**ORAL ARGUMENT HELD JANUARY 25, 2021**

**Nos. 20-7017, -7019**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

LUSIK USOYAN, et al.,

Plaintiffs-Appellees,

v.

REPUBLIC OF TURKEY,

Defendant-Appellant.

KASIM KURD, et al.,

Plaintiffs-Appellees,

v.

REPUBLIC OF TURKEY,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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## GLOSSARY

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| FSIA | Foreign Sovereign Immunities Act |
| FTCA | Federal Tort Claims Act |

## SUMMARY OF ARGUMENT

The United States submits this brief in response to the Court's request for its views "on this case, and in particular on the source and scope of any discretion afforded to foreign security personnel with respect to taking physical actions against domestic civilians on public property (i.e., not on diplomatic grounds)." Order of Jan. 25, 2021.

Both domestic law and international practice establish that foreign nations have the authority to protect their diplomats and senior officials in the United States, including outside their diplomatic missions, just as the United States has the authority to protect U.S. diplomats and senior officials overseas. That authority includes the discretion to use force against civilians on U.S. territory when foreign security personnel reasonably believe that the use of force is necessary to protect diplomats and senior officials from threats of bodily harm. If foreign security personnel exercise their discretion to use force that is protective in character—even if they abuse that discretion—foreign states are immune from suits arising from the discretionary conduct of their agents. But if foreign security personnel attack civilians on U.S. territory when the use of force does not reasonably appear necessary to protect against bodily harm, they are acting outside any reasonable conception of the protective function and thus outside their legally protected discretion, and the discretionary function rule does not apply. The foreign state accordingly is subject to suit under the Foreign Sovereign Immunities Act's noncommercial tort exception, 28 U.S.C. § 1605(a)(5).

This inquiry is highly fact-intensive. Here, the district court—having reviewed an extensive body of evidence, including numerous videos of the altercations at issue and declarations from security experts—found that Turkish security personnel "violently" attacked civilian protesters, including by "strik[ing] and kick[ing]" protesters who had fallen to the ground, with no reasonable basis for perceiving a threat to President Erdoğan. *Usoyan v. Republic of Turkey*, 438 F. Supp. 3d 1, 9, 20 (D.D.C. 2020). That conduct cannot reasonably be regarded as an exercise of the agents' protective function. The district court recognized that, "[h]ad the facts of these cases differed slightly," Turkey's entitlement to immunity might "have differed as well." *Id.* at 21. On the basis of the district court's factual determinations, however, the United States agrees with its conclusion that Turkey is not immune from these suits.

## ARGUMENT

### A. Both Sending And Receiving States Have Responsibilities To Protect Diplomats And Officials

International law has long recognized the importance of protecting diplomats and senior government officials during their travels abroad. *See, e.g.*, 4 E. de Vattel, *The Law of Nations* § 82, at 465 (J. Chitty ed. 1844) (an act of violence to a foreign public minister is "an offense against the law of nations"). The United States' respect for that principle is as old as the nation itself. As far back as 1781, for example, "the Continental Congress adopted a resolution calling on the States to enact laws punishing 'infractions

of the immunities of ambassadors and other public ministers[,]' … targeting in particular 'violence offered to their persons, houses, carriages and property.'" *Boos v. Barry*, 485 U.S. 312, 323 (1988); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The United States' commitment to protect visiting diplomats and foreign officials reflects not just "our Nation's important interest in international relations" but also our need to "ensure[] that similar protections will be accorded those that we send abroad to represent the United States." *Boos*, 485 U.S. at 323-324; *cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1396-1397 (2018) (discussing provisions of the Constitution and the Judiciary Act of 1789 allowing U.S. courts to resolve disputes involving diplomats).

International law assigns to the "receiving state"—that is, the nation receiving foreign diplomats or senor officials—primary responsibility for protecting those officials. The Vienna Convention on Diplomatic Relations provides that "[t]he receiving State shall … take all appropriate steps to prevent any attack on" the "person, freedom or dignity" of "a diplomatic agent." Vienna Convention on Diplomatic Relations art. 29, Dec. 13, 1972, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502. Congress has authorized both the Secret Service and the State Department to protect visiting foreign officials, *see* 18 U.S.C. § 3056(a)(5), (6); 22 U.S.C. § 2709(a)(3)(A), (D), and both agencies routinely exercise that authority. There is good reason to assign receiving states the primary responsibility for protecting visiting foreign government officials and diplomatic missions: Otherwise, "the task of repulsing invasions of [an] embassy and its grounds would be left largely to the foreign nation's security forces," and "[v]iolence between

[domestic] citizens and foreign security forces … is hardly calculated to improve relations between governments." *Finzer v. Barry*, 798 F.2d 1450, 1463 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988).

