No. 21-11545

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ELOY ROJAS MAMANI, ET AL.,

Plaintiffs-Appellees,

v.

JOSE CARLOS SANCHEZ BERZAIN AND GONZOLO DANIEL SANCHEZ DE LOZADA SANCHEZ BUSTAMANTE,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida, Ft. Lauderdale Division
Case Nos. 1:07-cv-22459, 1:08-cv-21063 (Judge James I. Cohn)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND REVERSAL

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July 28, 2021

Eloy Rojas Mamani, et al. v. Jose Carlos Sanchez Berzain, et al.
No. 21-11545

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Washington Legal Foundation certifies under Eleventh Circuit Rule 26.1.1 that, besides those identified in Appellants' and Appellees' Certificates of Interested Persons, the following are interested persons:

Andrews, Cory L. (counsel for *amicus*);

Masslon II, John M. (counsel for *amicus*); and

Washington Legal Foundation (*amicus*).

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Dated: July 28, 2021

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STATEMENT OF THE ISSUE

Whether the Torture Victim Protection Act provides for liability under a negligent civilian command-responsibility theory.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* to oppose judicial expansion of Congress's limited incorporation of international law. *See, e.g.*, *Nestlé, USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

INTRODUCTION

Whether extrajudicial killings occur in Walton County, Georgia, Afghanistan, or Bolivia, they are immoral and must be condemned. All civilized nations should respond quickly to extrajudicial killings and bring the perpetrators to justice. That justice can take many forms

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

including criminal liability, civil liability, or political sanctions. And that accountability can come in many forums. In appropriate circumstances, local courts, international war crime tribunals, the United Nations Security Council, and American courts can dispense justice for senseless acts of violence.

But no forum can remedy every extrajudicial killing. Given China's veto power, for example, the United Nations Security Council is not a good venue to make Chinese officials accountable for murdering Uyghurs. Similarly, the Burmese courts cannot bring the military junta to account for opening fire on unarmed citizens, as the junta controls the courts.

Nor can American courts remedy every extrajudicial killing worldwide. Our Constitution carefully safeguards the separation of powers. It gives Congress—and Congress alone—the power to create causes of action. Judge-made causes of action violate separation-of-powers principles by transferring the authority to make laws from Congress to the courts. Affirming the jury's verdict would violate separation-of-powers principles by allowing judicial expansion of the narrow, congressionally created TVPA claim.

The Constitution also vests the power to engage in international relations with the President. Courts have no role in international relations. Yet the decision below wades into sensitive areas of international relations. This too endangers core separation-of-powers principles. Combined with the practical problems the District Court's ruling creates, these separation-of-powers concerns should compel this Court to reverse.

STATEMENT OF THE CASE

WLF adopts Appellants' statement of the case.

SUMMARY OF ARGUMENT

I.A. The TVPA makes individuals who deliberately subject others to extrajudicial killing liable for their actions. The statute's plain language requires that defendants act deliberately to trigger TVPA liability. This Court, however, has looked beyond the TVPA's plain language to hold that civilian leaders may be liable for mere negligent oversight of military forces. Rather than perpetuate that error, this Court should return to applying the TVPA's statutory language as written.

B. Even if Congress incorporated parts of 1992 customary international law when passing the TVPA that year, it did not provide

for a nebulous incorporation of endlessly evolving international law. In 1992, customary international law did not include a civilian command-responsibility theory of liability. Rather, that theory was hotly debated and over four decades had passed since a divided tribunal last used the theory.

If the civilian command-responsibility theory were part of customary international law in 1992, the *mens rea* was higher than that required for the military command-responsibility theory. Because civilian leaders are farther removed from the battlefield, even gross-negligent oversight of troops cannot support liability. The jury charge, however, allowed a liability finding under the lower military *mens rea* requirement.

