13-3122

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE DOE, 1, an alien, JANE DOE, 2, an alien, JANE DOE, 3, an alien, JANE DOE, 4, an alien, JOHN DOE, 1, an alien, JOHN DOE, 2, an alien, JOHN DOE, 3, an alien, JOHN DOE, 4, an alien, JOHN DOE, 5, an alien, JOHN DOE, 6, an alien,
Plaintiffs-Appellants

v.

ERNESTO ZEDILLO PONCE de LEÓN, An Alien resident of Connecticut,
Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
No: 3:11cv1433 (MPS)

Judge Michael P. Shea

PROOF BRIEF OF DEFENDANT-APPELLEE
ERNESTO ZEDILLO PONCE de LEÓN

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STATEMENT OF JURISDICTION

Plaintiffs alleged jurisdiction under 28 U.S.C. § 1331, 1343 and 1350. The District Court determined that it lacked jurisdiction after the U.S. State Department issued a Suggestion of Immunity, declaring the defendant immune from suit. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In this case brought by anonymous plaintiffs against the former President of Mexico, Ernesto Zedillo de Ponce de León, the State Department filed a Suggestion of Immunity conclusively determining that President Zedillo is immune from suit because the Complaint relates to conduct undertaken in his official capacity as head of state. The issue in this appeal is whether the District Court acted within its discretion in dismissing the Complaint in deference to the State Department's Suggestion of Immunity without *sua sponte* offering Plaintiffs leave to amend, where Plaintiffs' proposed amended complaint would still relate only to official conduct and where, in any event, each of the purportedly new allegations had already been presented to, and rejected by, the State Department.

PRELIMINARY STATEMENT

From December 1, 1994, to December 1, 2000, Defendant–Appellee Ernesto Zedillo Ponce de León ("Zedillo" or "President Zedillo") served as President of the United Mexican States ("Mexico"). During his time in office, President Zedillo not

only led his country to overcome a severe economic crisis inherited from the prior administration, but achieved historic democratic reforms of Mexico's judicial and electoral systems, and implemented sweeping new programs of social assistance for Mexico's poorest regions and citizens.

The international community has repeatedly recognized his contributions to democracy and human rights. For example, President Zedillo was awarded the 2001 Democracy and Peace Award of the Institute of the Americas, which recognized his "exemplary reform and modernization of Mexico's electoral laws and process." D.E. 28-2 at 2. Along with the late Nelson Mandela, President Zedillo was awarded the 2002 Franklin D. Roosevelt Freedom From Fear Award, in recognition for having "led a peaceful revolution that has strengthened democracy and brought prosperity and respect for human rights to the people of his country." D.E. 28-3 at 5, 34. Most recently, President Zedillo was selected to become a member of The Elders, an "independent group of global leaders who work together for peace and human rights."[1] As noted by former United Nations Secretary General Kofi Annan, Chairman of The Elders:

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[1] The Elders, *What Makes an Elder?*, *at* http://theelders.org/about (further noting that Elders "share a common commitment to peace and universal human rights"). The current elders are Martti Ahtisaari, Kofi Annan, Ela Bhatt, Lakhdar Brahimi, Gro Harlem Brundtland, Fernando Cardoso, Jimmy Carter, Hina Jilani, Graça Machel, and Mary Robinson. Archbishop Desmond Tutu is an Honorary Elder, as was Nelson Mandela, the founder of The Elders, until his death. *Id.*

> During [Zedillo's] presidency, Mexico achieved profound democratic reforms, paving the way for a robust multi-party system. The country, after defeating a severe financial crisis, experienced strong economic growth and saw a great increase in social programmes to tackle poverty.[2]

Over a decade after President Zedillo left office, ten anonymous plaintiffs filed this lawsuit seeking 50 million dollars in damages for wrongs allegedly committed by the President while carrying out his official duties. Specifically, Plaintiffs alleged that President Zedillo was somehow complicit in the Acteal Massacre of December 22, 1997, when armed villagers hostile to the insurgent group Ejército Zapatista de Liberación Nacional (EZLN) attacked members of a "civil society" known as "Las Abejas" in the village of Acteal, in the Mexican state of Chiapas. Plaintiffs alleged that the Mexican government conspired with the anti-EZLN villagers to bring about the attack as part of a campaign to suppress an EZLN insurgency and to reassure international investors.

The lawsuit is a calumny. Though the massacre in Acteal was an appalling tragedy, it was not the result of an elaborate conspiracy by the Mexican government, masterminded by President Zedillo. The Acteal Massacre was the deadliest incident in the broader Chiapas Conflict, which began in 1994 during the

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[2] The Elders, *Kofi Annan Announces Two New Elders: Hina Jilani and Ernesto Zedillo* (July 11, 2013), *available at* http://theelders.org/article/kofi-annan-announces-two-new-elders-hina-jilani-and-ernesto-zedillo.

administration of President Zedillo's predecessor, Carlos Salinas de Gortari. As the United Nations Special Rapporteur explained in 1999, "[t]he tragic events in Acteal occurred against a background of long-standing disputes, often over land ownership, which have for decades divided the local indigenous communities."[3]

When he took office, President Zedillo made significant progress toward stabilizing the situation in Chiapas. As the Inter-American Commission on Human Rights noted in 1998, president Zedillo demonstrated his "willingness . . . to negotiate a peace accord with the [EZLN], with a view to seeking a peaceful solution to this internal problem of violence in Mexico."[4] When, despite those efforts, the Acteal tragedy struck, President Zedillo promptly and fully cooperated in successive investigations by Mexico's National Human Rights Commission (an entity entirely independent of the executive branch) and by Mexico's Office of the Attorney General. The individuals responsible for the killings, including over a

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[3] U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Addendum – Visit to Mexico,* U.N. Doc. E/CN.4/2000/3/Add.3 ¶ 20 (Nov. 25, 1999), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/279cc044f027da6580256887004fa59e?Opendocument.

[4] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100, Doc. 7 rev. 1 (Sept. 24, 1998), Chapter II – Right to Life, ¶ 142, *available at* http://www.cidh.oas.org/countryrep/Mexico98en/Chapter-2.htm.

dozen public officers, were vigorously prosecuted.[5] Zedillo's administration offered assistance to the victims of the attack and their families, including health care, permanent care programs for individuals disabled by the tragedy, psychological services, and economic support for survivors and caretakers of the victims.

