No. 25-2232

In the

United States Court of Appeals

For the Fourth Circuit

GERT JANNES KUIPER,

Plaintiff-Appellee,

v.

MARIO ADALBERTO REYES MENA,

Defendant-Appellant.

On Appeal from the U.S. District Court for the
Eastern District of Virginia
Honorable Rossie D. Alston, Jr.
Case No. 1:24-cv-01785-RDA-LRV

REPLY BRIEF OF APPELLANT

Jonathan Y. Ellis
H. Brent McKnight, Jr.
MCGUIREWOODS LLP
501 Fayetteville St.
Suite 500
Raleigh, NC 27601
T: (919) 755-6600
jellis@mcguirewoods.com
bmcknight@mcguirewoods.com

Kang He
Caroline G. Amarant
MCGUIREWOODS LLP
1750 Tysons Boulevard
Suite 1800
Tysons, VA 22102
T: (703) 712-5068
khe@mcguirewoods.com
camarant@mcguirewoods.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The district court denied Defendant Mario Adalberto Reyes Mena, a former Salvadoran military official, conduct-based foreign official immunity by applying a categorical exception for alleged *jus cogens* violations. Plaintiff's efforts to defend that ruling fail—as a matter of first principles and this Court's precedents.

As to first principles, every relevant source of guidance—international law, U.S. statutory law, the considered views and policies of the Executive Branch, and related judicial precedent—counsels against adopting a blanket exception in civil cases like this one. Plaintiff fails to identify a single example of an international decision recognizing a *jus cogens* exception to foreign official immunity in a civil case about conduct occurring outside the forum's sovereign territory. No court has agreed with Plaintiff's suggestion that the TVPA should be read to adopt such an exception. Plaintiff does not contest that the Executive Branch strongly opposes any such exception. Nor does he identify any support for such an exception in other courts' decisions.

As to this Court's precedents, reversing the district court's decision would not require overruling *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012). Conduct-based immunity is a common-law doctrine, and *Yousuf* was a

common-law decision. Even if some statements in *Yousuf* could be read as broadly supporting a blanket exception, by their very nature, common-law decisions control the law to the particular facts of that case. The same is true of this Court's follow-on decision in *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016). The facts here are materially different from the facts presented in those cases, and those differences warrant a different result.

Finally, Plaintiff's attempt to defend the ruling on grounds that the district court rejected is no more persuasive. Notwithstanding Plaintiff's selective quotations from other portions of the district court's decision, the court did not question that Reyes Mena meets all the prerequisites for foreign official immunity other than its erroneous *jus cogens* exception. And, in fact, he does. Plaintiff's own allegations make undisputedly clear that Plaintiff's case focuses on official acts. Adjudicating the lawfulness of that conduct would inevitably require U.S. courts to enforce a rule of law against El Salvador's alleged military strategy during its civil war. Foreign sovereign immunity exists to prevent such a result.

The order of the district court denying Reyes Mena foreign official immunity should be reversed, and this case should be remanded with instructions to dismiss Plaintiff's claim with prejudice.

ARGUMENT

A. The District Court Erred in Extending *Yousuf* to this Case.

Plaintiff principally contends that this Court's decisions in *Yousuf* and in *Warfaa* require affirmance. Resp. 13-23. They do not. Although *Yousuf* and *Warfaa* applied a *jus cogens* exception to the facts presented in those cases, there are compelling reasons not to extend those decisions to this case or to recognize, as the district court did, a categorical *jus cogens* exception out of step with international and domestic law.

1. Plaintiff misconstrues Reyes Mena's argument.

At the outset, it is important to correct Plaintiff's characterization of Reyes Mena's argument. Rather than respond to Reyes Mena's arguments on their own terms, Plaintiff attempts to reframe them. Plaintiff first narrowly focuses on *Yousuf* and *Warfaa*, disconnected from the larger context and principles of the conduct-based immunity doctrine. Resp. 13-23. Plaintiff then tries to reframe Reyes Mena's arguments about that broader context merely as reasons that *Yousuf* was "wrongly decided." Resp. 34-46. But that is not Reyes Mena's argument or the proper approach.

The doctrine of foreign sovereign immunity developed "as a matter of common law." Opening Br. 14 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010)). And, as Plaintiff rightly concedes (at Resp. 16 n.2), conduct-based

immunity remains a common-law doctrine. Opening Br. 16; *see Samantar*, 560 U.S. at 325. Under the common law, the district court should have found that the differences between the facts of this case and those presented in past cases warrant a different result. This Court need not revisit any previous decision to reach that conclusion. The panel need only (and should) hold that no blanket exception to immunity exists for *jus cogens* allegations and that the facts here are meaningfully different than the facts presented in past decisions.