C. The Supreme Court no longer implies causes of action to further a statute's purpose. Recent decisions show that courts must apply a statute as written—even if declining to imply a cause of action might conflict with the statute's purpose. Just last month, the Supreme Court emphasized that point when analyzing the Alien Tort Statute—the TVPA's sister statute. Because the TVPA's plain language does not recognize liability under a negligent civilian command-responsibility

theory, the only way Plaintiffs can prevail is if this Court implies such a cause of action. And since implying causes of action violates core separation-of-powers principles, the Court should decline to do so.

D. For three reasons, the law-of-the-case doctrine does not require a contrary holding. First, this Court's most recent opinion conflicts with the first opinion in this case. So any ruling now will conflict with at least one prior appellate opinion. Second, the most recent decision is clearly erroneous. Finally, an intervening Supreme Court decision highlights the errors of the last panel's decision.

II. This Court should consider the practical consequences of affirming the jury's verdict. Courts are reluctant to interfere with the President's international relations authority for good reason. Both friend and foe should know that when America speaks, it does so with one voice. Holding civilian leaders liable for negligently overseeing troops would cause major headaches for the President when crafting American foreign policy. Allies would hesitate to accept our assistance because of the threat of civil liability. A decision against another nation's leaders for mere negligence could trigger a global crisis. Also troubling, both American and foreign courts could hold civilian leaders liable for American troops'

actions overseas. These are real concerns that counsel against affirming the jury's verdict.

ARGUMENT

I. APPELLANTS DID NOT SUBJECT PLAINTIFFS' RELATIVES TO EXTRAJUDICIAL KILLINGS.

A. The Plain Text Of The TVPA Imposes Liability Only On Those Who Act Deliberately.

The TVPA imposes liability on "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing." 28 U.S.C. § 1350 note § 2(a)(2). Under the TVPA an extrajudicial killing is "a *deliberated* killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* § 1350 note § 3(a) (emphasis added). A deliberated killing is "a purposeful act to take another's life" that was "not caused by 'accidental or negligent' behavior." *Mamani v. Sanchez Bustamante* (*Mamani III)*, 968 F.3d 1216, 1235 (11th Cir. 2020).

A court's statutory interpretation must "begin" and "end" "with the language of the statute itself" when "the statute's language is plain." *Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019) (cleaned up). So if a

statute's command is clear, legislative history is irrelevant. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (citation omitted).

The TVPA's language is unambiguous. It imposes liability only on those who subject others to extrajudicial killings. *See* 28 U.S.C. § 1350 note § 2(a)(2). And an extrajudicial killing requires that the person act "deliberate[ly]." *Id.* § 1350 note § 3(a). This language means that the TVPA imposes liability only on those who act deliberately. It does not impose liability on those who act negligently.

But this Court's prior opinion incorrectly held that the jury could find Appellants liable for mere negligent oversight. *See Mamani III*, 968 F.3d at 1239 ("Plaintiffs do not need evidence that the superiors acted with deliberation."). Allowing the jury to find Appellants liable for negligently overseeing troops contravenes the TVPA's plain language, which requires deliberate conduct to impose liability.

That those who pulled the trigger killing Plaintiffs' relatives may have acted deliberately does not satisfy the TVPA's deliberateness requirement. As the First Circuit has explained in the deliberate indifference context, "[f]acts showing no more than a [superior's] mere negligence vis-á-vis [a] subordinate's misconduct are not enough to make

out a claim of supervisory liability." *Parker v. Landry*, 935 F.3d 9, 15 (1st Cir. 2019) (citation omitted); *accord Dodds v. Richardson*, 614 F.3d 1185, 1211 (10th Cir. 2010) (citation omitted). Yet that is what this Court allows. It should abandon this misreading of the TVPA and return to the TVPA's plain language.

Killing someone differs from failing to punish a killing or negligently overseeing individuals who kill. Those who kill are more culpable than superiors who negligently oversee them. The killers are also more culpable than superiors who fail to punish killers. Although the latter groups deserve some blame for their inaction, that does not put them on equal footing with a soldier who ruthlessly shoots an unarmed civilian.

