No. 21-1013

In the Supreme Court of the United States

REPUBLIC OF TURKEY, PETITIONER

v.

LUSIK USOYAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals properly determined, based on the facts found by the district court, that petitioner was not immune under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, for the conduct of its security agents at issue in this suit.

2. Which party bears the burden of proof with respect to application of the discretionary-function exception to the FSIA's exception to the general rule of foreign sovereign immunity for noncommercial torts, 28 U.S.C. 1605(a)(5)(A).

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Statutory Background

The Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1602 *et seq.*, "supplies the ground rules for 'obtaining jurisdiction over a foreign state in the courts of this country.'" *Federal Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 709 (2021) (citation omitted). The Act "creates a baseline presumption of immunity from suit," *ibid.* (citing 28 U.S.C. 1604), which is displaced only where "'a specified exception applies,'" *ibid.* (citation omitted).

The exception at issue here is the "noncommercial tort exception." *Philipp*, 141 S. Ct. at 714. It allows a suit "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 exception, however, does "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." 28 U.S.C. 1605(a)(5)(A). Accordingly, when a noncommercial-tort claim falls within that latter provision—the discretionary-function exception—a foreign state remains immune from suit. See, *e.g.*, *USAA Cas. Ins. Co.* v. *Permanent Mission of Republic of Namibia*, 681 F.3d 103, 111 (2d Cir. 2012) (explaining that the discretionary-function rule operates as an "exception to the [noncommercial-tort] exception").

Congress based the FSIA's discretionary-function exception on a provision of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, that contains nearly identical language, 28 U.S.C. 2680(a). See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 21 (1976). Courts have accordingly looked to decisions construing the FTCA's discretionary-function exception for "guidance on what acts should be deemed discretionary for FSIA purposes." *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987); see *id.* at 922.

B. Factual Background

1. In May 2017, Turkish President Recep Tayyip Erdoğan visited the White House to meet with then-President Trump. Pet. App. 3. A group of protesters

opposed to President Erdoğan and his policies assembled nearby in Lafayette Square. *Id.* at 2-3. Some protesters then traveled to the Turkish Ambassador's residence near Sheridan Circle, where they anticipated that President Erdoğan would travel next. *Id.* at 3. The protesters gathered on the sidewalk across the street from the Ambassador's residence. *Ibid.*

A group supporting President Erdoğan, including Turkish security agents, gathered on the sidewalk immediately in front of the residence, facing the protesters. Pet. App. 3-4. The groups "taunted and threatened each other" across the street. *Id.* at 4. Officers of the Washington, D.C. Metropolitan Police Department stood between the groups. *Ibid.* A brief physical altercation of unclear origin took place between the groups, resulting in injuries to members of both groups. *Ibid.* Police officers "restore[d] peace" and separated the groups. *Ibid.*

President Erdoğan then arrived. Pet. App. 4. While he sat in his car at the entrance of the residence, the pro-Erdoğan group—including Turkish security agents—broke through the line of U.S. law enforcement officers, struck and kicked protesters (including some who had fallen to the ground), and chased protesters who were running away. *Id.* at 4-5. During the altercation, President Erdoğan left his car and walked into the Ambassador's residence. *Id.* at 41.

U.S. law enforcement officers stopped the attack several minutes after it began. Pet. App. 41. The pro-Erdoğan group then tore up protesters' signs. *Ibid.*

2. Later that day, a different protester—Lacy MacAuley—walked toward the Turkish Embassy, President Erdoğan's next scheduled stop, with a protest sign. Pet. App. 5. She stood behind a police perimeter

and shouted at President Erdoğan's motorcade. *Id.* at 5-6. After the motorcade had passed, several Turkish security officers emerged from a vehicle and surrounded her. *Id.* at 6. One placed his hand over her mouth, another grabbed her wrist, and a third crumpled her sign. *Id.* at 42; see *id.* at 6. U.S. law enforcement officers stopped the altercation. *Id.* at 6.