2. There is no categorical *jus cogens* exception to conduct-based foreign official immunity.

The first step is easy. Both international and domestic law agree that there is no general *jus cogens* exception to conduct-based immunity.

a. International law does not recognize a blanket jus cogens *exception.*

"[I]nternational law has shaped the development of the common law of foreign sovereign immunity." *Yousuf*, 699 F.3d at 773. For official-acts immunity, international law rejects an across-the-board *jus cogens* exemption like the one that the district court recognized here, even if it allows an exception in certain cases (*i.e.*, criminal prosecutions). *See* Opening Br. 24-27; *compare Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581 (H.L. 1999) (applying

an exception in a criminal prosecution), *with Jones v. Saudi Arabia*, [2006] UKHL 26, ¶ 31 (rejecting exception in a civil case).

Plaintiff tries to distinguish the international decisions cited by Reyes Mena because they "involve different legal instruments, domestic immunity statutes, or sovereign-versus-sovereign disputes." Resp. 35. But he fails to explain why these distinctions make any difference. Nor could he. This Court has previously found cases like *Pinochet* and *Jones* instructive in developing the U.S. common law of immunity. *See Yousuf*, 699 F.3d at 776. And for *Fang v. Jiang*, [2007] NZAR 420, Plaintiff hardly offers a distinction at all, noting only that New Zealand "lack[s] a domestic statute codifying exceptions to state immunity." Resp. 35. This Court is likewise applying a common-law doctrine and evaluating the applicability of a purported common-law exception—the FSIA notwithstanding. *See Fang*, [2007] NZAR ¶¶ 16, 20 (rejecting a *jus cogens* exception based on "international law" and "common law").

In any event, the cases that Reyes Mena cited reflect international consensus. *See* Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT'L L. 1, 3-4 (2021). The *Jones* decision cataloged how "[t]he notion that acts contrary to jus cogens cannot be official acts has not been well received by eminent writers on

international law," who have described it as "unsound and even preposterous" and "easily discarded." *Jones*, [2006] UKHL ¶ 84. The European Court of Human Rights similarly concluded that "the bulk of the authority is … to the effect that the State's right to immunity may not be circumvented by suing its servants or agents instead" and found *Jones*'s rejection of a *jus cogens* exception to reflect "generally recognised rules of public international law." *Case of Jones and Others v. The United Kingdom*, App. Nos. 34356/06 and 40528/06, Judgment ¶¶ 213-15 (Eur. Ct. Hum. Rts. Jan. 14, 2014).

Meanwhile, the foreign decisions that Plaintiff tries to marshal in support of his position are inapposite. Resp. 36 n.4. Those cases applied a *jus cogens* exception to official immunity where the alleged misconduct occurred *within the forum State*, not in a foreign one. Both Italian decisions emphasized that the exercise of jurisdiction was warranted because "the relevant acts were carried out in the forum state." Andrea Bianchi, *Ferrini v. Fed. Rep. of Germany*, 99 AM. J. INT'L L. 242, 245 (2005); *see* Daniele Amoroso & Riccardo Pavoni, *Stergiopoulos v. Iran*, 117 AM. J. INT'L L. 315, 319 (2023) ("[T]he tort exception … applies only when the foreign state's harmful conduct takes place in whole or part in the territory of the forum state.").

The cases that Plaintiff cites from Brazil, South Korea, and Ukraine are the same. *See* Amoroso & Pavoni, *Stergiopoulos*, *supra*, at 318 n.22 (noting the Brazilian Supreme Court "clarified that state immunity is to be denied only where the human rights breach … occurred within the national territory."); Seryon Lee & Seokwoo Lee, *Korean Judicial Decision*, 10 KOREAN J. INT'L & COMP. L. 81, 109 (2022) (finding that "some of the … illegal acts took place on the Korean Peninsula, which is the territory of the Republic of Korea"); *see* Ielyzaveta Badanova, *Jurisdictional Immunities v. Grave Crimes: Reflections on New Developments from Ukraine* (Sept. 8, 2022) (explaining the case involved "unlawful actions in Ukraine").[1] A court's adjudication of alleged *jus cogens* violations within its own country's territory provides no precedent for U.S. courts to sit in judgment over alleged acts occurring exclusively in foreign territory.

Finally, Plaintiff urges the Court to rely on international "legal systems … where civil and criminal proceedings are not neatly divided." Resp. 37. But Plaintiff does not cite a single decision from such a system showing how it analyzed an asserted *jus cogens* exception. Moreover, it is hard to see why such

[1] Available at https://www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-reflections-on-new-developments-from-ukraine/.

legal systems would be relevant here, given that the U.S. system distinguishes between civil and criminal proceedings.