But this Court lumps them all together. A soldier who murdered innocent victims is just as liable as a civilian leader who negligently supervised the soldier or failed to punish him after the crime. This runs contrary to the TVPA's plain language.

Congress created narrow torts under the TVPA. Only two specified crimes—with narrow definitions—create liability. Limiting liability, Congress required that plaintiffs, to prevail, must prove defendants acted

deliberately. The plain language of the TVPA therefore limits who is liable under the statute. It requires a deliberate act; not a negligent act by a civilian supervisor. Because the District Court's charge allowed the jury to find Appellants liable despite their tenuous relationship to the troops' murders, the verdict conflicts with the TVPA's language.

B. In 1992, International Law Did Not Recognize The Tort Of Extrajudicial Killing Under A Civilian Command-Responsibility Theory.

1. "[T]he TVPA does not explicitly provide for liability of commanders for human rights violations." *Ford ex rel. Est. of Ford v. Garcia*, 289 F.3d 1283, 1288-89 (11th Cir. 2002). As described above, the inquiry should end there. But this Court has chosen a different path and looked to international law for guidance when deciding whether a civilian command-responsibility theory is viable under the TVPA. *See Doe v. Drummond Co.*, 782 F.3d 576, 609 (11th Cir. 2015) (citation omitted). Properly viewed, international law does not support Plaintiffs' liability theory. Rather, it shows why Plaintiffs cannot recover for Appellants' alleged negligent oversight of Bolivian troops.

This Court looks to international law because the TVPA's legislative history suggests that Congress sought to incorporate parts of

international law in the U.S. Code. *See Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1348-49 (11th Cir. 2011). Still, a new Supreme Court decision shows that strict rules govern what parts of international law are silently incorporated into U.S. law.

Nestlé recognized that some aspects of international law are incorporated into federal common law. But that incorporation is extremely narrow. Federal common law incorporates only three torts: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Nestlé*, 141 S. Ct. at 1937 (plurality) (quoting *Sosa*, 542 U.S. at 724). These were the three areas of international law that civilized nations agreed on in 1789—when Congress enacted the Alien Tort Statute. *Sosa*, 542 U.S. at 732. In other words, the crimes were "definable, universal and obligatory norms." *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

This Court should similarly interpret the TVPA. If Congress sought to incorporate international law into U.S. law through the TVPA, that incorporation does not extend beyond how international law viewed the torts of torture and extrajudicial killing in 1992. Thus, the key inquiry is

how international law viewed the command-responsibility theory then. Because there was no universal norm on a civilian command-responsibility theory, Plaintiffs cannot prevail on that theory. And even if international law recognized a civilian command-responsibility theory, that theory did not include ordinary negligence. This is a second reason that Plaintiffs' claims fail.

2. The authorities this Court cited to recognize TVPA liability under a civilian command-responsibility theory do not establish that it was a part of 1992 customary international law. In *Doe*, this Court cited only two authorities supporting the civilian command-responsibility theory. *See Doe*, 782 F.3d at 610 (citing *Doe v. Qi*, 349 F. Supp. 2d 1258, 1330-31 (N.D. Cal. 2004); Br. of International Criminal Law Scholars as *Amicus Curiae* Supporting Appellants at 6-18, *Doe*, 782 F.3d 576 (No. 13-15503), 2014 WL 1870570). Those authorities, however, do not fully support a conclusion that the civilian command-responsibility theory was universally recognized in 1992.

Qi, for example, cited only two cases supporting its holding that the civilian command-responsibility theory was part of 1992 customary international law. *See* 349 F. Supp. 2d at 1331. Both cases came *after*

1992—when Congress passed the TVPA. It is nonsensical to rely on post-1992 cases to prove that the civilian command-responsibility theory was part of customary international law in 1992.

The *Doe amicus* brief bolsters Plaintiffs' theory only by oversimplifying the legal landscape. It cites the Nuremberg and Tokyo trials when analyzing the civilian command-responsibility theory. But the charters of those tribunals did not formally include the command-responsibility theory. Rather, they allowed punishing "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544; *accord* Charter of the International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589.

