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

In the United States Court of Appeals for the Eleventh Circuit

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ELOY ROJAS MAMANI, ET AL.,
APPELLEES

v.

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

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

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CERTIFICATE OF INTERESTED PERSONS

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

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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-

dence that the case should go forward. That too was error, and the district court's order denying defendants' motion to dismiss should be reversed.

ARGUMENT

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

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

The district court principally erred when it held that the political question doctrine did not bar plaintiffs' lawsuit. As explained in defendants' opening brief, the political question doctrine applies in this case for two overlapping but independent reasons. First, however plaintiffs' claims are properly characterized, adjudication of this case would require a federal court to second-guess judgments made by a foreign military in dealing with a conflict in a foreign land. Second, adjudication of this case would require a federal court not only to pass judgment on the actions of the Executive Branch, but effectively to interpose itself in relations with Bolivia by putting the former Bolivian president and defense minister on trial for their actions while in office. Plaintiffs' various arguments notwithstanding, there is simply no precedent for adjudication of this type of claim.[1]

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[1] Although plaintiffs repeatedly complain that defendants have cited materials outside the complaint (Br. 5, 18-19, 20 n.5), the district court held, and plaintiffs do not dispute, that those materials could appropriately be considered in connection with defendants' motion to dismiss for lack of subject-matter jurisdiction—and thus consideration of these materials is entirely

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

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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-

ble standards for resolving it." *Nixon* v. *United States*, 506 U.S. 224, 228 (1993) (emphasis added) (internal quotation marks omitted) (citing *Baker*, 369 U.S. at 217). Although the Court noted that a lack of judicially manageable standards may serve to "strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch," it made clear that the second factor mandated a discrete inquiry. *Id.* at 228-229.

To be sure, as plaintiffs note (Br. 41), cases in which courts are asked to evaluate judgments made by the *American* military directly implicate not only the second *Baker* factor (*viz.*, whether there were judicially discoverable and manageable standards), but also the first (*viz.*, whether there was a textually demonstrable constitutional commitment of the issue to a coordinate political department). Those cases, however, do not conflate the two factors; instead, they make clear that military judgments are insulated from judicial review *both* because "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches" *and* because "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10; *see also, e.g.*, *Carmichael*, 572 F.3d at 1288-1292 (addressing second factor separately from the first). Even assuming, *arguendo*, that the claims at issue here do not implicate the first *Baker* factor, *but see* pp. 11-16, *infra*, those claims, no less (and arguably more) than claims

involving *American* military judgments, unquestionably implicate the second factor, and are therefore barred by the political question doctrine.

c. Plaintiffs' other arguments for the proposition that there are judicially discoverable and manageable standards are invalid.

i. Plaintiffs contend (Br. 34) that judicially manageable standards exist simply because courts have previously adjudicated claims under the Alien Tort Statute based on violations of similar international norms. As this Court explained in *Carmichael*, however, it is the nature of the alleged misconduct, not the particular cause of action on which the plaintiff relies, which is determinative of the second-factor inquiry. *See* 572 F.3d at 1288. In *Carmichael* itself, the claim at issue was a garden-variety state-law negligence claim based on a vehicle accident; this Court nevertheless held that the claim was not justiciable on the ground that the crash at issue took place in the theater of battle during ongoing military operations. *Id.* In this case, all of the conduct at issue indisputably took place in the course of a sovereign government's response to violent unrest, and "the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded." *El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 844 (D.C. Cir. 2010), *cert. denied*, No. 10-328, 2011 WL 134284 (Jan. 18, 2011).

ii. In the alternative, plaintiffs contend (Br. 34-35, 37-38) that judicially manageable standards exist because they are not challenging defendants' conduct during the entire insurgency, but rather alleging discrete incidents of killing. But to the extent that plaintiffs cite cases in which purportedly comparable "claims . . . that occurred in the context of broader instability" were allowed to proceed (Br. 34), those cases are in fact readily distinguishable, because the allegations in those cases did not "involve combat, training activities, or any peculiarly *military* activity at all." *McMahon* v. *Presidential Airways*, 502 F.3d 1331, 1363 (11th Cir. 2007). Instead, in each of those cases, liability was premised on the personal actions of the *defendants*, rather than on the role of the defendants in commanding or more generally supervising the actions of other members of the military. Thus, in *Arce* v. *Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006), the plaintiff alleged that the defendants had engaged in deliberate kidnapping and torture; in *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005), the plaintiffs alleged that the defendant had murdered incarcerated opposition members; and in *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 845-846 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996), the plaintiffs alleged that the defendant had personally supervised the torture of the victims.