3. The State Department responded to the altercations with a statement "communicating [its] concern to the Turkish government in the strongest possible terms." Heather Nauert, *United States Concerned by Violence Outside Turkish Diplomatic Facilities* (May 17, 2017), https://go.usa.gov/xuz9c. The House of Representatives unanimously passed a resolution condemning the "brutal[] attack." H.R. Res. 354, 115th Cong., 1st Sess. (2017); see 163 Cong. Rec. H4640-4641 (daily ed. June 6, 2017). And a grand jury indicted 15 Turkish security agents and other defendants involved in the altercations for criminal assault. Pet. App. 19.[1]

C. This Litigation

1. Two groups of plaintiffs injured in the altercations (respondents in this Court) brought these suits. Lacy MacAuley and four other respondents brought the first suit, *Usoyan* v. *Republic of Turkey*, against the Republic of Turkey (petitioner here). C.A. J.A. 36-62 (complaint).[2] That suit relies on the FSIA's noncommercial-

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[1] Two of the defendants, who are not security agents, pleaded guilty to assault resulting in significant bodily injury. The United States dismissed charges against some of the agents, and charges remain pending against others.

[2] Per a recent diplomatic request, the United States now officially refers to petitioner as the "Republic of Türkiye." For clarity, this brief uses "Turkey," as the parties have throughout this litigation.

tort exception to foreign sovereign immunity and includes claims for assault, battery, negligent and intentional infliction of emotional distress, loss of consortium, civil conspiracy, and violations of a D.C. bias-related crime statute and the federal Anti-Terrorism Act. *Id.* at 54-61. Fifteen additional respondents brought the second suit, *Kurd* v. *Republic of Turkey*, likewise relying on the noncommercial-tort exception and asserting similar claims against petitioner and individual Turkish agents. *Id.* at 63-113.

As relevant here, petitioner moved to dismiss both suits as barred by the discretionary-function exception. Pet. App. 34. The parties litigated the motions based on exhibits to their filings, including videos of the altercations. *Id.* at 34-36.

2. The district court denied the motions in essentially identical opinions. Pet. App. 33-77 (*Usoyan*); see 438 F. Supp. 3d 69 (*Kurd*). The court applied the two-part standard set forth in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), for determining whether the FTCA's discretionary-function exception permits a suit against the United States. As to the first element of the *Berkovitz* test—whether the conduct in question "involves an element of judgment or choice," as opposed to being dictated by applicable law or policy, *id.* at 536—the court determined that the FSIA's discretionary-function exception was potentially applicable because "there was no federal statute, regulation, or policy specifically prescribing [petitioner's] actions during the events at issue in these cases." Pet. App. 54. The court then proceeded to the second part of the *Berkovitz* test, which "considers whether the * * * exercise of discretion is 'grounded in social, economic, or political policy'

and is 'of the kind that the discretionary function exception was designed to shield.'" *Id.* at 57 (quoting 486 U.S. at 536-537). The court concluded that petitioner's "exercise of discretion in these cases was not grounded in social, economic, or political policy and was not 'of the nature and quality that Congress intended to shield from tort liability.'" *Ibid.*

In particular, the district court reasoned that "the Turkish security forces did not have the discretion to violently physically attack the protesters, with the degree and nature of force which was used, when the protesters were standing, protesting on a public sidewalk," and "did not have the discretion to continue violently physically attacking the protesters after the protesters had fallen to the ground or otherwise attempted to flee." Pet. App. 68. The court recognized that "those charged with the security of a president in a foreign country are often required to use their discretion to successfully perform their duties" and described its holding as "very narrow" and "fact-specific." *Id.* at 66-67. "Had the facts of these cases differed slightly," the court noted, its "decision as to [petitioner's] sovereign immunity may have differed as well." *Id.* at 67.

3. Petitioner appealed, and the D.C. Circuit consolidated the appeals. After oral argument, the court invited the government to provide its views as amicus curiae. The court then affirmed the district court's decisions allowing the claims to proceed. Pet. App. 1-32.

Like the district court, the court of appeals relied on this Court's construction of the FTCA's discretionary-function provision in *Berkovitz*. With respect to the first step of the *Berkovitz* test, the court of appeals concluded that "a sending state has a right in customary

international law to protect diplomats and other high officials representing the sending state abroad." Pet. App. 18 (relying on the government's amicus brief). The court determined that "generally applicable laws prohibiting criminal assault did not give the Turkish security detail a sufficiently 'specific directive'" to negate that discretion. *Id.* at 20.