Ignoring the facts, the anonymous plaintiffs who brought this lawsuit seek to hold President Zedillo—and him alone—responsible for the massacre. Their lawsuit, however, has attracted the scorn of Las Abejas, the group that has long claimed to be "the only organization representing the survivors of the Acteal massacre ever since the time that it occurred." D.E. 28-6 at 2. Las Abejas denounced Plaintiffs' lawsuit, stating that "no family of those directly affected by the massacre fits the characteristics of the family that these lawyers present as plaintiffs against Zedillo" in this action. D.E. 28-6 at 3.[6] Instead, as Las Abejas noted, "the memory of the martyrs of Acteal is being manipulated for political-election and economic purposes," leading it to conclude that "IT IS NOT THE INTERESTS OF THE SURVIVORS, BUT OTHERS' INTERESTS, which are

[5] Ironically, in large measure due to the reforms President Zedillo brought about to create an independent judiciary, many of those convicted later had their convictions overturned on due process grounds.

[6] Statement from the Civil Society Organization las Abejas (Sept. 22, 2011) at 2, *available at* http://chiapasdenuncia.blogspot.com/2011/09/from-civil-society-organization-las.html.

moving behind this lawsuit." *Id.* (emphasis in original); *see also, e.g.*, *The Economist*, "The trials of Ernesto Zedillo," (Sept. 1, 2012), *available at* http://www.economist.com/node/21561904 ("Many people in Mexico contend that, rather than a search for justice, the case looks like a settling of political scores.").

Whatever the motivation, and whoever the plaintiffs truly are, it has been clear from the outset that this case must be dismissed—and not just because Plaintiffs' claims are utterly baseless. As the former head of state of Mexico, a sovereign democracy and staunch ally of the United States, President Zedillo has immunity from any suit brought against him in the United States for actions that he took in his capacity as President. The Complaint alleges conduct that—even if it were true—goes to the heart of a head of state's duties: to secure domestic peace in a time of civil unrest, to regulate the state's response to armed elements of the citizenry, and to oversee the law enforcement and social policy response to a tragedy.

On September 7, 2012, the U.S. State Department submitted a "suggestion of immunity" on President Zedillo's behalf. Under longstanding and binding precedent, when the State Department suggests a defendant's immunity, a district court must immediately surrender jurisdiction and dismiss the case. Plaintiffs attempted to forestall that inevitable result by filing a lawsuit in Mexico challenging the validity, as a matter of *Mexican* law, of the Mexican Government's

request that President Zedillo be accorded immunity. The Mexican suit, later dismissed by a Mexican appellate court, was irrelevant from the start because U.S. courts accord immunity to former heads of state under principles of customary international law and U.S. common law. The State Department recognized this, and reiterated its Suggestion of Immunity on May 14, 2013. Thereafter, the District Court properly dismissed the lawsuit.

In this appeal, Plaintiffs do not argue that the District Court's decision was incorrect. Indeed, they *cannot*, for the law is clear that once the State Department suggests immunity, a court must dismiss in deference to the exclusive prerogative of the Executive Branch over foreign relations. Instead, Plaintiffs argue that the District Court abused its discretion by dismissing their case without, *sua sponte*, granting them leave to amend their Complaint. This argument fails, however, because their proposed amendments are plainly futile. They seek to add allegations regarding Zedillo's supposed involvement in the massacre, and regarding the supposed invalidity of the Mexican Government's immunity request—two issues irrelevant to the State Department's decision to grant immunity. Indeed, Plaintiffs made these additional arguments directly to the State Department *before* it suggested President Zedillo's immunity in September 2012, and *before* it reiterated its Suggestion of Immunity in May 2013.

This Court should affirm the dismissal of this calumnious suit.

STATEMENT OF THE CASE[7]

I. Plaintiffs' Complaint Seeks to Hold President Zedillo Responsible for Conduct Undertaken in His Official Capacity.

On December 22, 1997, an armed anti-EZLN group opened fire on a prayer meeting held by members of an indigenous group called Las Abejas in the village of Acteal, Chiapas, killing forty-five people and wounding seventeen. *See generally* D.E. 1 at 20–22. Fifteen years later, on September 16, 2011, Plaintiffs filed this lawsuit in the District of Connecticut seeking compensatory and punitive damages from President Zedillo for his alleged complicity, while in office, in the Acteal Massacre. D.E. 1, 1-1.

No one denies that the Acteal Massacre was an appalling tragedy. Indeed, following the massacre, President Zedillo insisted upon an independent investigation by the autonomous National Human Rights Commission, as well as by Mexico's Office of the Attorney General. Dozens of people were prosecuted in connection with the massacre, including eleven police officers, a member of the armed forces, and a former mayor.

Plaintiffs didn't sue any of them, however. Instead, they sued President Zedillo, Mexico's former head of state. Though their 232-paragraph Complaint

[7] Plaintiffs' Statement of Facts describes many things that were not alleged in their Complaint. *See*, App. Br. at 16–20. Some are true, many are not, but nearly all are beside the point. Though President Zedillo will not burden the court by rebutting each unsupported factual assertion made in Plaintiffs' brief, he in no way accedes to them.

mentions at least eight other individuals alleged to have been part of a conspiracy to incite and then cover up the massacre, D.E. 1 at 17, 20, 25, it alleges very little directly against President Zedillo. The overwhelming majority of the allegations address "Zedillo's administration," *id.* at 17, 18, 19, or "the Mexican Government" *id.* at 16, 17, "law enforcement authorities," *id.* at 18, and the all-encompassing "individual members and/or agents of one or more subdivisions, instrumentalities and/or agencies of Zedillo's government," e.g., *id.* at 23. Many other allegations make strategic use of the passive voice, as when Plaintiffs allege, for example, that "a military campaign plan was adopted with the aim of suppressing the EZLN" called the "Plan de Campaña Chiapas '94." *Id.* at 12**.**

The Complaint makes clear that Plaintiffs seek to hold President Zedillo liable for alleged acts and omissions undertaken in his official capacity, as President of the sovereign state of Mexico. It alleges that the supposed military campaign plan that led to the massacre was adopted "soon *after* Defendant Zedillo was sworn in" as President. *Id.* (emphasis added). Though few in number, the allegations directly concerning President Zedillo all relate to his actions as President, not actions undertaken in a private capacity. *See id.* at 16–24. Plaintiffs make that point themselves, specifically alleging that "[t]he acts described herein were carried out under actual or apparent authority or color of law of the Mexican Government." *Id.* at 28.

II. Following President Zedillo's Motion to Dismiss, Plaintiffs Seek to Persuade the State Department not to Suggest Immunity.

President Zedillo moved to dismiss on the basis of former head-of-state immunity because the Complaint sought to hold him liable for alleged actions taken in his official capacity. D.E. 28. Six months later, on June 21, 2012, the District Court issued a short order directing that "no later than July 23, 2012, the United States shall indicate to the court whether or not it intends to file a Statement of Interest . . . and if so, a date by which the Statement of Interest will be filed." D.E. 33. Pursuant to that order, the United States filed a notice stating that it would file a Statement of Interest by September 7, 2012. D.E. 38.

