be dispositive; in the absence of an affirmative expression by the United States government that defendants are not entitled to immunity, this Court should make an independent determination as to whether that immunity remains in effect. And because this case does not present either of the considerations cited in *Noriega*, the Court should hold that defendants are entitled to immunity.

b. Operating on the assumption that the Morales regime validly waived defendants' immunity,[2] plaintiffs heavily rely on their assertion that

---

[2] Plaintiffs contend (Br. 24 n.9) that defendants waived their argument that the purported waiver of immunity appears to have been invalid as a matter of Bolivian law. But after plaintiffs proffered that waiver below, defendants expressly argued that the district court should not rely on it absent a valid explanation as to why the Minister of Justice had the authority to issue it. *See* R. 94-15 & n.10. And plaintiffs offer no such explanation now, other than the remarkable (and unelaborated) assertion (Br. 25) that a waiver of

the United States government has in fact "accepted" the Bolivian government's purported waiver and merely "declined to take a position *on the merits of the litigation.*" Br. 25 (emphasis added). That assertion conspicuously overreads the government's position on whether defendants are entitled to immunity. Contrary to plaintiffs' contention, the United States government has not expressly indicated that defendants' claim of immunity should be denied.

Although plaintiffs correctly note (Br. 21) that the government acknowledged, in the "notice" it filed below, that the State Department had "accepted" a waiver from the Morales regime, *see* R. 107-1, the government at the same time stressed that the "acceptance" of 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 (emphasis added). As the United States undoubtedly knew, one of the "dispositive issues" then pending before the district court was the issue of immunity. The United States therefore went out

---

immunity "falls comfortably" within the Minister's duties to "protect[] human rights" and "facilitat[e] access to justice." The Attorney General of the United States has similar responsibilities, but no one would seriously argue that he has the unilateral authority to waive the immunity of a former American president.

of the way to make clear that it was taking *no* position on the immunity issue, notwithstanding the reference to the State Department's ministerial act of "accept[ing]" the waiver.[3]

Absent a more affirmative expression of approval from the Executive Branch, a court should not permit the claims against defendants to go forward. When the Executive Branch wishes to *assert* the immunity of foreign government officials, it does so in unequivocal terms. This Court should require a similarly clear statement before the immunity of foreign government officials is *abrogated*—particularly in a case such as this one. *See Noriega*, 117 F.3d at 1212 (relying on "clear sentiment" of Executive Branch in abrogating immunity of former foreign official); *cf. United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (noting that "[w]aivers of the Government's [own] immunity, "to be effective, must be unequivocally expressed") (internal quotation marks omitted).

By permitting this lawsuit to proceed, an American court would effectively take sides in the dispute between the former and current Bolivian regimes and thereby thrust itself into the "complex and difficult" relations between Bolivia and the United States, R. 107-2. At a minimum, an American

---

[3] Notably, the State Department has consistently declined to facilitate any claims against defendants: it has refused to act on Bolivia's longstanding requests that it extradite defendants or even to serve them with papers from the Bolivian government through letters rogatory. *See* R. 77-16 (¶ 76).

court should not do so without the blessing of the branch of government to which responsibility for those relations is primarily committed. Whether on the basis of immunity or the other grounds raised by defendants, this nonjusticiable and unprecedented action should be brought to an end.

CONCLUSION

For the foregoing reasons and those stated in defendants' opening brief, the district court's order denying defendants' motion to dismiss in relevant part should be reversed.

Respectfully submitted,

KANNON K. SHANMUGAM
ANA C. REYES
ANNA-ROSE MATHIESON
N. MAHMOOD AHMAD
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

JACK LANDMAN GOLDSMITH, III
1563 Massachusetts Avenue
Cambridge, MA 02138

FEBRUARY 2, 2011

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 6,912 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

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font.

KANNON K. SHANMUGAM

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellants and a member of the Bar of this Court, certify that, on February 2, 2011, copies of this Reply Brief of Appellants were sent, by third-party commercial carrier for delivery overnight, to the Clerk of the Court and to the following counsel:

Steven H. Schulman, Esq.
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Michael C. Small, Esq.
Jeremy F. Bollinger, Esq.
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Susan Hannah Farbstein, Esq.
Tyler R. Giannini, Esq.
James L. Cavallaro, Esq.
International Human Rights Clinic
Human Rights Program
Harvard Law School, Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138

Beth P. Stephens, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Judith Brown Chomsky, Esq.
Center for Constitutional Rights
8120 New Second Street
Elkins Park, PA 19027

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

KANNON K. SHANMUGAM

FEBRUARY 2, 2011