Like the district court, the court of appeals concluded at the second step of the *Berkovitz* test that "the decisions by the Turkish security detail giving rise to [respondents'] suit were not the kind of security-related decisions that are 'fraught with' economic, political, or social judgments." Pet. App. 27 (citation omitted). In particular, the court observed that "[t]he nature of the challenged conduct was not plausibly related to protecting President Erdogan, which is the only authority Turkey had to use force against United States citizens and residents." *Ibid.* The court accordingly held that the Turkish agents' conduct did not fall within the discretionary-function exception to the FSIA's noncommercial-tort exception. *Ibid.*[3]

DISCUSSION

The court of appeals correctly held that petitioner is not immune from these suits. 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 can protect a U.S. diplomat or senior official overseas. That

[3] Petitioner also moved to dismiss respondents' suits as nonjusticiable under the political question doctrine and principles of international comity. Pet. App. 68, 73. The lower courts rejected those contentions, *id.* at 28-32, 68-76, and petitioner does not seek review of those issues in this Court.

authority affords foreign security personnel discretion to use force on U.S. territory when they reasonably believe that doing so 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—the foreign state is immune from suits arising from its agents' discretionary conduct. But if foreign security personnel use force in a manner that 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. The FSIA's discretionary-function exception therefore does not apply.

The district court—having reviewed an extensive body of evidence, including videos of the altercations and declarations from security experts—determined that Turkish security personnel "violently" attacked protesters with no reasonable basis for perceiving a threat to President Erdoğan. Pet. App. 41. The court of appeals accepted the district court's factual findings. *Id.* at 5. Because the Turkish agents' conduct as determined by the district court cannot reasonably be regarded as an exercise of the protective function, the court of appeals was correct to hold that the agents' conduct is not protected by the discretionary-function exception. Certain aspects of the court's opinion raise questions about the scope of its reasoning, but those questions have no practical significance in this case, and petitioner identifies no other basis for this Court's review. The petition for a writ of certiorari should accordingly be denied.

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER IS NOT IMMUNE FROM THESE SUITS IS CORRECT AND DOES NOT WARRANT THIS COURT'S REVIEW

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

International law has long recognized the importance of protecting diplomats and senior government officials during their travels abroad. See, *e.g.*, 4 Emmerich de Vattel, *The Law of Nations* Bk. III § 82, at 465 (Joseph Chitty trans., 1844) (6th Am. ed.) (stating that an act of violence to a foreign public minister is "an offence against the law of nations"). The United States' respect for that principle is as old as the Nation itself. In 1781, "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) (citation omitted); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716-717 (2004) (discussing similar history). The United States' commitment to protecting visiting diplomats and foreign officials reflects not just "our Nation's important interest in international relations," but also the 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.

International law assigns to the receiving state—that is, the nation receiving foreign diplomats or senior 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, *done* Apr. 18, 1961, art. 29, Dec. 13, 1972, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502 (entered into force for the United States, Dec. 13, 1972). Congress has authorized 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) and (D), and both agencies routinely exercise that authority. Assigning receiving states the primary responsibility for protecting visiting foreign government officials and diplomatic missions reflects the reality that otherwise such protection "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, *Boos* v. *Barry*, *supra*.

While 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, *e.g.*, 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. 2681-71, 2681-72. The amendment's sponsor explained that the exception was meant to cover "categories of people wh[o] might" need to possess a firearm "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) (statement of Sen. Durbin). The State Department has accordingly informed foreign missions that foreign "Protective Escorts" may import firearms "for the purpose of protecting the visiting foreign government dignitary they are accompanying." *Circular Diplomatic Note* 2 (June 10, 2015), https://go.usa.gov/xsxPX (*Circular*); see *United States* v. *Alkhaldi*, No. 12-cr-1, 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.[4]

B. Foreign Security Personnel Have Discretion To Use Force On Domestic Territory Only When Doing So Reasonably Appears Necessary To Defend A Protected Person

Foreign states' authority and responsibility to protect their diplomats and senior officials abroad is subject to an important limitation: foreign security personnel may use force 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. Consistent with that limitation, the State Department's guidance to foreign

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[4] The court of appeals stated that "a sending state has a right in customary international law to protect diplomats and other high officials representing the sending state abroad." Pet. App. 18. The United States has not taken the position that a sending state has a right as a matter of international law to provide such protection outside of its territory, and the United States emphasizes that the authority of the sending state to provide such protection is subject to the authorization of the receiving state.

missions states 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* 2. No source of law affords foreign security personnel discretion to use force on U.S. territory except in the exercise of their protective function.