In the interim, the Plaintiffs intensively lobbied the State Department, asking it not to submit a suggestion of immunity. Plaintiffs' counsel first met with the Office of the Legal Adviser to the State Department ("the Legal Adviser") on January 11, 2012, five days after President Zedillo filed his Motion to Dismiss. *See* D.E. 43-1 at 3. Thereafter, Plaintiffs sent numerous "information packets" to the Legal Adviser containing documents, opinions, and arguments that they hoped would persuade the State Department not to file a Suggestion of Immunity. *See* D.E. 43-3–43-10. These "information packets" included the very arguments and allegations that Plaintiffs now seek to add to an amended complaint.[8]

[8] For example, on March 6, 2012, Plaintiffs sent a letter to the Legal Adviser containing "the opinion of Attorney Agustin Lopez Padilla analyzing the extent of

On August 30, 2012, just over a week before the State Department was set to file its Statement of Interest in the case, Plaintiffs submitted to the Legal Advisor two "declarations" signed by Ariel Jesus Maldonado Leza, who Plaintiffs described (with undue sensationalism) as "a key witness [who] has now decided to go public with highly sensitive information substantiating former President Zedillo's culpability for the Acteal massacre." D.E. 43-10 at 2. In his declarations, Maldonado Leza, a former mid-level Mexican government official, described having met in December 1997 with several members of something he called the "Chiapas Coordination Group," meetings that included "representatives" from the Attorney General's Office and the Department of National Defense. *Id*. at 13. According to Maldonado Leza's fifteen-year-old recollection, the individuals at these meetings discussed an operation against a roadblock, the "Polhó Checkpoint," maintained by the EZLN near Acteal. *Id.* at 17. Following the massacre, Maldonado Leza wondered if there might have been a connection between the plan to remove the roadblock and the attack on Las Abejas. *Id.* at 18. In sum, this "key witness" claimed only that he had attended meetings with

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constitutional immunity of the office of the president of the Mexican Republic." D.E. 43-5 at 2. In his "opinion," Lopez Padilla (a private tax lawyer with no apparent expertise in Mexican constitutional law, *id.* at 11) described his theory that former Mexican officials, after leaving office, have no immunity from civil suits challenging official actions that they took while in office, and that the Mexican Government cannot request civil immunity for former officials. *Id.* at 8–10 (emphasis in original).

individuals at least two levels below President Zedillo, at which the Acteal Massacre was neither planned nor even directly considered. He describes no direct connection between President Zedillo and these meetings, let alone a connection between Zedillo and the massacre.

III. The State Department Suggests Immunity.

Despite having received these and other submissions, the State Department determined that President Zedillo is entitled to immunity from this action. It thus filed a Suggestion of Immunity in the District Court on September 7, 2012. D.E. 38. The Suggestion of Immunity set forth the legal standard governing immunity for former heads of state, noting that "[a]fter a head of state leaves office . . . that individual's residual immunity depends on the *conduct* at issue and generally applies only to acts taken in an official capacity while in that position." *Id.* at 5 (emphasis in original). It went on to explain how the State Department determines whether immunity should apply in a given case, and what factors are relevant to that determination:

> In determining whether certain acts were taken in an official capacity, the Department of State generally presumes that allegations relating to the official's exercise of the powers of his or her office fall into that category. This preliminary assessment is particularly apt for former heads of state, who typically have wide-ranging responsibilities. The Department of State also *considers* a foreign government's request for a suggestion of immunity, averring that the acts of its former official that are the subject of a lawsuit were

> taken (if at all) in an official capacity, *to further strengthen* that preliminary assessment. In such cases, unless the plaintiff provides the Department of State with a basis for questioning the preliminary assessment, the Department of State will generally determine that the former official is immune.

Id. at 5–6 (emphasis added); *see also* D.E. 38-1 at 2-3 (letter from Legal Adviser to Acting Assistant Attorney General setting forth the same process).

Applying these principles, the State Department "determined that former President Zedillo is entitled to immunity from suit in this action." D.E. 38 at 6. The basis of that determination was that "[t]he alleged actions as set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office." *Id.* Reviewing the Complaint, the Department determined that neither the allegations relating to "lower level officials' tortious conduct" nor the few allegations relating to President Zedillo himself "provide a sufficient reason to question [its] initial assessment . . . that [President Zedillo's] conduct was taken in his official capacity." *Id.* at 6; *see also* D.E. 38-1 at 23 ("The complaint is predicated on former President Zedillo's actions as President, not private conduct."). As the Legal Adviser explained in a letter accompanying the Suggestion of Immunity, "[f]or these reasons, the Department has determined that former President Zedillo's alleged actions were taken in an official capacity, and he enjoys immunity from this lawsuit." D.E. 38-1 at 3.

On September 25, 2012, a week after the Suggestion of Immunity was filed, the District Court entered an order requiring Plaintiffs to show cause why the case should not be dismissed on the basis of former head-of-state immunity. D.E. 39 at 2. Simultaneously, it entered an order denying as moot President Zedillo's Motion to Dismiss—which, of course, sought the same ultimate relief. D.E. 40.

IV. Plaintiffs Rush to Court in Mexico in an Effort to Change the Facts on the Ground.

On October 4, 2012—four weeks after the State Department filed its Suggestion of Immunity, and two weeks after the District Court entered its Order to Show Cause—"some of the Plaintiffs" filed a petition for a writ (or "*amparo*") in Mexico seeking a declaration that Mexico's diplomatic request to the United States for immunity on behalf of Zedillo "violated Mexican law and the Mexican constitution and is, therefore, a nullity." D.E. 43-1 at 5–6; D.E. 43-12. Through the *amparo* suit, Plaintiffs made the same argument to a Mexican trial court that they had already unsuccessfully argued to the U.S. State Department—namely, that Mexico can never request immunity for former heads of state sued in civil proceedings in other nations. *See* D.E. 43-5 at 8–10.

On October 16, 2012, Plaintiffs responded to the Order to Show Cause, arguing primarily that the District Court should stay the case pending the outcome of the Mexican *amparo* suit. D.E. 43 at 1; D.E. 43-1 at 8–17. Alternatively, they asked that any dismissal be without prejudice to their re-filing the case after the

Mexican *amparo* proceeding, and that the court toll the statute of limitations in the interim. D.E. 43 at 2; D.E. 43-1 at 19–20. Plaintiffs also asked the court to provide "guidance" as to whether they should seek leave to amend their Complaint to add allegations relating to the declarations of Maldonado Leza, which had already been submitted directly to the State Department. D.E. 43-1 at 18.[9] President Zedillo responded, noting that the State Department's Suggestion of Immunity divested the court of jurisdiction and required prompt dismissal, and further explaining that the *amparo* suit was nothing more than a dilatory sideshow. D.E. 55 at 2.