Plaintiff passingly notes that some countries "allow civil claims to be made in the course of criminal proceedings in order for the victim to recover damages." Resp. 38 n.5. According to the Complaint, that is true of El Salvador, and Plaintiff has alleged he can avail himself of that remedy in El Salvador. JA36. But that is no reason to recognize a categorical *jus cogens* exception that applies here, especially as the United States is not prosecuting Reyes Mena. Even if foreign official immunity posed no barrier to such adjunct civil relief, allowing victims to seek damages in connection with criminal proceedings—which have "robust procedural guardrails not used in civil cases," Opening Br. 25—is far different from recognizing a categorical exception to immunity that would apply in all cases.

The district court's recognition of a blanket *jus cogens* exception contravenes international law.

b. U.S. statutory law does not support a blanket* jus cogens *exception.

As for U.S. law, Plaintiff relies heavily on the TVPA, arguing that because Congress created a private right of action broad enough to encompass some *jus cogens* violations, Congress must also intend a blanket *jus cogens*

exemption that thwarts conduct-based immunity. Resp. 15-16, 39-41. But as Reyes Mena explained in the Opening Brief (at 40 n.5), the existence of the TVPA's cause of action does not abrogate foreign official immunity. The far more relevant federal statute is the one that speaks directly to immunity issues—the FSIA.

The TVPA must be interpreted "with the presumption that Congress intended to retain the substance of the common law." *Samantar*, 560 U.S. at 320 n.13. As Plaintiff concedes, the TVPA "codif[ied] existing international law." Resp. 40. When the TVPA was enacted, "foreign state immunity—including the immunity of foreign officials—was part of the common law." *Does v. Obiano*, 138 F.4th 955, 960 (5th Cir. 2025). As the Fifth and Ninth Circuits have thus explained, courts "may take it as a given that Congress … legislated with an expectation that [these] principle[s] will apply" unless "a statutory purpose to the contrary is evident." *Id.* (citation omitted); *see Doğan v. Barak*, 932 F.3d 888, 894-95 (9th Cir. 2019).

The Fifth and Ninth Circuits' approach is consistent with the broader principle that to abrogate common law, a "statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). That rule applies with special force to immunity doctrines, given

that Congress must provide a "clear indication that [it] meant to abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *see Filarsky v. Delia*, 566 U.S. 377, 389 (2012) ("Common law principles of immunity … should not be abrogated absent clear legislative intent."); *Does*, 138 F.4th at 963; *Doğan*, 932 F.3d at 894-95.

Against this backdrop, the TVPA cannot be read to abrogate conduct-based immunity or require a blanket *jus cogens* exception tantamount to abrogation. The TVPA's plain text does not mention immunity, and Plaintiff cites nothing in the statute that addresses immunity. At most, Plaintiff quotes snippets from legislative history that do not even directly address foreign official immunity. Resp. 15-16. That showing falls far short of the clear statement necessary to find an implied abrogation of common-law immunity. This Court's sister circuits have thus correctly held that "the TVPA does not abrogate foreign official immunity." *Does*, 138 F.4th at 961; *Doğan*, 932 F.3d at 895 ("[T]he TVPA does not abrogate foreign official immunity.").

Because the TVPA says nothing about foreign official immunity, Reyes Mena's reliance on the FSIA is not "misplaced." Resp. 39. Although "the FSIA applies only to sovereign states, not to individual officials," *id.*, foreign officials derive their immunity from the State, as the State can act only

through its agents. *See Yousuf*, 699 F.3d at 774 ("[S]overeign immunity, which belongs to a foreign *state*, extends to an individual *official* acting on behalf of that foreign state."); *Belhas v. Ya'Alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008) ("Every act committed by a sovereign government is carried out by its officials and agents."). Congress's conception of foreign *States'* immunity is thus directly relevant.

As Reyes Mena explained, Congress has rejected a general *jus cogens* exception to foreign sovereign immunity. Opening Br. 29-32. As Plaintiff concedes, "[t]he FSIA's list of enumerated exceptions does omit a blanket *jus cogens* exception." Resp. 39. Indeed, even though Congress enacted an exception that covers certain *jus cogens* violations in limited circumstances, *see* 28 U.S.C. § 1605(a)(5), Congress has never enacted a categorical *jus cogens* exception like the one that the district court applied here.

c. Recognition of a general jus cogens *exception is inconsistent with federal jurisprudence nationwide.*

Federal courts nationwide likewise do not support the district court's recognition of a general *jus cogens* exception for conduct-based immunity. Opening Br. 32-37. Plaintiff's attempt to show that the decision below is consistent with other authorities fails.