U.S. security personnel charged with protecting U.S. diplomatic and consular personnel and senior officials in foreign territory (including agents of 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." Office of Diplomatic Security, U.S. Dep't of State, 12 *Foreign Affairs Manual* §§ 091, 092 (Feb. 22, 2021), https://go.usa.gov/xsPrZ.

C. The FSIA's Discretionary-Function Exception Does Not Protect Sending States Whose Agents Use Force Outside Their Protective Function

As explained above, the FSIA provides an exception to a foreign state's immunity for specified noncommercial torts, 28 U.S.C. 1605(a)(5), but that exception does 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," 28 U.S.C. 1605(a)(5)(A).

Foreign security agents' protection of diplomats and senior officials against threats of bodily harm ordinarily

involves 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.*, *Wood* v. *Moss*, 572 U.S. 744, 759 (2014) ("[O]fficers 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.") (citation omitted). 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) (citation and internal quotation marks omitted). The FSIA thus expressly provides that, in a noncommercial-tort suit, a foreign state retains immunity for the exercise of a discretionary function "regardless of whether the discretion be abused." 28 U.S.C. 1605(a)(5)(A).

The FSIA's discretionary-function rule cannot apply, however, when agents have no lawful discretion to exercise. That is the case when foreign security personnel use force 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 agents, the relevant question is whether—from the perspective of an agent on the scene—the agents' use of force can reasonably be re-

garded as protective in character. If so, the discretionary-function rule bars the suit, regardless of whether the agents abused their discretion; if not, the suit may proceed.

D. The Force Used By Turkish Security Personnel Was Not Protective In Character

The facts found by the district court, which the court of appeals accepted (Pet. App. 5), establish that Turkish security personnel used force in a manner outside any reasonable conception of their protective function. Their use of force is therefore not protected by the FSIA's discretionary-function exception. That conclusion rests on two principal bases.

First, at the time of the main altercation, respondents —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." Pet. App. 64. 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 39-40. Yet the Turkish agents "crossed [the] police line" separating them from the protesters "to attack the protesters" "violently," and the district court found that they took that aggressive action without any indication "that an attack by the protesters was imminent," *id.* at 65, or any other reasonable basis for perceiving a threat to President Erdoğan. There is no basis, given those factual findings, to regard the "attack" by Turkish agents as protective in nature. *Ibid.*

Second, the actions taken by the Turkish agents after the initial attack strongly support the conclusion 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"; instead, they "either fell to the ground * * * or ran away." Pet. App. 65. Yet the Turkish agents "continued to strike and kick the protesters who were lying prone on the ground," and the agents "chased * * * and violently physically attacked many of" the protesters who were running away from the scene. *Id.* at 41. The agents then "ripped up the protesters' signs." *Ibid.* None of those actions can 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 respondent Lacy MacAuley. Pet. App. 42. 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 "[a]fter President Erdogan's motorcade had already passed." *Id.* at 66. Those actions likewise cannot reasonably be regarded as protective in character.

Because the Turkish agents' use of force was not protective in character, the agents were not exercising legally protected discretion, and petitioner is accordingly subject to these suits under the FSIA's noncommercial-tort exception, 28 U.S.C. 1605(a)(5).

E. The Court Of Appeals Reached The Correct Result, And Its Decision Does Not Warrant Review

1. The court of appeals correctly determined, based on the facts found by the district court, that the FSIA's discretionary-function exception does not shield petitioner from these suits. Pet. App. 27. In particular, the

court of appeals recognized that a sending state has discretion to use force on domestic territory only in the exercise of their protective function, *id.* at 18 (relying on government's amicus brief), and that the "nature of the challenged conduct" here "was not plausibly related to protecting President Erdogan" and thus exceeded "the only authority Turkey had to use force against United States citizens and residents," *id.* at 27.

2. Several aspects of the court of appeals' opinion could be read to characterize the discretionary-function exception too narrowly, but those aspects of the opinion were not material to the court's holding in this case and do not warrant this Court's review.

a. In applying the first part of the FTCA discretionary-function standard articulated by this Court in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), the court of appeals appeared to suggest that a state or local law—if sufficiently specific—could cabin the discretion of a foreign-government actor such that the actor's conduct would not "involve[] an element of judgment or choice" for purposes of the discretionary-function rule. *Id.* at 536; see Pet. App. 18-23. Decisions applying the FTCA's discretionary-function exception, however, have long established that only *federal* law—not state or local law—can negate a federal employee's discretion in this sense. See, *e.g.*, *Carroll* v. *United States*, 661 F.3d 87, 101 (1st Cir. 2011) (collecting cases). The same is true of the FSIA's parallel discretionary-function exception, particularly "given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) (citation omitted).