V. The State Department Reaffirms Its Suggestion of Immunity.

On February 4, 2013, the case was transferred from Chief Judge Thompson to Judge Shea, newly confirmed to the District Court. D.E. 69. Judge Shea scheduled oral argument on the Order to Show Cause for July 18, 2013. In response, the United States filed a notice on May 14, 2013, indicating that it did not intend to appear at the hearing and stating that the United States "rests on its

[9] Plaintiffs made no reference to any other proposed amendment, including any allegation that the Mexican Constitution prohibited immunity for former officials and so precluded the Mexican Government from asking other nations for immunity for former Mexican officials. *Id.* at 17–18.

Suggestion of Immunity . . . which sets forth the United States' determination regarding the immunity of former President Zedillo from this suit." D.E. 76.[10]

When the State Department reaffirmed its Suggestion of Immunity, it had already received all of Plaintiffs' communications, and knew of every development and argument that Plaintiffs now seek to put in an amended complaint. The only development that occurred *after* the May 14 notice was that the Mexican trial court's *amparo* decision—the lynchpin of Plaintiffs' theory that the Mexican Government's immunity request was invalid—was unanimously reversed by a Mexican appellate court. *See* D.E. 77. The Mexican appellate court recognized that the Mexican Government's request that the United States grant immunity to President Zedillo simply represented a diplomatic communication "from one Sovereign State to another Sovereign State," D.E. 77 at 18, and that the ultimate granting of immunity "is a sovereign act from the *granting* State," here the United States. D.E. 77 at 25 (emphasis added). The Mexican appellate court specifically noted that "[t]he suggestion of immunity was made in keeping with international common law, based on case precedents in which the United States has reaffirmed its position on immunity for Heads of State, even after the official capacity has ended." *Id.*

[10] Plaintiffs tellingly omit the part of the sentence stating that the prior Suggestion of Immunity "sets forth the United States' determination regarding the immunity of former President Zedillo from this suit." *See* App. Br. at 11, 33.

VI. The District Court Recognizes President Zedillo's Immunity and Dismisses the Complaint.

Oral argument was held on July 18, 2013. At oral argument, Plaintiffs' counsel asked the District Court to stay the proceedings and request that the State Department reconsider (again) its Suggestion of Immunity in light of events occurring since the Suggestion was first filed in September 2012. Tr. at 5–6. When the District Court asked if they had "submitted the same papers to the State Department that you submitted to the Court," Plaintiffs' counsel responded that "[w]e have not directly forwarded anything to them. We have not lobbied them, talked to them." Tr. at 7. But as the docket sheet reveals, Plaintiffs had submitted all of their arguments directly to the State Department *before* the State Department filed its Suggestion of Immunity in September 2012. *See* D.E. 43-3–43-10; *see also supra at* 10–12. In any event, Plaintiffs ultimately conceded that the State Department received all papers filed in the case through its attorney in the Department of Justice, who had filed an appearance. Tr. at 7. The District Court therefore pointed out:

> [I]t appears the State Department had available to it all of the evidence that the Plaintiffs subsequently produced in the so-called *Amparo* proceeding challenging the validity of the Mexican government's Request for Immunity, and the State Department is also presumably aware of the Mexican trial court's decision invalidating that Request. Yet, despite having access to that information, the State Department has communicated to this Court that it stands by its Suggestion of Immunity.

D.E. 87-2 at 4–5.

At the conclusion of the hearing, the District Court dismissed the Complaint "because the State Department has determined that Defendant Ernesto Zedillo Ponce de Leon is immune from this lawsuit as a former head-of-state and Plaintiffs have offered no reason why this Court is not required to defer to that immunity determination." *Id.* at 2. Although the District Court allowed both parties to speak at length, Plaintiffs never requested leave to amend their Complaint during oral argument. Nor did Plaintiffs move for post-judgment relief, through Federal Rules of Civil Procedure 59 or 60.

Instead, they filed this appeal.

SUMMARY OF THE ARGUMENT

President Zedillo forcefully rejects the anonymous Plaintiffs' allegations that he bears any responsibility for the deplorable crimes committed in Acteal. As President, he officially recognized the rights of indigenous peoples in Chiapas and worked to end the Zapatista unrest in a just and peaceful manner. Following the massacre, he insisted upon an independent investigation and provided redress to the victims and their families. His efforts to bring peace and justice to Chiapas have been widely recognized, and the anonymous allegations in this lawsuit to the contrary are not only implausible, but outrageous.

Nevertheless, the law of sovereign immunity absolves President Zedillo of the need to defend himself from these baseless claims in the first instance. As a matter of customary international law—reflected in U.S. common law—President Zedillo is immune from any lawsuit brought in the United States against him involving acts or omissions that he took in his official capacity as President. Recognizing that this anonymous lawsuit relates exclusively to conduct President Zedillo allegedly took in his official capacity, the State Department filed a Suggestion of Immunity on President Zedillo's behalf. As the District Court properly recognized, the Suggestion of Immunity filed by the State Department is dispositive and required it to surrender jurisdiction and dismiss the case.

In this appeal, Plaintiffs do not contend that the District Court erred in dismissing the case on grounds of residual head-of-state immunity. Rather, they argue that the District Court abused its discretion by dismissing the case without affirmatively granting them leave to amend their Complaint to raise supposedly new allegations concerning President Zedillo's alleged involvement in the massacre and the alleged invalidity of the Mexican Government's request for immunity. Plaintiffs never moved for leave to amend their Complaint and never submitted a proposed amended complaint to the District Court. But even if they had, the District Court would have been well within its rights to deny leave, because any amendment would be futile.

First, the State Department suggested immunity in this case despite being aware of the very allegations Plaintiffs seek to add to an amended complaint. The State Department's Suggestion of Immunity is conclusive and Plaintiffs have provided no basis for believing that it would have acted differently if they had included these allegations in their Complaint, rather than in "information packets" that they submitted directly to the State Department. That the State Department considered Plaintiffs' "new" arguments and still suggested immunity conclusively demonstrates that their proposed amendments are futile.

Second, even leaving aside the State Department's views, the proposed amendments are futile because they do not cure the defect that prompted the Suggestion of Immunity in the first instance—namely, that the Complaint relates exclusively to President Zedillo's actions in his official capacity, as head of state of a foreign sovereign. Plaintiffs do not—because, of course, they cannot—allege that President Zedillo acted in his personal capacity when he presided over the Mexican Government's response to the Chiapas Conflict. Their proposed amendments do not change the fact that their lawsuit seeks to hold President Zedillo responsible for official conduct.

Accordingly, the District Court acted well within its discretion in dismissing Plaintiffs' Complaint without affirmatively granting them leave to amend.