Plaintiff claims that where "a foreign state has not claimed immunity for the official's conduct, the sovereign immunity principles animating" the Supreme Court's decisions in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), "do not apply." Resp. 42. But Plaintiff cites no case holding that a foreign State must request a suggestion of immunity for its officials to claim conduct-based immunity. The Restatement (Second) of Foreign Relations Law § 66(f) suggests no such requirement. And the Supreme Court has explained that in the absence of a suggestion of immunity, a district court may "decide for itself whether all the requisites for such immunity exist[]." *Samantar*, 560 U.S. at 311.

So, for example, in *Rishikof v. Mortada*, 70 F. Supp. 3d 8 (D.D.C. 2014), the district court granted foreign official immunity to a Swiss official even though the Swiss Confederation did not request a suggestion of immunity and indeed agreed to accept any legal liability for the official's actions. *Id.* at 10, 12. No suggestion of immunity was needed. Immunity derives from the State, not based on "the foreign state's willingness to extend it," Resp. 42, but because the alleged conduct is an official act done at the State's behest. *See Yousuf*, 699 F.3d at 774-75.

Plaintiff argues that the result reached by the district court is consistent with how other circuits would treat this case on the premise that El Salvador has "disavow[ed] or fail[ed] to adopt or ratify" Reyes Mena's alleged actions "as its own." Resp. 42-43. But El Salvador has not waived Reyes Mena's immunity, and Plaintiff's own allegations are that Reyes Mena's conduct was authorized and ratified by the Salvadoran government. JA9, 12-13, 23, 31, 35-36; Opening Br. 18-19. That El Salvador is prosecuting Reyes Mena decades later does not change whether his alleged conduct was initially sanctioned.

Nor should El Salvador's choice to use its own courts to adjudicate the alleged conduct support Plaintiff's attempt to rely on U.S. courts. *Cf. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation."). El Salvador "has a comity interest in using its own courts for a dispute if it has a right to do so," particularly when (as here) the claims "arise from events of historical and political significance for the [country] and its people." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008); *see Underhill v. Hernandez*, 168 U.S. 250, 252-53 (1897) ("Where a civil war prevails … foreign nations do not assume to judge of the merits of the quarrel."). Allowing this suit merely *because* El

Salvador is exercising that right through its own courts would undermine the comity interest.

The decisions that Plaintiff cites are not to the contrary. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), there was "no suggestion that [defendant] claim[ed] diplomatic immunity from suit." *Id.* at 879. Instead, the court addressed subject-matter jurisdiction under the Alien Tort Statute, which is not at issue here. *See id.* at 889. Similarly, *Does* and *Doğan* referred to a foreign State "disavowing" conduct in the sense that the State denied that the conduct had ever been performed in an official capacity. *See Does*, 138 F.4th at 961; *Doğan*, 932 F.3d at 895-96. Indeed, the case that both *Does* and *Doğan* cite in support involved a government making clear that it had no objection to the defendant's conduct being adjudicated in a foreign court and that the "acts were not taken within any official mandate and were therefore not the acts of an agency or instrumentality of a foreign state." *Hilao v. Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994). El Salvador has offered nothing comparable here in support of a U.S. court's authority to scrutinize its domestic military actions.

d. The Executive Branch strongly opposes a blanket jus cogens *exception.*

Plaintiff does not dispute that the Executive Branch opposes recognition of a categorical *jus cogens* exception. *See* Opening Br. 27-29. Instead, Plaintiff contends that the Executive's position "cannot override … binding precedent" and that "two principles that the Executive espouses support denying him immunity." Resp. 44-45. Neither argument is persuasive.

Reyes Mena has not argued that Executive Branch policy overrules precedent. We offer the Executive's views and the principles it has espoused as relevant to whether the Court should *extend* its precedent to this case. Federal courts "consistently [have] deferred to the decisions of the political branches," and "in particular, those of the Executive Branch," as to the application of foreign sovereign immunity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). The Executive Branch has made clear that "customary international [law] does not recognize any *jus cogens* exception to foreign official immunity" and that this "international consensus" should not be disturbed "by recognizing a *jus cogens* exception in a civil suit." Br. of United States as Amicus Curiae at 22, 24, *Matar v. Dichter*, 2007 WL 6931924 (2d Cir. Dec. 19, 2007) (*Matar* Amicus Br.).