b. At the second step of the *Berkovitz* framework, the court of appeals contrasted the Turkish agents' "use[]" of security "resources" with decisions as to "how many security officers to deploy and how to train and arm them"—decisions that, the court explained, would involve "policy tradeoffs." Pet. App. 26. This Court has explained, however, that "[d]iscretionary conduct is not confined to the policy or planning level." *Gaubert*, 499 U.S. at 325. For example, the "acts of agency employees in executing" a "system of 'spot-checking' airplanes" for safety are subject to the discretionary-function exception, even if those employees did not play any role in planning the program. *Ibid.* (discussing *United States* v. *Varig Airlines*, 467 U.S. 797 (1984)). Consistent with that understanding, lower courts regularly apply the discretionary-function exception to operational law enforcement activities, such as conducting investigations, *Dichter-Mad Family Partners, LLP* v. *United States*, 709 F.3d 749, 750 (9th Cir.) (per curiam), cert. denied, 571 U.S. 823 (2013), or deciding whether to bring a prosecution, *Gray* v. *Bell*, 712 F.2d 490, 513 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

As discussed above (pp. 13-14, *supra*), protecting diplomats and senior officials often requires operational decisions, which ordinarily fall within the FSIA's discretionary-function exception. The reason the conduct at issue in this case fell outside that rule is that it was not an exercise of the Turkish agents' protective function (pp. 15-16, *supra*)—not that it was operational.

c. Notwithstanding those aspects of the court of appeals' reasoning, this Court's review is unwarranted. Petitioner identifies no division of authority among the courts of appeals as to the application of the FSIA's discretionary-function exception. Petitioner's argument

(Pet. 13-24) is instead that the court of appeals misapplied this Court's decisions construing the FTCA's discretionary-function exception. But even assuming those FTCA decisions are fully applicable to the FSIA context, the court of appeals' decision does not present the sort of conflict that warrants review.

That is particularly true because, in other cases, the D.C. Circuit has correctly applied this Court's discretionary-function precedents. In *Macharia* v. *United States*, 334 F.3d 61 (2003), cert. denied, 540 U.S. 1149 (2004), for example, the court stated that the first prong of the *Berkovitz* test "requires that [courts] determine whether any '*federal* statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'" *Id.* at 65 (emphasis added). And in *Griggs* v. *Washington Metropolitan Area Transit Authority*, 232 F.3d 917 (2000), the court recognized that, under *Gaubert*, "discretionary activity can include operational activities and is 'not confined to the policy or planning level.'" *Id.* at 923 (citation omitted). Because future panels of the D.C. Circuit will need to read the decision here as consistent with those prior D.C. Circuit precedents and this Court's precedents, see, *e.g.*, *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), the language discussed above is unlikely to have any significant effect on future cases, and no need exists for this Court's intervention.

3. Petitioner asserts (Pet. 29-32) that the decision below will produce adverse foreign-relations consequences for the United States. But as the United States' position in the court of appeals and this Court demonstrates, petitioner's assessment of the United States' interests is misplaced. The United States values its relationship with Turkey, a NATO ally, and the

United States has a paramount interest in protecting its diplomats and senior officials traveling abroad. Cf. *Wood*, 572 U.S. at 758-759. But the decision below does not undermine those interests. The decision is consistent with other decisions in which U.S. courts have held that foreign states are not entitled to sovereign immunity for torts that involve the use of violence in the United States outside a sphere of protected conduct. See, *e.g.*, *Liu* v. *Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990); *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980). And while the United States has strong reciprocal interests in maintaining sovereign immunity for foreign states whose security personnel exercise protective functions to defend foreign diplomats and leaders from physical attack, the United States does not have the same reciprocal interests in maintaining a foreign state's immunity for the use of force by security officials in the United States targeting those who do not pose a physical threat to the protected foreign officials.

II. THE ALLOCATION OF THE BURDEN OF PROOF ON APPLICATION OF THE FSIA'S DISCRETIONARY-FUNCTION EXCEPTION DOES NOT WARRANT REVIEW IN THIS CASE

Petitioner separately contends (Pet. 27-29) that the Court should grant review to determine how courts should allocate the burden of proof in applying the FSIA's discretionary-function rule. But that issue played no role in the court of appeals' decision. This case would therefore not be an appropriate vehicle to consider the question petitioner proposes.