ARGUMENT

I. Standard of Review

This Court reviews a district court's decision to dismiss a complaint "without *sua sponte* granting leave to replead" for abuse of discretion. *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 106 (2d Cir. 1998); *accord Metz v. U.S. Life Ins. Co.*, 662 F.3d 600, 603 (2d Cir. 2011) ("We review the denial of leave to amend for abuse of discretion."). "Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

This Court has held that "[i]t is within the court's discretion to deny leave to amend implicitly by not addressing the request when leave is requested informally in a brief filed in opposition to a motion to dismiss." *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 220 (2d Cir. 2006), *abrogated on other grounds by F.T.C. v. Actavis*, 133 S. Ct. 2223 (2013); *see also, e.g., Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 723 (2d Cir. 2011) (same); *In re Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F.3d 167, 188 (2d Cir. 2011) ("Where, as here, the district court did not specify in its decisions that it dismissed the complaints with

prejudice, and plaintiffs thereafter failed to make formal motions to amend or offer proposed amended complaints, we identify no abuse of discretion in the district court's implicit denial of plaintiffs' cursory requests for leave to amend."); *Porat v. Lincoln Towers Cmty. Ass'n*, 464 F.3d 274, 276 (2d Cir. 2006) (per curiam) (finding no abuse of discretion where district court failed to address request for leave to amend made in brief).

II. The District Court Properly Dismissed the Complaint in View of President Zedillo's Residual Head-of-State Immunity.

A. The State Department's Suggestion of Immunity is a Conclusive Determination, Divesting the Court of Jurisdiction.

The District Court dismissed the Complaint "because the State Department has determined that defendant Ernesto Zedillo Ponce de Leon is immune from this lawsuit as a former head-of-state and Plaintiffs have offered no reason why this Court is not required to defer to that immunity determination." D.E. 87-2 at 2.

The decision was correct, for "a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underyling claims of a plaintiff." *Ye v. Zemin*, 383 F.3d 620, 626 (7th Cir. 2004). The Supreme Court has held that a suggestion of immunity is "a *conclusive* determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations," *Ex parte Peru*, 318 U.S. 578, 589 (1943)

(emphasis added); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow . . . ."). As this Court has noted, "once the State Department has ruled in a matter of this nature, the judiciary will not interfere." *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971). This principle of U.S. common law is not subject to honest dispute. As Judge Wisdom said forty years ago, "[t]he precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. Moreover, they have done so with no further review of the executive's determination." *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974).

The Judiciary's absolute deference to the Executive Branch's determination of immunity is compelled by the Constitutional separation of powers. The Constitution makes the Executive the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *accord Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir 2009). "Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." *Spacil*, 489 F.2d at 619. In Judge Wisdom's words, "[o]nly if we permit an executive suggestion of immunity to preempt completely

judicial consideration of the question can we be certain that we are not encroaching upon the executive's prerogative in foreign affairs." *Id.* at 620.[11]

When Congress passed the Foreign Sovereign Immunities Act ("FSIA") in 1976, it did not remove from the Executive Branch the "conclusive" prerogative to determine the immunity of foreign officials. *See Samantar v. Yousuf*, 560 U.S. 305, 319 (2010). The FSIA places responsibility for determining the immunity of sovereign *states* in the hands of the courts, but the Supreme Court has held that courts still must adhere to pre-FSIA common law in cases involving foreign *officials*. *Id.* at 325 ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). And, as this Court has noted, "in the common-law context, we defer to the Executive's determination of the scope of immunity." *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009).[12]

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[11] Because this deference stems from separation-of-powers principles, it applies whether the case involves a sitting head of state, *e.g. Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012), a former official, *e.g.*, *Matar*, 563 F.3d at 14, or even property, *Ex parte Peru*, 318 U.S. at 589.

[12] Courts defer to an Executive suggestion of immunity even when plaintiffs contend that the Executive is factually mistaken or has been hoodwinked. In *Southeastern Leasing Corp. v. Stern Dagger Belogorsk*, 493 F.2d 1223 (1st Cir. 1974), the First Circuit held that the State Department's suggestion "must be accepted by the courts as a conclusive determination" even though the plaintiffs argued that the State Department erred in thinking the property at issue was owned

Here, the State Department suggested President Zedillo's immunity from suit in September 2012, and reaffirmed its suggestion in May 2013. *See* D.E. 38 at 6 ("[T]he Department of State has determined that former President Zedillo is entitled to immunity from suit in this action" because "[t]he alleged actions as set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office."); D.E. 76 ("The United States rests on its Suggestion of Immunity . . ., which sets for the United States' determination regarding the immunity of former President Zedillo from this suit."). Once the State Department suggested immunity, the District Court had no choice but to dismiss. *See Hoffman*, 324 U.S. at 35; *Ex parte Peru*, 318 U.S. at 589; *Matar*, 563 F.3d at 15. And, as set forth below, nothing about Plaintiffs proposed amendments would have persuaded the State Department to withdraw its Suggestion of Immunity.

B. The District Court Would Have Been Correct to Dismiss Even Absent a Suggestion of Immunity.

Although a court has no choice but to dismiss where the State Department suggests that the defendant is immune, the court may itself recognize a defendant's

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by a sovereign. *Id*. at 1224. Similarly, in *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971), this Court affirmed dismissal on the basis of the State Department's suggestion of immunity, even though it disagreed with State's determination that the case involved official conduct rather than "purely private commercial decisions." *Id.* at 1200.

immunity where the State Department has remained silent. "[I]n the absence of recognition of the immunity by the Department of State, a district court 'had authority to decide for itself whether all the requisites for such immunity existed.'" *Samantar*, 560 U.S. at 311 (quoting *Ex parte Peru*, 318 U.S. at 587); *see also, e.g.*, *Heaney v. Gov't of Spain*, 445 F.2d 501, 503, 503 n. 2 (2d Cir. 1971) (evaluating sovereign immunity independently where State Department had failed to respond to a request for its views). "In making that decision, a district court inquires 'whether the ground of immunity is one which it is the established policy of the State Department to recognize.'" *Samantar*, 560 U.S. at 312 (quoting *Hoffman*, 324 U.S. at 36).

It is the established policy of the State Department to recognize the immunity of former heads of state for conduct taken in their official capacity. As the Department explained in its Suggestion of Immunity below:

> As a general matter, under customary international law principles accepted by the Executive Branch, a sitting head of state's immunity is based on his *status* as the incumbent office holder and extends to all his actions. *See* 1 *Oppenheim's International Law* 1038 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). After a head of state leaves office, however, that individual's residual immunity depends on the *conduct* at issue and generally applies only to acts taken in an official capacity while in that position. *See id.* at 1043–44.

D.E. 38 at 5; *see also, e.g.*, *Matar*, 563 F.3d at 14 (noting that foreign officials retain immunity after leaving office because "the common law of foreign sovereign

immunity recognized an individual official's entitlement to immunity for acts performed in his official capacity," and "immunity based on acts—rather than status—does not depend on tenure in office").