Neither of the Executive's "principles" that Plaintiff cites supports recognizing such an exception or applying it here. Resp. 45-46. First, Plaintiff maintains that when "no foreign government seeks immunity for a defendant, that silence weighs against immunity." Resp. 45; *see* Resp. 21-22 (making a similar argument). But the United States' amicus brief in *Yousuf*, which Plaintiff cites in support, does not stand for that proposition. Instead, the Executive emphasized the very facts that distinguish *Yousuf* from this case—that "there [was] no currently-recognized Somali government to request immunity … or to express a position on whether … the relevant acts were taken in an official capacity." Br. of the United States as Amicus Curiae at 2, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011), ECF No. 43 (*Yousuf* Amicus Br.). Elsewhere, the Executive has made clear that the absence of a suggestion of immunity carries no independent weight. It simply means that the district court conducts the analysis for itself. *See Matar* Amicus Br. 22; *see also Rishikof*, 70 F. Supp. 3d at 16 (granting conduct-based immunity in the absence of a suggestion of immunity); *Ivey for Carolina Golf Dev. Co. v. Lynch*, No. 17-cv-439, 2018 WL 3764264, at *7 (M.D.N.C. Aug. 8, 2018) (same); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 278 (S.D.N.Y. 2015) (same); *Weiming*

Chen v. Ying-jeou Ma, No. 12-cv-5232, 2013 WL 4437607, at *3 (S.D.N.Y. Aug. 19, 2013) (same for head-of-state immunity).

Second, the Executive has not suggested that U.S. citizenship or residency forecloses an assertion of immunity. Resp. 45-46. To the contrary, in *Yousuf*, the Executive explained that "a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office." *Yousuf* Amicus Br. at 7; *see, e.g.*, *Rishikof*, 70 F. Supp. 3d at 10 (explaining defendant was allegedly "a legal resident of Washington, D.C."); *Ivey for Carolina Golf*, 2018 WL 3764264, at *2 (granting immunity to a D.C. lawyer acting as agent for a German court-appointed insolvency administrator). The *Yousuf* Amicus Brief did state that U.S. residents "ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents." *Yousuf*, 699 F.3d at 767. But Plaintiff is not a U.S. resident. JA14. And the government's statement was within the context of "the absence of a recognized [foreign] government." *Yousuf* Amicus Br. at 7.

In short, none of Plaintiff's arguments cast doubt on whether a blanket *jus cogens* exception to conduct-based immunity exists. It does not, and the

district court erred by applying one to reject Reyes Mena's assertion of conduct-based immunity.

3. *Yousuf* does not require a *jus cogens* exception that extends to this case.

Plaintiff, like the court below, nonetheless contends that this Court's decisions in *Yousuf* compels rejection of Reyes Mena's claim to immunity. Resp. 13-23. But whatever broad statements appear in that decision to support the result there, Plaintiff does not contest that the doctrine of foreign official immunity is a matter of common law. The doctrine thus must develop according to the common-law method, in which "rules of law often develop incrementally as earlier decisions are applied to new factual situations." *Williams v. Taylor*, 529 U.S. 362, 384-85 (2000) (opinion of Stevens, J.).

The facts of this case—as alleged by Plaintiff himself—distinguish it from *Yousuf*. *Yousuf* involved a foreign official from a foreign State (Somalia) that lacked a recognized government to whom comity and immunity were owed. *Warfaa* concerned conduct in the very same country.[2] Although this

[2] When the suit was initially filed in *Warfaa*, Somalia likewise lacked a recognized government. *See* Br. of United States as Amicus Curiae at 9, *Ali v. Warfaa*, 2017 WL 2275811 (U.S. May 23, 2017) (*Warfaa* Amicus Br.). By the time this Court issued its decision, the State Department had recognized the new government in Somalia but had told the district court that it could not say whether immunity was warranted. Statement of Interest, *Warfaa v. Ali*, No.

Court may have stated broadly in those cases that foreign officials are not immune for *jus cogens* violations, the Court had "no occasion" in either case to consider whether that should be true in all circumstances—*i.e.*, to recognize a categorical *jus cogens* exception—or in the circumstances presented here. *Doğan*, 932 F.3d at 897 (rejecting such a broad reading of *Yousuf*). The Court should not extend *Yousuf* (or *Warfaa*) to deny foreign official immunity to a former official from a State with a recognized government (and a U.S. ally) to whom comity and immunity are owed.

While a *jus cogens* exception may not offend comity when applied to governments not recognized by the State Department (or an official for whom immunity is waived), the inverse is true for recognized governments. Applying an exception in this context would implicate the very concerns that other courts and the Executive Branch have cited in rejecting a categorical exception. *See* Opening Br. 42-43; *cf. Yousuf*, 699 F.3d at 777 (reasoning that "[b]ecause the State Department has not officially recognized a Somali government, the court does not face the usual risk of offending a foreign nation by

---

1:05-cv-701 (E.D. Va. Apr. 24, 2014), ECF No. 85. Eventually, the State Department informed the Supreme Court that the new government did not wish for immunity to be afforded to Warfaa. *Warfaa* Amicus Br. at 11-12. No party in *Warfaa* argued to this Court that events post-dating the complaint distinguished *Yousuf*.

exercising jurisdiction"). None of Plaintiff's arguments to the contrary is persuasive.