As in the district court, plaintiffs primarily rely (Br. 32-33, 37-38, 41-42) on *Linder* v. *Portocarrero*, 963 F.2d 332 (11th Cir. 1992). *Linder*, however, is

distinguishable on the same ground as the other cases plaintiffs cite, because it involved a claim that low-level military defendants were *personally* responsible for murdering a single American in Nicaragua. *Id.* at 333-334. In allowing the claim against those defendants to proceed, this Court noted that the complaint "does not simply allege that agents of the defendants caused the torture and murder of Linder, or that the defendants generally approved particular attacks; rather, the defendants *themselves* ordered Linder's killing because he was a United States citizen." *Id.* at 335 (emphasis added). The Court ultimately held that the claim could proceed because it was "narrowly focused on the lawfulness of the defendants' conduct in a single incident" and did not "require the court to pronounce who was right and who was wrong in the Nicaraguan civil war." *Id.* at 337. Notably, at the same time the Court permitted that claim to proceed, it affirmed the *dismissal* of broader claims against organizational defendants, *id.*, which the district court had excluded on the ground that it lacked "discoverable and manageable standards to adjudicate the nature and methods by which the contras chose to wage war in Nicaragua," *Linder* v. *Portocarrero*, 747 F. Supp. 1452, 1460 (S.D. Fla. 1990).

Here, the complaint does not identify a single instance in which defendants committed, ordered, or were even aware of the specific killings at issue. And even if the complaint could be read to allege that defendants "generally approved particular attacks," that would be insufficient to state a justi-

ciable claim under *Linder*. 963 F.2d at 335. In the absence of any claim that defendants personally engaged in misconduct that could be adjudicated without reference to the broader unrest, there are no judicially discoverable and manageable standards to govern the disposition of plaintiffs' claims, and the district court committed reversible error when it permitted those claims to go forward.

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

The district court erred not only in applying the second *Baker* factor, but also in applying the remaining *Baker* factors, which focus on the need to avoid judicial interference with the actions of the political branches. Adjudication of this case would require a federal court to pass judgment on the contemporaneous actions of the Executive Branch—and to insert itself into present-day relations with Bolivia by also passing judgment on the actions of the former and current Bolivian presidents.

a. Although plaintiffs state the self-evident proposition that the Executive Branch has never "ratif[ied] the targeted killings of peaceful, unarmed civilians" (Br. 40), they do not seriously dispute that the Executive Branch has consistently taken the position that the democratically elected Lozada government acted appropriately in response to the 2003 unrest. As explained at length in defendants' opening brief (at 3-9), at the time of the

unrest, State Department officials and embassy personnel unequivocally expressed their support for the actions taken by the Lozada government, with one report indicating that the Bolivian military and police had acted with "enormous restraint" in responding to the often-violent unrest. R. 81-10-65; *see also* R. 81-10-25 to 81-10-70. In the aftermath of the unrest, moreover, the State Department reiterated that the Bolivian military and police had acted with restraint, and, in response to a request from Congress, reported that "[t]he Bolivian military and police generally respected human rights in 2003, despite two major incidents of social upheaval," R. 81-2-6; *see* R. 81-2-3, 81-2-12, 81-26-1.

In the face of overwhelming evidence that the Executive Branch initially supported the Lozada government's decision to deploy force and subsequently ratified the Lozada government's response, plaintiffs make two wafer-thin arguments. First, plaintiffs contend (Br. 40-41 & n.22) that the evidence is entitled to little weight because it consists of "comments [by] a variety of lower-ranking officials" and "[i]nternal State Department communications." That contention is simply wrong, both because the evidence comprises public statements as well as private assessments, *see, e.g.*, R. 81-2 (State Department report to Congress); R. 81-26-1 (State Department public statement), and because it includes statements by such high-ranking officials

as then-National Security Advisor Rice and then-Ambassador Greenlee, *see, e.g.*, R. 81-23 (Rice); R. 81-3-2 (Greenlee).