Both Nuremberg proceedings the *amicus* brief cites involved defendants' direct participation in the offenses. *See* Yaël Ronen, *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 VAND. J. TRANSNAT'L L. 313, 324 (2010). The analysis also omits any mention of the dissent from the Tokyo tribunals. Judge

Röling dissented because he believed that the tribunal should not apply a civilian command-responsibility theory. *See* Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments, 787-89 (Robert Cryer & Neil Boister eds. 2008).

This is why the assertion that the Tokyo and Nuremberg trials both made the civilian command-responsibility theory "an established principle of customary international law" is, at best, questionable. Ronen, 43 VAND. J. TRANSNAT'L L. at 324. Of the five convictions cited, only two addressed the civilian command-responsibility theory. *See id.* at 321-23. And one judge dissented from holding those civilians liable for troops' actions. *See* Cryer & Boister, *supra* at 788.

The *Doe amicus* brief's next section is also telling. Between the post-war tribunals and 1992, the academics cited no case applying the civilian command-responsibility theory. They relied on the text of Protocol I of the Geneva conventions. *See* 2014 WL 1870570 at *9-10. That is because no such case from that period exists. Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 112 (2000). But even taking the brief's reliance on Protocol I at face value, Appellants persuasively explain why

the commentary to Protocol I supports their position. *See* Appellants' Br. 48-49.

Judge Röling's dissent at the Tokyo trial, combined with the lack of intervening cases applying the theory, led the International Criminal Tribunal for Rwanda to find that "the application of the [command-responsibility theory] to civilians remains contentious." *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgement, ¶ 491 (Sept. 2, 1998), https://bit.ly/3yN4rTu. Because the issue was contentious in 1998, it was not part of customary international law when Congress passed the TVPA in 1992.

The viability of the civilian command-responsibility theory was far from settled in 1992. *See* Vetter, 25 YALE J. INT'L L. at 111, 132. After the Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998), the civilian command-responsibility theory may now be a part of customary international law. *See* Vetter, 25 YALE J. INT'L L. at 111; *cf. infra*, § I.B.3. (discussing differing command-responsibility standards for military leaders and civilian leaders). But the post-1998 status of the theory is immaterial for TVPA purposes. As described above, this Court

must look to 1992 customary international law when interpreting the TVPA.

Scattered cases applying a command-responsibility theory to civilians on uncertain terms does not make it "universal." *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring). Rather, it shows that after atrocities whose scope was unique in world history, international tribunals applied the theory. Congress therefore did not incorporate the civilian command-responsibility theory by passing the TVPA.

3. But even if the civilian command-responsibility theory were part of 1992 customary international law, the *mens rea* necessary to hold civilians responsible for troops' actions differs from that required for military commanders. This is because "international law, historical tradition, and military reality impose substantial direct responsibility on military commanders to control their troops," while "political leaders tend to be viewed as distanced from military activity and insulated from personal liability." W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 116 (1995). Another reason for the differing standards is that "military authority

includes the power to order subordinates to risk their own lives," while civilians typically "do not wield the same type of life and death authority." *Id.* at 117.

"[S]imple or gross negligence" by civilians thus falls short of satisfying the heightened *mens rea* requirement. Fenrick, 6 DUKE J. COMP. & INT'L L. at 116 (citing William H. Parks, *Command Responsibility for Crimes*, 62 MIL. L. REV. 1, 95-101 (1973)). Yet the jury charge allowed a liability finding for Appellants' negligent oversight of Bolivian troops.

As described above, this Court must look to 1992 international law to decide the TVPA's scope. But even if this Court looks to post-1992 developments, they bolster Appellants' argument that the command-responsibility theory applies differently to civilians than it does to military commanders. In 1998, the Rome Statute recognized the civilian command-responsibility theory. It set forth a three-part test for applying both civilian and military command-responsibility theories. One prong—the inaction requirement—is the same for both types of leaders. *Cf. Prosecutor v. Delalic*, No. IT-96-21-T, Judgement, ¶¶ 394-95 (Int'l Crim.