Plaintiff argues that *Yousuf*'s holding applies to all foreign States, regardless of whether they have a recognized government, because "*jus cogens* norms are universal." Resp. 19. That the norms are "universally agreed-upon," however, is merely definitional. *Yousuf*, 699 F.3d at 775. Their universality says nothing about whether there is a blanket exception to conduct-based immunity, in U.S. courts, for their alleged violation abroad. Plaintiff's reliance on the Nuremberg trials provides no basis for recognizing an exception here. Resp. 19 n.3. Those were *criminal* proceedings. As explained, carving out an exception for criminal prosecutions does not mean a blanket exception applies in all cases or that any such exception should apply here.

Contrary to Plaintiff's contention (at 22-23), Reyes Mena is not "dressing a TVPA exhaustion defense in the garb of immunity." The TVPA requires exhaustion where immunity principles do *not* apply. Exhaustion turns on factual inquiries about whether an alternative forum would be ineffective or inadequate. The district court declined to consider those factual questions at the motion-to-dismiss stage, JA79-80, and Reyes Mena has not taken issue with

that approach in this Court. But where, as here, foreign official immunity principles do apply, those factual questions are not implicated.

Regardless of how El Salvador chooses to adjudicate claims based on Reyes Mena's alleged conduct, it would be an "affront" to the dignity of a recognized foreign State for U.S. courts to sit in judgment of the Salvadoran government's wartime actions. *See Pimentel*, 553 U.S. at 866. And while Plaintiff attempts (at 22) to dismiss *Pimentel* as merely a joinder case, in deciding that question, the Supreme Court articulated broader principles about the "intersection of joinder and the governmental immunity of the United States." *Id.* In language that applies with full force here, the Court explained that "[g]iving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine," which derives from "standards of … reciprocal self-interest and respect for the 'power and dignity' of the foreign sovereign," and that "[t]he dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause." *Id.* This Court should decline Plaintiff's invitation to confine those principles to the joinder or exhaustion context.

B. Reyes Mena Satisfies the Criteria for Foreign Official Immunity.

The district court did not dispute that Reyes Mena satisfies the criteria for immunity. JA71-72.[3] Yet Plaintiff argues that even if no *jus cogens* exception applies, this Court should hold that Reyes Mena is not entitled to immunity in the first place. Resp. 23-34. Those alternative grounds for affirmance are unavailing. Whether a foreign official is entitled to conduct-based immunity requires examination of: (1) whether the defendant was a "public minister, official, or agent of the state"; (2) whether the defendant's actions were "performed in his official capacity"; and (3) whether "the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law § 66(f) (Restatement). Plaintiff concedes that the first element is satisfied, challenging only the second and third. Both challenges miss the mark.

1. Reyes Mena allegedly acted in his official capacity.

Plaintiff's Complaint focuses exclusively on Reyes Mena's alleged official acts as a military officer in furtherance of the Salvadoran government's

[3] Plaintiff argues that the district court addressed the two elements of conduct-based immunity that he challenges here. Resp. 24. But Plaintiff simply cherry-picks portions of the district court's FSIA analysis. The district court did not find that those elements are not satisfied here.

alleged wartime strategy of "regularly intimidat[ing] and target[ing] domestic and foreign journalists whose independent reporting they viewed as a threat." JA9, JA31; *see* Opening Br. 18-20. On these allegations, Reyes Mena "acted within the structure of the [Salvadoran] government and military, drawing on official powers and duties and relying on the governmental and military chains-of-command." *Doe 1 v. Buratai*, 318 F. Supp. 3d 218, 232 (D.D.C. 2018). Plaintiff alleges no action that Reyes Mena took in a private capacity.

Plaintiff argues that Reyes Mena's actions cannot have been taken in an official capacity because El Salvador is criminally prosecuting him decades after the fact. Resp. 26. But because it is the "act itself and whether the act was performed on behalf of the foreign state" that drives the inquiry, what matters is the Salvadoran government's initial authorization, not subsequent conduct. *Rishikof*, 70 F. Supp. 3d at 13; *see Yousuf*, 699 F.3d at 775 (explaining conduct-based immunity is about "acts performed within the scope of [the official's] duty"); *Moriah*, 107 F. Supp. 3d at 279 ("[W]hat matters is whether, for this particular task, [the person] *acted* as an agent of the government."). That makes particular sense for claims against former officials, since the claim looks backwards to the official's acts during his tenure within the government for which he worked. *See Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir.