Second, plaintiffs assert (Br. 10, 40) that the State Department had noted that investigations were ongoing as to whether individual incidents of human-rights violations had occurred in the course of the response to the unrest. Plaintiffs, however, must show not simply that some human-rights violations occurred, but that *defendants* were personally responsible for those violations—and the Executive Branch has consistently vindicated the response to the unrest without ever suggesting that President Lozada or members of his government masterminded or were otherwise complicit in any such violations. Put another way, if there were credible evidence that defendants were in any way involved in "the targeted killings of peaceful, unarmed civilians," Pltfs. Br. 40, it is hard to imagine that the State Department would have reported to Congress that the Bolivian military and police "acted with restraint and with force commensurate to the threat posed by protestors." R. 81-2-12. And even assuming that asylum decisions are "grounded principally in humanitarian [considerations]," Pltfs. Br. 40 n.21, it is equally hard to imagine that the Executive Branch would have granted asylum to Minister Berzaín if it believed that he was personally responsible for a campaign of extrajudicial killings and crimes against humanity.

b. The repeated statements of Executive Branch policy implicate each of the remaining *Baker* factors—including, most notably, the textually demonstrable constitutional commitment of foreign affairs to the political branches. Plaintiffs do not dispute the proposition that, where the adjudication of a case would call into question the foreign policy of the Executive Branch, the case should be dismissed under the political question doctrine. *See, e.g.*, *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 977-979, 983 (9th Cir. 2007). Plaintiffs merely seek to distinguish the cases supporting that proposition on the ground that, in this case, the Executive Branch did not "instruct, authorize, finance, advance, or approve the conduct of [d]efendants that is at issue here." Br. 43. For purposes of applying the political question doctrine, however, the relevant inquiry is not whether the Executive Branch sanctioned the targeted killings that plaintiffs allege (if insufficiently). Br. 40. Instead, it is whether adjudicating the claims against defendants would "necessarily require the judicial branch of our government to question the political branches' decision[s]" in supporting defendants' regime and its actions. *Corrie*, 503 F.3d at 982. Because it plainly would, the resolution of this case would impermissibly interfere with the Executive Branch's conduct of foreign relations.

c. The resolution of this case would also impermissibly insert a court directly into present-day relations with Bolivia, because it would re-

quire the court to pass judgment on the actions both of the former Bolivian president (who is a defendant in this litigation and whom the United States government has consistently supported) and of the current president (who led the insurgency at issue and with whom the United States government has repeatedly clashed). Notably, in refusing to take a position on this litigation before the district court, the government cited the "complex and difficult" nature of relations with the current Bolivian regime and the State Department's unwillingness to take positions at times when it "might be inopportune diplomatically." R. 107-2.

Following the district court, plaintiffs contend (Br. 43-44) that the government's refusal to take a position in this litigation constitutes an implicit endorsement that the litigation should go forward. As plaintiffs ultimately concede (Br. 44), however, the government's refusal to take a position should at most be given no weight in the political question analysis. *See, e.g., Alperin* v. *Vatican Bank*, 410 F.3d 532, 557 (9th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006). And at least in this case, the government's refusal to take a position actually *supports* the application of the political question doctrine, because the government has not simply been silent; the government has provided an affirmative explanation for its failure to take a position, which unambiguously reflects its concern that the resolution of the case would interfere with the Executive Branch's conduct of foreign relations. Because the

instigators of the 2003 unrest now form the government of Bolivia (and relations with that government are extraordinarily sensitive), it is hardly surprising that the United States has not intervened in this litigation to express its views. In short, because the issue presented by this case cannot be resolved in a manner that respects the Executive Branch's conduct of foreign relations, and also because there are no judicially discoverable and manageable standards to resolve that issue, the district court erred when it permitted plaintiffs' lawsuit to go forward.

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

The district court additionally erred when it held that plaintiffs had identified actionable international norms that would support jurisdiction under the ATS. When fairly read, plaintiffs' complaint alleges a violation of a norm of international law prohibiting the disproportionate use of force—a norm that is insufficiently specific and universal to be actionable. And although plaintiffs attempt to characterize their complaint as alleging violations of two narrower norms, the complaint fails to state a claim against defendants for either violation.

1. A Norm Of International Law Prohibiting The Disproportionate Use Of Force Is Not Actionable

As a threshold matter, plaintiffs do not dispute the proposition that there is no actionable norm of international law prohibiting the disproportio-

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