But although receiving states have primary responsibility for protecting visiting foreign government officials and diplomats, sending states retain the inherent authority and responsibility to protect their own personnel when they travel overseas, subject to the authorization of the receiving state. The United States routinely exercises this authority to protect U.S. diplomats and diplomatic facilities overseas, supplementing the host government's protection with Diplomatic Security personnel, U.S. Marine Security Guards, and local contractors. *See* 22 U.S.C. § 4802(a) (directing the Secretary of State to "develop and implement … policies and programs" for protecting U.S. government personnel and missions abroad). The United States also exercises its authority to protect senior U.S. officials, including the President, when they travel overseas. The United States would not rely entirely on a foreign government, even that of a close ally, to protect senior U.S. officials traveling abroad; nor would the United States expect other nations to fully cede the protection of their diplomats and senior officials to our own personnel.

Congress has explicitly recognized our government's authority to protect U.S. diplomats and officials overseas, as discussed above, and it has impliedly recognized foreign nations' authority to protect their diplomats and senior officials in the United States. In 1999, Congress prohibited the possession of firearms by persons admitted

to the United States on nonimmigrant visas, but it exempted from that prohibition certain "official representative[s] of a foreign government" and "foreign law enforcement officer[s] of a friendly foreign government entering the United States on official law enforcement business." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, § 121, 112 Stat. 2681, 2681–72 (1998) (codified at 18 U.S.C. § 922(y)(2)). The amendment's sponsor explained that the exception was meant to cover "categories of people [who] might" need to possess a gun "for very legitimate purposes," such as a member of the "security contingent" of "any head of state" visiting the United States. 144 Cong. Rec. 16,493 (1998) (Sen. Durbin). The State Department has accordingly informed foreign missions that foreign "Protective Escorts" may import weapons "for the purpose of protecting the visiting foreign government dignitary they are accompanying." Circular Diplomatic Note (June 10, 2015), *available at* https://go.usa.gov/xsxPX; *see also United States v. Alkhaldi*, 2012 WL 5415579, at *4 (E.D. Ark. Nov. 6, 2012) ("The statute allows certain representatives of foreign governments the same security and right to firearms that the United States might desire for its personnel abroad[.]").

The principle that sending states are authorized to protect diplomats and officials traveling abroad has not been codified in a treaty, as has the obligation of receiving states to protect foreign diplomatic and consular personnel, but that does not reflect any uncertainty about whether the authority exists. To the contrary, this principle is widely accepted in international practice and reflects the fact that nations have inherent

authority to protect their diplomats and senior officials outside their borders, subject to the authorization of the receiving state.

### B. Foreign Security Personnel Have Discretion To Use Force Against Domestic Civilians On Domestic Territory Only When It Reasonably Appears Necessary To Defend A Protected Person

As noted above, foreign states have the authority and responsibility to protect their diplomats and senior officials abroad, and that authority includes the discretion to use force against domestic civilians on domestic territory in certain circumstances.[1] But that authority is subject to an important limitation: Foreign security personnel may use force against domestic civilians on domestic territory only in the exercise of their protective function—that is, when the use of force reasonably appears necessary to protect against a threat of bodily harm.[2] That limitation is reflected, for example, in the State Department's guidance to foreign missions that protective escorts "may only bring weapons into the United States for the purpose of protecting the visiting foreign government dignitary they are accompanying." Circular Diplomatic Note (June 10, 2015), *supra*. No source of law affords foreign security personnel discretion to use force against civilians on U.S. territory except in the exercise of their protective function.

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[1] While the premises of a diplomatic or consular mission are part of the host nation's territory, for purposes of this brief, references to "domestic territory," "foreign territory," or "U.S. territory" exclude the premises of a diplomatic or consular mission.

[2] Because the district court's account of the facts establishes that Turkey's security agents acted outside any reasonable conception of this protective function, *see infra* pp. 10-12, this case does not present the need to consider what (if any) other constraints might apply to the use of force by foreign security personnel against domestic civilians.

U.S. security personnel charged with protecting U.S. diplomatic and consular personnel and senior officials in foreign territory (including agents of both the State Department and the Secret Service) are required as a matter of policy to respect that constraint. The State Department, for example, permits Diplomatic Security personnel to use less-than-lethal force only when doing so "reasonably appears necessary … to limit, disperse, or address a threatening situation" and to use deadly force "only when necessary" in light of "a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the special agent or to another person." 12 Foreign Affairs Manual 091, 092, https://go.usa.gov/xsPrZ.

### C. The FSIA's Discretionary Function Rule Does Not Protect Sending States Whose Agents Use Force Outside Any Reasonable Conception Of Their Protective Function

The Foreign Sovereign Immunities Act (FSIA) provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States … in any case … in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). The Act qualifies that exception to immunity, however, by stating that it "shall not apply" to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." *Id.* § 1605(a)(5)(A). Decisions construing the discretionary function exception

of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a), may provide "guidance" on the construction of the FSIA's discretionary function rule, *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-922 (D.C. Cir. 1987), although the two provisions serve distinct purposes.