Trib. for the Former Yugoslavia Nov. 16, 1998), https://bit.ly/3raaIWU (not recognizing any differences for this prong).

Yet the Rome Statute differentiated between the *mens rea* required to hold civilians liable and the *mens rea* required to hold military commanders liable for troops' actions. To show liability for military leaders, the prosecution must show that they "knew, or, owing to the circumstances at the time, should have known" their troops' were committing atrocities. Rome Statute art. 28(a)(i). On the other hand, to show liability for civilian leaders, the prosecution must show that they "either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit" atrocities. *Id.* art. 28(b)(i). "The civilian formulation" is therefore tougher for prosecutors to satisfy. Vetter, 25 YALE J. INT'L L. at 123.

Under the Rome Statute's "civilian knowledge standard," a "civilian superior" has "a significantly lessened duty" "to remain informed of events within the superior's domain" than does a "military commander." Vetter, 25 YALE J. INT'L L. at 123. But the District Court allowed the jury to find Appellants liable for failing to satisfy the Rome Statute's standard for military commanders—the "knew or should-have-known" standard.

There is little support for finding that the civilian command-responsibility theory was part of 1992 customary international law. And even if it were, the *mens rea* requirement for civilian leaders was higher than that for military leaders. The District Court's contrary analysis requires reversing the denial of Appellants' motion for judgment as a matter of law.

C. Courts Cannot Update The TVPA To Further The TVPA's Purpose.

The "Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59 (2001) (citations omitted). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

But for a brief time last century, the Supreme Court assumed it was "a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). "[T]he Court would imply causes of action not explicit in the statutory

text itself." *Id.* (citations omitted). In a string of decisions culminating in *Alexander v. Sandoval*, however, the Court "abandoned" its older understanding of implied causes of action and "ha[s] not returned to it since." 532 U.S. 275, 287 (2001). So now when a party asks courts to imply "a cause of action under a federal statute, separation-of-powers principles" must "be central to the analysis." *Abbasi*, 137 S. Ct. at 1857.

The Supreme Court has considered the TVPA's scope only once. In *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012), the petitioners argued that the TVPA implicitly allowed a cause of action against organizations despite the statute allowing suits against only individuals. The Court soundly rejected that argument. It held that, because the TVPA's plain language does not permit suits against organizations, it could not infer such a cause of action. *Id.* at 456-61.

This Court similarly should not infer a TVPA cause of action for civilian command responsibility for mere negligence. Such an inference skirts decades of Supreme Court precedent declining to infer causes of action; it harkens back to the mid-20th century era of judges acting as legislators.

The Supreme Court's dicta "that the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing" does not change this analysis. *Mohamad*, 566 U.S. at 458 (citation omitted). The Court was not implying a cause of action against superiors. Rather, it was just noting that a person can deliberately kill another without firing the gun. For example, a general can order a private to shoot an innocent civilian. That is a deliberate extrajudicial killing by the general triggering TVPA liability.

Just last month, the Supreme Court reaffirmed the principle that courts should not infer causes of action when examining the Alien Tort Statute. Justice Thomas explained that courts "cannot create a cause of action . . . . That job belongs to Congress, not the Federal Judiciary." *Nestlé*, 141 S. Ct. at 1937 (plurality). This reduces "stress on the separation of powers." *Id.* at 1938. Thus, the *Nestlé* plaintiffs' suit failed because they asked the federal courts to recognize a new cause of action—a job reserved to Congress. *See id.* Plaintiffs' claims fail for the same reason.