The Complaint seeks to hold President Zedillo liable for acts and omissions that occurred exclusively during his tenure as President of Mexico, in connection with the Mexican Government's response to the EZLN's armed insurrection and the events in Acteal. For example, the plaintiffs allege (falsely) that President Zedillo wrongfully: (1) adopted a plan for responding to the insurgency, the "Plan de Campaña Chiapas '94," which allegedly involved "occupation of Chiapas by military and police forces," and "concentration of military forces in areas of Chiapas," D.E. 1 at 12–14; (2) formed a special federal cabinet to develop a strategy for handling the conflict, *id.* at 17; (3) encouraged or permitted the Mexican Army to arm or train civilian opponents of the separatists, *id.* at 18; (4) failed to act on warnings from citizens in Chiapas before the massacre, *id.* at 20; (5) responded inadequately in the aftermath of the massacre, *id.* at 23; and/or (6) "knew or should have known that his subordinates were committing human rights abuses, and he failed to prevent the abuses or punish those responsible," D.E. 1-1 at 2.

If President Zedillo were not entitled to immunity, he would forcefully deny and disprove these baseless allegations. But even taking the Complaint on its own

terms, it describes conduct that could only be undertaken by someone acting for and with the authority of the Mexican sovereign. The allegations, though false, relate to acts of the Mexican Government, on Mexican territory, in furtherance of Mexican national security. Indeed, the Complaint itself expressly alleges that "[t]he acts described herein were carried out under actual or apparent authority or color of law of the Mexican Government." D.E. 1 at 28; *see also* D.E. 1-1 at 22 ("Defendant Zedillo's acts or omissions . . . and the acts committed by various members and/or agents of . . . the Mexican government, were committed under actual or apparent authority or color of law of the Mexican Government.").[13]

[13] It is of no consequence that the Complaint elsewhere alleges (again, falsely) that President Zedillo's actions "were outside the scope of [his] lawful authority," D.E. 1-1 at 3. As this Court has long recognized, "to condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct," *i.e.*, whether the conduct falls outside lawful authority, "would frustrate the very purpose of the doctrine itself." *Heaney*, 445 F.2d at 504. Nor does it matter that certain of Plaintiffs' (false) allegations involve violations of *jus cogens* norms of international law. *See* D.E. 1-1 at 2–3; App. Br. at 29**.** This Court has squarely held that "[a] claim premised on the violation *jus cogens* does not withstand foreign sovereign immunity." *Matar*, 515 F.3d at 15 (former head of the Israeli Security Agency had immunity from claims that he authorized bombing of apartment complex in violation of *jus cogens* norms); *cf.* Br. of United States as Amicus Curiae at 4 (Dec. 19, 2007), *Matar*, 563 F.3d at 9 [R. 28 Ex. 7] ("The Executive does not recognize any exception to a foreign official's immunity for civil suits alleging *jus cogens* violations . . . [and] the recognition of such an exception would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad."). Notably, Plaintiffs fail to cite *Matar* anywhere in their brief..

Accordingly, even in the absence of the Suggestion of Immunity, the District Court would have correctly dismissed the Complaint because it relates to President Zedillo's "acts taken in an official capacity" and not to private conduct. However, because the State Department *did* suggest President Zedillo's immunity—*twice*—the District Court had no choice but to dismiss the Complaint. And nothing Plaintiffs seek to add to the Complaint could have prevented that outcome.

III. The District Court Acted Well within Its Discretion in Dismissing the Complaint without Affirmatively Granting Leave to Amend.

Plaintiffs do not—indeed, cannot—challenge the authority discussed above, and therefore do not argue that the District Court's decision to dismiss their Complaint was, itself, erroneous. Instead, they argue that the District Court abused its discretion because it did not, *sua sponte*, grant them leave to amend their Complaint. Specifically, Plaintiffs argue that they should have been given leave to amend their Complaint to: (1) add allegations "that would have directly implicated Zedillo in the Acteal Massacre, rather than implicating him vicariously through the actions of low level officials," App. Br. at 21; and (2) add allegations relating to "the findings of the Mexican federal district court relating to the unconstitutionality and illegality of the Mexican ambassador's request for immunity on behalf of Zedillo, and . . . additional arguments relating to the waiver of Zedillo's purported immunity by the Mexican court and the operation of Mexican law," *id.*

Plaintiffs never actually moved to amend their Complaint or submitted a proposed amended complaint to the District Court.[14] But even if they had adequately raised their request to amend, it was well within the District Court's discretion to deny the request, explicitly or implicitly, because any amendment in this matter would be futile. "It is well-established that one good reason to deny leave to amend is when such leave would be futile, specifically when the additional information does not cure the complaint." *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Germany*, 615 F.3d 97, 114 (2d Cir. 2010) (finding no abuse of discretion in district court's denial of leave to amend where "the proposed amended complaint did not cure the original complaint's deficiencies . . . by providing a basis for subject matter jurisdiction").

Here, the additional allegations that Plaintiffs seek to add do not address the reasons for the Complaint's dismissal: namely, that the State Department suggested immunity because "[t]he alleged actions set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office." D.E. 38 at 6; *see also* D.E. 38-1 at 3. That the

[14] Even in their response to the Order to Show Cause, where Plaintiffs "sought guidance" as to whether they must move to amend their Complaint, Plaintiffs proposed only to amend the Complaint to add allegations derived from the Maldonado Leza declarations. They never proposed allegations relating to the validity of the Mexican Government's immunity request or the purported implied waiver of sovereign immunity in the Mexican Constitution. *See* D.E. 43-1 at 17–18; *see also supra* n. 10.

State Department knew of the additional allegations *before* suggesting President Zedillo's immunity is conclusive proof that any amendment would be futile.

A. The State Department Knew of, and Rejected, Plaintiffs' Proposed Additional Allegations.

The District Court dismissed the Complaint because the State Department filed a Suggestion of Immunity. *See* D.E. 87-2 at 2. The State Department's Suggestion was a "conclusive" determination that President Zedillo is immune from this suit. *Ex parte Peru*, 318 U.S. at 589; *see generally supra* at 23–26, *supra*. Thus, unless an amendment would result in the State Department withdrawing its Suggestion of Immunity, it is necessarily futile. The surest evidence of futility in this case is that the State Department already knew of all of the additional allegations Plaintiffs would add to an amended complaint *before* it filed its Suggestion of Immunity.