1971) (allegation that the defendant "was at all relevant times an employee and agent of the" State sufficed "to dispose of [plaintiff's] claim against [defendant] individually").

And according to Plaintiff's own allegations, El Salvador did "immediately ratif[y]" Reyes Mena's conduct. Resp. 26. Plaintiff alleges that high-ranking Salvadoran military and intelligence officials authorized the alleged military operation at the center of this case as part of the State's wartime strategy. *See, e.g.*, JA23. Plaintiff alleges that the "Salvadoran government and its Security Forces worked to promote a false narrative" about the incident. JA25. In fact, it was not until "Plaintiff filed a criminal complaint with the Salvadoran Attorney General's Office" decades later that El Salvador "began prosecuting [its] case." JA35. Plaintiff also filed the "renewed criminal complaint [specifically] naming Defendant and two other officers," and Plaintiff "asked the court to order Defendant's arrest," which only then prompted El Salvador to make "the same request." JA35-36. Nothing about these current events changes that El Salvador authorized Reyes Mena's alleged conduct in 1982 when that alleged conduct occurred.

The cases that Plaintiff cites do not address this question. As noted, *Filartiga* did not address a claim for immunity, so the court had no need to

address whether the defendant's conduct was in an official capacity. *Filartiga*, 630 F.2d at 879. The language Plaintiff relies on is dicta. And *Free & Sovereign State of Chihuahua v. Duarte Jaquez* did not involve government-authorized conduct in pursuit of state goals. It instead involved purely private acts of "corruption and fraud for plundering hundreds of millions of dollars in government funds." No. 20-cv-86, 2020 WL 3977672, at *1 (W.D. Tex. July 14, 2020). And although Plaintiff compiles a string cite of cases in which judgments were entered against foreign officials for extrajudicial killings, *none* of those cases discusses foreign sovereign immunity. Resp. 29-30.

Nor does granting Reyes Mena immunity "render the TVPA a dead letter." Resp. 28. The TVPA applies to individuals who act "under actual or apparent authority, or color of law." 28 U.S.C. § 1350 note, § 2(a). That language sweeps more broadly than the "official acts" necessary to assert conduct-based immunity. *See Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (requiring only "some governmental involvement" to distinguish conduct acts committed by "purely private groups"). And officials from States with unrecognized governments to whom comity and immunity are not owed clearly can come within the TVPA. Moreover, conduct-based immunity looks not only to the official's conduct but to whether exercising jurisdiction would enforce a rule of law

against the foreign State. Restatement § 66(f). That additional element further narrows conduct-based immunity compared to the TVPA. All told, the TVPA does not abrogate foreign official immunity, but granting immunity here in no way renders the TVPA a "dead letter."

2. Exercising jurisdiction would enforce a rule of law on El Salvador.

Plaintiff's challenge to the third element for conduct-based immunity—whether exercising jurisdiction would enforce a rule of law against El Salvador—is also unpersuasive. Resp. 31-34. Plaintiff's argument rests entirely on the D.C. Circuit's construction of this element, which "allow[s] for immunity when a judgment against the official would bind (or be enforceable against) the foreign state." *Lewis v. Mutond*, 918 F.3d 142, 146 (D.C. Cir. 2019).[4] Because he seeks damages from Reyes Mena personally, Plaintiff argues that Reyes Mena cannot satisfy this element. But the D.C. Circuit's view conflicts with the approach of other federal courts. This Court is not bound by D.C. Circuit precedent, and this Court should not adopt its cramped view.

[4] Plaintiff also cites the district court's decision in *WhatsApp Inc. v. NSO Group Technologies Ltd.*, 472 F. Supp. 3d 649 (N.D. Cal. 2020), *aff'd*, 17 F.4th 930 (9th Cir. 2021). Resp. 31. But the district court did not independently consider the third element; it blindly followed *Lewis*. *See id.* at 665. The Ninth Circuit's affirmance, meanwhile, involved only the FSIA and does not even cite *Lewis*.

There are several problems with the D.C. Circuit's rule. Most fundamentally, as Professor Bradley has observed, the D.C. Circuit's "approach collapses the issue of foreign official immunity with the issue of whether the foreign state is the 'real party in interest.'" Bradley, *supra*, at 13. If a plaintiff seeks damages directly from the foreign State or an order enforceable directly against the foreign State, as *Lewis* requires, there would be no need (and no place) for foreign official immunity. Any immunity in such a suit would fall under the FSIA. *See Samantar*, 560 U.S. at 325 ("[S]ome actions against an official in his official capacity should be treated as actions against the foreign state itself [for purposes of the FSIA], as the state is the real party in interest."). And foreign official immunity becomes a dead letter.