D. The Law-Of-The-Case Doctrine Does Not Compel A Contrary Holding.

"Under the law-of-the-case doctrine, this Court is generally bound by a prior appellate decision of the same case and is precluded from revisiting issues that were decided explicitly or by necessary implication in" prior appeals. *Welch v. United States*, 958 F.3d 1093, 1098 (11th Cir. 2020) (*per curiam*) (cleaned up). There are, however, exceptions to this general rule. The doctrine is inapplicable if there is "an intervening change in the controlling law" that "dictates a different result, or the appellate decision is clearly erroneous and, if implemented, would work a manifest injustice." *Thomas v. United States*, 572 F.3d 1300, 1304 (11th Cir. 2009) (quoting *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1510 (11th Cir. 1987)).

This Court has issued conflicting opinions in this case. In the first act of this (now four-act) saga, the Court explained that "even if" Plaintiffs' "Complaint includes factual allegations that are consistent with a deliberated killing by someone (for example, the actual shooters), not all deliberated killings are extrajudicial killings." *Mamani v. Berzain* (*Mamani I*), 654 F.3d 1148, 1155 (11th Cir. 2011). Plaintiffs must show Appellants, "in their capacity as high-level officials—committed

extrajudicial killings within the meaning of established international law." *Id.* (citing *Belhas v. Ya'alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring)). What Plaintiffs proved at trial falls short of what this Court said was required for a finding that a superior acted deliberately. *See id.* & n.9.

Mamani III did not explain why it failed to follow *Mamani I*, which required Plaintiffs to show that Appellants acted deliberately. Rather, *Mamani III* held that "Plaintiffs do not need evidence that the superiors acted with deliberation." 968 F.3d at 1239. Allowing a panel to create new law of the case that conflicts with a prior panel's decision—without explanation—would undermine the whole doctrine. So *Mamani III* was "clearly erroneous" for two reasons. *See Thomas*, 572 F.3d at 1304 (quotation omitted). First, it failed to adhere to the law-of-the-case doctrine by not requiring Plaintiffs to show that Appellants acted deliberately. Second, as described above, it conflicts with the TVPA's plain language and history. Forcing two defendants to pay an eight-figure judgment because of a prior panel's error would lead to manifest injustice. Thus, the "clearly erroneous" exception applies.

But even if this Court disagrees, the Supreme Court's intervening *Nestlé* decision also shows that the law-of-the-case-doctrine no longer applies. As described above, the Supreme Court said that courts can look to international law only as it existed when Congress enacted the Alien Tort Statute or TVPA when deciding the scope of Congress's incorporation of international law. In 1992, the civilian command-responsibility theory was not part of customary international law. And if it were, the *mens rea* was more demanding than that for military superiors. This Court can therefore hold that Appellants did not engage in extrajudicial killings without violating the law-of-the-case doctrine.

* * *

This case should begin and end with the TVPA's plain language. It does not create a cause of action for civilian leaders who negligently supervise troops committing extrajudicial killings. The Court should not look to legislative history or the TVPA's purpose to disregard this plain language and infer a cause of action like the one Plaintiffs brought. But even if this Court disagrees that the statute's plain language ends the inquiry, 1992 customary international law does not support applying a

civilian command-responsibility theory. And even if it did, negligence does not satisfy the civilian *mens rea* requirement.

II. ALLOWING CLAIMS FOR NEGLIGENCE BY CIVILIAN LEADERS WILL UNDERMINE INTERNATIONAL RELATIONS.

If this Court affirms, it will cause major problems for the United States's foreign relations. These problems are threefold. First, it would permit suits against allies' civilian leaders for troops' actions. Second, it would interfere with the President's ability to conduct foreign relations. Third, it could lead to suits against America's civilian leaders—both here and abroad.

A. Affirming Could Lead To Lawsuits Against Allies' Civilian Leaders For Troops' Actions.

The TVPA limits liability to those "individual[s] who[act] under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note § 2(a). When President George H.W. Bush signed the TVPA, he believed that it would not apply to American troops' actions because they are always under domestic control. *See* Statement on Signing the Torture Victim Protection Act of 1991, 1 Pub. Papers 437, 438 (Mar. 12, 1992). But American troops sometimes are under both domestic and foreign command.