Plaintiffs filed this lawsuit in September 2011 and almost immediately set to work lobbying the State Department to refrain from suggesting President Zedillo's immunity. "On December 19, 2011, Plaintiffs . . . notified the U.S. State Department of this lawsuit and urged it not to issue a suggestion of immunity to Defendant Ernesto Ponce de Leon." D.E. 43-2 at 2 (declaration of Plaintiffs' counsel M. Pugliese). Plaintiffs' counsel personally met with the State Department Office of Legal Counsel on January 11, 2012. *Id.* at 3. Plaintiffs also wrote repeatedly to the State Department, submitting materials they thought relevant and

advancing various arguments. *See* D.E. 43-3–43-10 (composite exhibit containing written submissions sent by Plaintiffs' counsel to the State Department on December 19, 2011, January 23, 2012, March 6, 2012, March 7, 2012, March 8, 2012, April 2, 2012, July 3, 2012, August 30, 2012). Each of these submissions, like the in-person meeting with the Legal Adviser, occurred *before* the State Department filed its Suggestion of Immunity on September 7, 2012. *See* D.E. 38.

In those submissions, Plaintiffs advanced precisely the arguments that they say they should have been allowed to add to an amended complaint. On March 6, 2012, for example, Plaintiffs submitted "the opinion of Attorney Agustin Lopez Padilla analyzing the extent of constitutional immunity of the office of the president of the Mexican Republic." D.E. 43-5 at 2. This is the letter (written by a Mexican tax lawyer) that Plaintiffs use to support their assertion that the unwritten penumbras of several clauses of the Mexican constitution amount to a silent waiver of the sovereign immunity of Mexico's former officials, invalidating Mexico's request to the United States for immunity for President Zedillo. *See* App. Br. at 29–30 (citing D.E. 43-5 at 4, 8). Similarly, on August 30, 2012, Plaintiffs submitted to the State Department the declarations of Ariel Jesus Maldonado Leza, the documents that they (falsely) claim implicate President Zedillo "directly in the

Acteal Massacre."[15] D.E. 43-10; *see also* App. Br. at 32. One week later, the State Department filed its Suggestion of Immunity.

It bears repeating: All of this information was provided to the State Department *before* it filed its *initial* Suggestion of Immunity. D.E. 38; *see also* D.E. 43-1 at 17 (Plaintiffs' brief conceding that "the State Department was provided with more than merely the detailed original Complaint and its several exhibits").[16] In other words, the State Department knew of Plaintiffs' argument that

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[15] In reality, the Maldonado Lena Declarations, even taken at face value, do not implicate President Zedillo in the massacre. They describe meetings attended by individuals at least two degrees removed from President Zedillo, where the response to the Zapatista unrest was purportedly discussed. *See infra* at 44–45.

[16] During oral argument on the Order to Show Cause, the District Court asked Plaintiffs' counsel whether he had "submitted the same papers to the State Department that you submitted to the Court." Tr. at 7. Though Plaintiffs' counsel acknowledged that "there is a lawyer from the Justice Department who is on the CM/ECF notice list," he stated that "[w]e have not directly forwarded anything to them. We have not lobbied them, talked to them." *Id.* This representation was false, as the Record shows. *See* D.E. 43-3.

Plaintiffs continue to act improperly in implying that the documents were not conveyed to the State Department. *See* App. Br. at 34 ("[E]ven if one were inclined to assume that the information relating to the unconstitutionality of the Mexican ambassador's request and Mr. Maldonado Leza's testimony *was* communicated to the Department, the fact remains that the Suggestion of Immunity before the district court was premised on a particular set of assumptions."). One need not "assume" that Plaintiffs conveyed this information to the State Department; the Record conclusively shows that Plaintiffs sent the Lopez Padilla opinion on the unconstitutionality of the immunity request *and* the Maldonado Leza declarations directly to the State Department *before* the State Department filed its initial Suggestion of Immunity. D.E. 43-5 (March 6, 2012 letter attaching Lopez Padilla opinion); 43-10 (August 30, 2012 letter attaching Maldonado Leza declarations).

Mexico's request for immunity was invalid because the Mexican constitution supposedly waived former head-of-state immunity, and the State Department had been provided with the Maldonado Leza Declarations purporting to directly implicate President Zedillo in the Acteal Massacre, but still filed its Suggestion of Immunity on September 7, 2012, conclusively determining that President Zedillo is immune from suit. D.E. 38 at 2 **(**stating that "the Department of State has determined that former President Zedillo enjoys immunity from suit with respect to this action" and that "this determination is controlling and is not subject to judicial review"); *see also* D.E. 38-1 at 2–3.

Even after the Suggestion of Immunity was filed, the State Department continued to receive Plaintiffs' submissions to the District Court through its attorney in the Department of Justice, as Plaintiffs admit. *See* Docket Sheet; Tr. at 7. Thus, the State Department was privy to Plaintiffs' later arguments relating to the *amparo* suit, which in any event merely derived from the previously filed Lopez Padilla opinion. *See, e.g.*, D.E. 43-1 at 5–6, 10–16; D.E. 59 at 2–6; D.E. 61-1, D.E. 70. Despite knowing that a Mexican trial court had issued a "definitive suspension order" supposedly invalidating the Mexican Government's diplomatic request for immunity for President Zedillo, the State Department nevertheless reiterated its suggestion of immunity in May 2013. D.E. 76 (stating that "[t]he United States rests on its Suggestion of Immunity . . . , which sets forth the United

States' determination regarding the immunity of former President Zedillo from this suit"). Indeed, the only development that occurred *after* the State Department's reiteration of its Suggestion of Immunity was the Mexican appellate court decision unanimously reversing the trial court's *amparo* decision (and necessarily rendering it irrelevant). *See* D.E. 77.

It is thus disingenuous for Plaintiffs to speculate, in this Court, that the State Department might have changed its mind and withdrawn its Suggestion of Immunity if only Plaintiffs had been able to amend their Complaint. The Record conclusively shows that the State Department *was already provided with* all of the information that Plaintiffs say they would have added, and that it nevertheless suggested immunity in September 2012—and "stood by" its suggestion following the briefing on the Order to Show Cause in May 2013. As the District Court correctly observed:

> [T]he State Department had available to it all of the evidence that the Plaintiffs subsequently produced in the so-called *Amparo* proceeding challenging the validity of the Mexican government's Request for Immunity, and the State Department is also presumably aware of the Mexican court's decision invalidating that Request. Yet, despite having access to that information, the State Department has communicated to this Court that it stands by its Suggestion of Immunity.

D.E. 87-2 at 4–5.