But the FSIA and foreign official immunity are two separate doctrines. *Id.* at 321 (distinguishing between the two). The Restatement makes clear that a foreign official has "immunity from *personal liability* … [so long as] the effect of exercising jurisdiction would be to enforce a rule against the foreign state." Restatement § 66 cmt. b (emphasis added); *see* John B. Bellinger III, *The Dog that Caught the Car*, 44 VAND. J. TRANSNAT'L L. 819, 821 (2011) ("[A]n official should be shielded from personal liability for the performance of official functions."). And the Supreme Court has held that, "[e]ven if a suit

is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law." *Samantar*, 560 U.S. at 324. The narrow view adopted by *Lewis* eliminates this possibility.

In a similar vein, *Lewis* would substantially weaken foreign sovereign immunity itself. "Every act committed by a sovereign government is carried out by its officials and agents." *Belhas*, 515 F.3d at 1286. And yet, under *Lewis*, U.S. courts would still be required to adjudicate the lawfulness of official actions by former and current officials, so long as a plaintiff sues a foreign official seeking personal damages only. Plaintiffs should not be so readily permitted to circumvent the comity protections provided by those doctrines. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n.7 (1976) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory.") (citation omitted).

At bottom, the D.C. Circuit's approach conflates an attempt to "enforce a *rule of law* against the state" with an attempt to "enforce a *judgment* against the state." *See* Bradley, *supra*, at 13. But the two concepts are distinct. A court can enforce a rule of law against a foreign state without enforcing a judgment. *See Baker v. GMC*, 522 U.S. 222, 232 (1998) ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to

judgments."); *see also Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("A prevailing party seeks to enforce not a district court's reasoning, but the court's *judgment*."). Foreign official immunity recognizes that either can present grave diplomatic and comity concerns.

The better view, as Professor Bradley adopts, is that "[w]hen a court holds that an official has violated international human rights law for conduct carried out on behalf of their state," it is "enforcing the rule [of law] against the state, since states act through their officials." Bradley, *supra*, at 14. This is true "regardless of whether the damages *judgment* operates only against the official." *Id.* In *Does v. Obiano*, for example, the rule-of-law element was satisfied because exercising jurisdiction "would affect how Nigeria's government, military, and police function, *regardless [of] whether the damages come from [the official's] own wallet[] or Nigeria's coffers*." No. 4:23-cv-813, 2024 WL 185642, at *3 (S.D. Tex. Jan. 17, 2024) (emphasis added), *report and recommendation adopted*, No. 4:23-cv-813, 2024 WL 420901 (S.D. Tex. Feb. 5, 2024), *aff'd*, 138 F.4th 955 (5th Cir. 2025). And in *Doğan v. Barak*, the rule-of-law element was satisfied because "[i]f this Court passed judgment on the legality of the [military] operation, it would likely affect our diplomatic

relationships." No. 2-15-cv-8130, 2016 WL 6024416, at *9 (C.D. Cal. Oct. 13, 2016), *aff'd*, 932 F.3d at 891, 894.

Properly construed, the rule-of-law element is easily satisfied. This action is not really about Reyes Mena. It is about a military operation that Plaintiff alleges the Salvadoran government authorized and conducted through officials like Reyes Mena. Adjudicating this dispute would require U.S. courts to sit in judgment over the Salvadoran government's military operations and strategy during its civil war decades ago. Even if Plaintiff only seeks damages against Reyes Mena, a judgment would necessarily be a condemnation of El Salvador. Foreign official immunity is designed to prevent that result.

CONCLUSION

For the foregoing reasons, the order of the district court denying Reyes Mena's motion to dismiss should be reversed, and this Court should remand with instructions to dismiss this case with prejudice.

Dated: February 24, 2026

Respectfully submitted,

/s/ Jonathan Y. Ellis

Jonathan Y. Ellis
H. Brent McKnight, Jr.
McGuireWoods LLP
501 Fayetteville St.
Suite 500
Raleigh, NC 27601
T: (919) 755-6600
jellis@mcguirewoods.com
bmcknight@mcguirewoods.com

- and -

Kang He
Caroline G. Amarant
McGuireWoods LLP
1750 Tysons Boulevard
Suite 1800
Tysons, VA 22102
T: (703) 712-5068
khe@mcguirewoods.com
camarant@mcguirewoods.com

Counsel for Mario Adalberto Reyes Mena

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,366 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced CenturyExpd BT typeface using Microsoft Word, in 14-point size.

/s/ Jonathan Y. Ellis
Jonathan Y. Ellis

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2026, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

/s/ Jonathan Y. Ellis
Jonathan Y. Ellis