In 1994, President William J. Clinton issued Presidential Decisional Directive 25. *See* United States: Administration Policy on Reforming Multilateral Peace Operations, 33 I.L.M. 795 (1994). "The President retains and will never relinquish command authority over U.S. forces." *Id.* at 807. But "the President has the authority to place U.S. forces under the operational control of a foreign commander when doing so serves American security interests, just as American leaders have done numerous times since the Revolutionary War, including in Operation Desert Storm." *Id.* at 799.

This means that American troops sometimes operate under color of both United States law and another country's law. For example, the President may place troops under the operational command of a British general. In those cases, American troops are acting under color of a foreign nation's laws. So they would fall within the TVPA's plain language.

Under the District Court's theory, if an American soldier under the command of a British general in Afghanistan killed civilians without just cause, Britain's civilian leaders could face suit in American courts for negligently permitting the killing. A major international crisis would

ensue if a jury in this circuit returned an eight-figure verdict against British civilian leaders. Affirming the verdict here would encourage such lawsuits and could lead to an international relations crisis.

But even if no case ever went to trial, the threat of such lawsuits would reverberate across the Atlantic. No sane ally would agree to assume command responsibility for United States troops if doing so could subject its civilian leaders to TVPA liability for negligent acts. Allies may decide that the risk is not worth it. And that would lead to a decreased ability to coordinate peacekeeping missions and other joint operations.

Of course, our allies' civilian leaders could also face liability for their own troops' actions. If a French soldier commits an extrajudicial killing, under the District Court's rationale the family could sue France's civilian leaders in American courts for negligently supervising the troops. Such a ruling would make France hesitate before putting its troops in harm's way. And because foreign leaders must travel to the United States for American courts to have personal jurisdiction, it would also discourage world leaders from traveling to Washington or New York for international meetings.

Sticking to the TVPA's language solves these problems. Requiring a deliberate act by civilian officials to hold them liable for actions by troops under their command limits verdicts against allies' civilian leaders. It is hard to fathom British civilian leaders taking deliberate actions to allow American troops to engage in extrajudicial killings. But if that occurred, the international community would accept verdicts for the victims' families. Our allies should be able to assume command responsibility for American troops in peacekeeping missions without fear of having their civilian leaders hauled into a Florida federal court to face TVPA claims.

B. This Case Highlights The Perils Of Allowing Extrajudicial-Killing Liability Under A Civilian Command-Responsibility Theory.

The elder President Bush was worried that the TVPA "would give rise to serious friction in international relations and would also be a waste of our own limited and already overburdened judicial resources." 1 Pub. Papers at 437. That warning was prescient. For almost two decades, this case has caused friction between the United States and Bolivia. Affirming the jury's verdict would only increase that tension and could create problems with other countries moving forward.

After the tragic events of September and October 2003, Appellants came to the United States. Bolivia then requested their extradition to face charges for the civilians' deaths. *See* Glenn Greenwald, *America's refusal to extradite Bolivia's ex-president to face genocide charges* (Sept. 9, 2012), https://bit.ly/3dG7BjN. The United States refused the request. *See id.*

As the U.S. State Department explained, civilians cannot be held liable for troops' actions "without evidence showing that the civilian official specifically intended or knew that the criminal violation would occur as a result of his or her orders. Evidence of mere foreseeability, general knowledge of misconduct or failure to act on the part of the civilian" cannot support applying the command-responsibility theory. Letter from Mitchell L. Ferguson, Ministro Consejero en Funciones, to David Choquehuanca Céspedes, Ministerio de Relaciones Exteriores del Estado Plurinacional de Bolivia (Sept. 5, 2012), https://bit.ly/3roGD6f. This caused "Bolivia's fraught relationship with the United States" to "nosedive[]." Simeon Tegel, *Is the US harboring a human rights abuser?* (Sep. 29, 2016), https://bit.ly/36dmjeb.