Moreover, petitioner errs in asserting that courts of appeals are divided on the question. The rule in the D.C. Circuit is that a "plaintiff bears the initial burden

to overcome" the FSIA's "presumption of immunity * * * by producing evidence that an exception applies," and, if the plaintiff meets that burden, "the sovereign bears the ultimate burden of persuasion to show the exception does not apply." *Bell Helicopter Textron, Inc.* v. *Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013). Other courts of appeals resolving cases under the FSIA have adopted the same approach. See, *e.g.*, *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013); *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42, 52 (2d Cir. 2021); *Federal Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 & n.13 (3d Cir. 1993), cert. denied, 511 U.S. 1107 (1994); *Velasco* v. *Government of Indonesia*, 370 F.3d 392, 397-398 (4th Cir. 2004); *Frank* v. *Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 367 (5th Cir. 2016); *O'Bryan* v. *Holy See*, 556 F.3d 361, 376 (6th Cir.), cert. denied, 558 U.S. 819 (2009); *Broidy Cap. Mgmt., LLC* v. *State of Qatar*, 982 F.3d 582, 590-591 (9th Cir. 2020), cert. denied, 141 S. Ct. 2704 (2021); *Orient Mineral Co.* v. *Bank of China*, 506 F.3d 980, 991-992 (10th Cir. 2007), cert. denied, 553 U.S. 1079 (2008); *Butler* v. *Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009).[5]

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[5] The Eighth Circuit has stated that "'[o]nce a foreign state makes a prima facie showing of immunity, the plaintiff seeking to litigate in the United States then has the burden of showing that an exception applies.'" *Community Fin. Grp., Inc.* v. *Republic of Kenya*, 663 F.3d 977, 980 (2011) (citation omitted). That court has not expressly stated the second step of the burden-shifting framework articulated by other courts: that a defendant bears the ultimate burden of persuasion if a plaintiff offers evidence to show that an exception to immunity applies. But the Eighth Circuit recognizes that, "[g]enerally, the party seeking to invoke immunity is allocated the burden of proof on that issue." *Brewer* v. *Socialist People's Republic of Iraq*,

Petitioner suggests that the Seventh Circuit adopted a conflicting rule in its nonprecedential decision in *Nwoke* v. *Consulate of Nigeria*, 729 Fed. Appx. 478 (2018), cert. denied, 139 S. Ct. 1172 (2019). But *Nwoke* simply stated in passing that the plaintiff had "not met her burden to show that immunity does not apply," *id.* at 479, and the circuit precedent that *Nwoke* cites for that proposition—*Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983)—in fact states the same rule that applies in the D.C. Circuit: plaintiffs bear the burden of offering evidence to show that an exception to immunity applies, and if they carry that burden, then "[d]efendants bear the ultimate burden of proving that they are entitled to immunity." *Id.* at 255.

The government has previously expressed the view, in addressing an analogous issue in a case involving diplomatic immunity under the Vienna Convention on Diplomatic Relations, that the burden-shifting framework adopted by courts applying the FSIA is inconsistent with the FSIA's presumption of foreign sovereign immunity, 28 U.S.C. 1604. See U.S. Amicus Br. at 16-17, *Broidy Cap. Mgmt. LLC* v. *Benomar*, 944 F.3d 436 (2d Cir. 2019) (No. 19-236). Courts have overlooked that aspect of the FSIA's text and instead relied on a snippet of its legislative history incorrectly suggesting that foreign sovereign immunity should be treated as an affirmative defense. See *ibid.* But because the Court need not address the burden of proof to resolve the immunity

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890 F.2d 97, 100-101 (1989). And other courts have not recognized any conflict on this question; to the contrary, the Tenth Circuit has quoted the Eighth Circuit's rule as the first step in the burden-shifting framework that it applies. *Southway* v. *Central Bank of Nigeria*, 328 F.3d 1267, 1271 (10th Cir. 2003).

issue here, this case does not provide an appropriate vehicle to consider that question.

Finally, while petitioner asserts (Pet. 28-29) that courts have divided on the proper allocation of the burden with respect to the FTCA's discretionary-function exception, the appropriate vehicle for reviewing any such conflict would be a case brought under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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