The protection of diplomats and senior officials against threats of bodily harm would ordinarily involve the sort of discretion insulated from suit under the FSIA. Agents performing that function must exercise sophisticated, often split-second judgment in detecting potential threats and determining the appropriate response. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring in the judgment) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy."); *Galella v. Onassis*, 487 F.2d 986, 993-994 & n.9 (2d Cir. 1973) (explaining that the duties of Secret Service agents "involve an element of discretion" and that "the duty of protecting" senior officials and their family members "is *toto coelo* different from the normal police function"). And as in the Fourth Amendment context, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Indeed, the very "purpose of" immunity for the exercise of discretionary functions "is to prevent judicial second-guessing of" discretionary governmental decisions "through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quotation marks omitted). For that reason, the FSIA expressly

provides that foreign states retain immunity for the exercise of a discretionary function "regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

The district court was therefore incorrect to the extent it suggested that the discretionary function rule categorically cannot immunize conduct involving the use of "violent physical" force or "sudden, violent, physical acts," 438 F. Supp. 3d at 17-18. Although security personnel for the United States take all appropriate actions to modulate the use of force when protecting U.S. diplomats and senior officials abroad, the use of violent force may unfortunately be necessary in certain circumstances to repel or neutralize threats to a protectee. As long as a security agent is exercising discretion to defend a protected person, in circumstances where the use of force reasonably appears necessary to protect against bodily harm, the discretionary function rule preserves immunity whether or not the agent "abuse[s]" his or her discretion, 28 U.S.C. § 1605(a)(5).

The discretionary function rule cannot apply, however, when agents have no lawful discretion to exercise. That is the case when foreign security personnel use force against civilians on U.S. territory in a manner that cannot be understood to fall within any reasonable conception of their protective function. Thus, in determining whether a foreign state is subject to suit for the use of force by its security personnel against domestic civilians, the relevant question is whether—from the perspective of an agent on the scene—the agents' use of force can reasonably be regarded as protective in character. If so, it is protected by the discretionary function rule, whether or not it can

be regarded as an abuse of discretion; but if not, it is unprotected by the discretionary function rule.

### D. The District Court's Account Of The Facts Establishes That The Force Used By Turkish Security Personnel Was Not Protective In Character

The district court's description of the facts establishes that Turkish security personnel used force in a manner outside any reasonable conception of their protective function and therefore not protected by the FSIA's discretionary function rule. That is true for two reasons.

*First*, at the time of the principal altercation between plaintiffs and the Turkish security personnel, plaintiffs—along with other protesters—"were standing and remaining on the Sheridan Circle sidewalk which had been designated for protesting by United [S]tates law enforcement." *Usoyan*, 438 F. Supp. 3d at 19-20. Both the Turkish agents (along with supporters of President Erdoğan) and U.S. law enforcement separated the protesters from the Ambassador's Residence at which President Erdoğan had arrived. *Id.* at 8. Yet the Turkish agents "crossed [the] police line" separating them from the protesters in order "to attack the protesters" "violently," and they took that aggressive action without any indication (according to the district court) "that an attack by the protesters was imminent," *id.* at 20, and without any finding by the district court of some other reasonable basis for perceiving a threat to President Erdoğan. There is no basis in the district court's account of the facts to regard the "attack" by Turkish agents as protective in nature.

*Second*, the actions the Turkish agents took after the initial attack leave little doubt that they were using force for a purpose outside their proper protective function. The district court observed that "[t]he protesters did not rush to meet the attack"; they "either fell to the ground … or ran away." 438 F. Supp. 3d at 20. Yet the Turkish agents "continued to strike and kick the protesters who were lying prone on the ground," and they "chased … and violently physically attacked many of" the protesters who were running away from the scene. *Id.* at 9; *see id.* at 20. They then "ripped up the protesters' signs." *Id.* at 9. None of those actions could reasonably be regarded as protective in character. Later the same day, moreover, Turkish agents "emerged from a van that was part of President Erdogan's motorcade" and assaulted plaintiff Lacey MacAuley. *Id.* at 10. MacAuley was doing nothing more than standing "behind a police line," "holding a sign and chanting" as the motorcade drove by—yet Turkish agents "physically attacked [her] by forcibly covering her mouth, grabbing her wrist and arm, and snatching and crumbling her sign," all "after President Erdogan's motorcade had already passed." *Id.* at 20. Those actions, too, cannot reasonably be regarded as protective in character.

As the district court properly recognized, the conclusion that the actions of the Turkish security personnel are not protected by the discretionary function rule is "very narrow [and] fact-specific." 438 F. Supp. 3d at 20. "[P]roviding security for a president is extremely challenging and often requires split-second decision making," and those "challenges are especially fraught when providing security for a leader such as President Erdogan who has been the victim of multiple assassination threats and attempts." *Id.*

at 20-21. "Had the facts of these cases differed slightly," Turkey's entitlement to immunity might "have differed as well." *Id.* at 21. But because the district court's account of the facts makes clear that the Turkish agents' use of force was not protective in character, the agents were not exercising legally protected discretion, and Turkey is accordingly subject to these suits under the FSIA's noncommercial tort exception, 28 U.S.C. § 1605(a)(5).

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit set by the Court's order of January 25, 2021, because it contains 2,985 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

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