Now that the District Court has denied Appellants' motion for judgment as a matter of law, the problems have worsened. Bolivia relied on the District Court's order when renewing its demand that the United States extradite Sánchez De Lozada. *See* MercoPress, *Bolivia to seek extradition of former President Sánchez de Lozada from US* (Apr. 8, 2021), https://bit.ly/36bs4cr. Bolivia's renewing its call for Sánchez De Lozada's extradition less than one day after the District Court's order shows how TVPA suits can hurt international relations.

Decisions like this one disrupt "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964). When such disputes arise, courts must refrain from interfering with the Executive Branch's international relations authority. *See id.* at 428-29.

Allowing the jury's verdict to stand would encourage more lawsuits seeking to put pressure on the Executive Branch to adopt certain positions. If plaintiffs can convince six citizens without international relations experience that foreign officials negligently allowed troops to

torture or kill innocent civilians, then plaintiffs will have a ready way to undermine the Executive Branch's considered judgments.

Requiring plaintiffs to show that a civilian deliberately killed or tortured civilians to prevail in a TVPA action solves this problem. The greater the consensus about "a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it," because "courts can then focus on" applying facts to law "rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Banco Nacional de Cuba*, 376 U.S. at 428. There is international consensus about deliberately killing or torturing civilians. So it is appropriate for courts to render judgments on those questions. It is not, however, appropriate for courts to weigh in on the civilian command-responsibility theory for negligence. Yet that is what the District Court blessed by denying Appellants' motion for judgment as a matter of law.

C. Permitting Negligence To Sustain A Finding Of Civilian Command Responsibility Could Lead Other Nations To Find American Civilian Officials Liable For American Troops' Actions.

Finally, this Court should realize how other nations might respond to American courts holding civilians liable for negligent oversight of

troops. One reason that American officials seldom face such actions in foreign courts is because of international comity. But affirming the District Court's order would upset this comity. It would invite nations—both friend and foe—to allow similar suits against America's civilian leaders.

"[U]nder international law," many countries employ a "tit-for-tat strategy." Anthony D'Amato, *Is International Law Really 'Law'?*, 79 NW. U. L. REV. 1293, 1310 (1984). This often plays out when a country expels ambassadors or other diplomats. The expelled diplomats' country almost always retaliates by expelling the other nation's diplomats. *See, e.g.*, Reuters, *Russia expels one Romanian diplomat* (May 11, 2021), https://reut.rs/2V0HVbc.

If America holds other nations' leaders liable for negligently overseeing troops, those nations will likely retaliate by making America's civilian leaders accountable for negligently overseeing American troops. An example proves the point. Five American troops killed three Afghan civilians. Barbara Starr, *Army: 12 soldiers killed Afghans, mutilated corpses* (Sept. 10, 2010), https://cnn.it/3jMo0Y6. There is no evidence that American officials deliberately allowed the murders. But if Afghanistan

adopted the District Court's rationale, that is immaterial. If American officials acted negligently, a court could hold them liable for the civilians' deaths.

This would have a chilling effect on American military actions. Our civilian leaders would have to worry about eight-figure judgments for negligently overseeing American troops. This Court should not open the door for other nations to adopt rules making America's leaders liable for negligent supervision of American troops. Rather, it should recognize that the Constitution gives the Executive Branch the ability to direct American forces without judicial intervention. Requiring deliberate acts for TVPA liability accomplishes this goal.

* * *

At least two considerations weigh against affirming the jury's verdict. First, the TVPA's text and history do not support liability for extrajudicial killing under a civilian command-responsibility theory. Second, there are practical problems with allowing negligence by civilian leaders to support a TVPA claim. Thus, the District Court erred by denying Appellants' motion for judgment as a matter of law.

CONCLUSION

This Court should reverse and remand with instructions to enter judgment as a matter of law for Appellants on Plaintiffs' TVPA claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because it contains 5,918 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it uses 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on July 28, 2021, I served a copy of this Brief on all counsel via the Court's CM/ECF system, except for the following attorneys who were served via U.S. Mail:

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