Plaintiffs' suggestion that "the record does not clearly reflect that the Department considered the additional information," App. Br. at 33, cannot be taken seriously. To be sure, the State Department did not explicitly mention every one of Plaintiffs' arguments and submissions in its Suggestion of Immunity. But in making the foreign policy determinations attendant on a request for immunity, the State Department has no obligation even to *consider* a plaintiff's arguments, let alone to respond in writing to every one of them. Plaintiffs concede as much, recognizing that "the Department could have, theoretically, simply declared by proverbial fiat that Zedillo was entitled to immunity as a former head of state." App. Br. at 24. It is equally true that the State Department could have done what it did here: explained its conclusions, without addressing every irrelevant argument that Plaintiffs made to it. In any case, "the doctrine of the separation of powers under our [c]onstitution requires [courts] to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion" that immunity should be granted. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961). Once the State Department suggested immunity, it was beyond the power of the District Court to request further consideration. *See Ex parte Peru*, 318 U.S. at 588–89; *Ye*, 383 F.3d at 626 ("[A] determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination *without reference to the underlying claims of a*

plaintiff."); *Spacil*, 489 F.2d at 617 (courts defer to Executive's suggestion of immunity "with no further review of the executive's determination").[17]

The State Department knew of the "new" allegations Plaintiffs would add to their Complaint, and it still suggested immunity.[18] Plaintiffs offer no reason to think that the State Department would have acted differently if they had included

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[17] Plaintiffs point to *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988), *appeal dismissed, Estate of Domingo, by Mast*, 895 F.2d 1416 (9th Cir. 1990) as proof that the State Department can change its mind on immunity. App. Br. at 34-36. The case is irrelevant for two reasons. First and foremost, the State Department in this case *did not* change its mind, despite being presented with all of Plaintiffs' additional allegations and theories. Instead, it filed a document prior to oral argument making plain that it still "rest[ed] on its Suggestion of Immunity . . . which sets forth the United States' determination regarding the immunity of former President Zedillo from this suit." D.E. 76; *see supra* at 32–36. Second, *Domingo*—unlike this case—involved a change in the legal status of the foreign official. The State Department suggested Marcos's immunity when he was a sitting head of state, entitled to "status immunity." After Marcos left office, he was entitled only to "conduct immunity," and when the Philippine government waived that immunity, the State Department acceded to the waiver and did not reiterate its suggestion of immunity. *See Domingo*, 694 F. Supp. at 786 ("The suggestion of immunity had significance when filed in 1982, but has none [now] given the change of circumstance."). Here, by contrast, President Zedillo has been a former official since the suit was filed; there has been no "change of circumstance" with respect to his legal status. *See* D.E. 38 at 5.

[18] It is not surprising that the State Department chose to stand by its Suggestion of Immunity notwithstanding Plaintiffs' theory that the Mexican Ambassador lacked the power to request immunity. As the Mexican appeals court noted, the ultimate granting of immunity "is a sovereign act from the granting State," not an act that depends on the powers of the requesting state. D.E. 77 at 25; *see also infra at* 39–41. As the Mexican appellate court also noted: "The suggestion of immunity was made in keeping with international common law, based on case precedents in which the United States has reaffirmed its position on immunity for Heads of State, even after the official capacity has ended." *Id*

all of their allegations in an amended complaint, rather than conveying them in their voluminous submissions and their in-person meeting.

B. The Additional Allegations Do Not Cure the Defect that Warranted Dismissal.

The State Department extended immunity because "[t]he alleged actions as set forth in the Complaint are predicated on former President Zedillo's actions as President of Mexico, thus involving the exercise of his powers of office." D.E. 38 at 6; *see also* D.E. 38-1 at 3 ("The complaint is predicated on former President Zedillo's actions as President, not private conduct."); *see generally* Part II.B, *supra* (detailing how the Complaint alleges liability only for official actions taken by President Zedillo as head of state). The "new" allegations Plaintiffs would add to an amended complaint—relating to supposed Mexican legal barriers to Mexico's request for immunity, and to President Zedillo's supposed direct involvement in the massacre—do not somehow transform the Complaint from one alleging conduct taken in President Zedillo's *official* capacity to one alleging conduct taken in Mr. Zedillo's *personal* capacity.

Plaintiffs' argument is premised on a misunderstanding of the basis for the Suggestion of Immunity. Plaintiffs assert that the Suggestion depended on "(a) the validity of the Mexican ambassador's request for immunity and (b) the sufficiency of the allegations of the complaint" relating to President Zedillo's degree of involvement in the massacre. App. Br. at 3. Any objective reading of the

Suggestion of Immunity and the accompanying letter from the Legal Adviser belies that assertion. By its plain terms, the Suggestion of Immunity did not depend upon the validity of the Ambassador's request under Mexican law, or on President Zedillo's alleged degree of involvement in the massacre. Rather, it depended on the State Department determination that the Complaint concerned actions taken in President Zedillo's *official* capacity. Accordingly, amending the Complaint to add allegations relating to these issues would be futile. *See, e.g.*, *Sharnese v. California*, No. 12-55407, 2013 WL 5879506 (9th Cir. Nov. 4, 2013) (proposed amendment "that does not cure the fatal defects concerning judicial immunity [and] sovereign immunity . . . would be futile"); *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 383 (6th Cir. 1993) ("The proposed claim . . . would not be able to withstand a motion to dismiss by the Department of Treasury since . . . it is immune under the Eleventh Amendment . . . .").

1. The Validity of the Mexican Government's Request for Immunity under Mexican Law Is Irrelevant.

In his letter to the Justice Department instructing it to file a Suggestion of Immunity, the Legal Adviser explained that

> In a case involving conduct-based immunity, as here, the Department of State generally presumes that actions taken by a foreign official exercising the powers of his office were taken in his official capacity. This preliminary assessment is particularly appropriate when a former head of state is sued, because holders of a

> country's highest office may be expected to be on duty at all times and to have wide-ranging responsibilities.

D.E. 38-1 at 2-3.[19] With respect to the impact of the foreign government's request for immunity, the Legal Adviser stated that "that initial assessment *gains further support* where, as here, the foreign government itself has asserted that the actions of its official were taken in an official capacity." *Id.* (emphasis added).

The Suggestion of Immunity thus did not depend on the existence, let alone the validity under Mexican law, of the Mexican Government's request for immunity. The only relevance the Mexican request had to the immunity determination was in providing "further support" to the presumption that the acts and omissions alleged in the Complaint were taken in President Zedillo's *official capacity*. D.E. 38-1 at 3. The validity of the request under Mexican law played no part in the Legal Advisor's letter or the State Department's Suggestion of Immunity.[20]

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[19] In its Suggestion of Immunity, the State Department stated that the presumption of official conduct might be rebutted, for example, "in a suit challenging a former official's personal financial dealings, which generally would not be considered to constitute acts taken in an official capacity." D.E. 38 at 6 n. 5.

[20] Although the validity of the Mexican Ambassador's request as a matter of Mexican law is irrelevant to the sovereign determination of the United States to grant immunity under its own common law, Plaintiffs' outlandish theory that the Mexican Ambassador somehow perpetrated a fraud on *both* governments cannot be left unanswered. Contrary to Plaintiffs' assertions, *see, e.g.*, App. Br. at 8, Ambassador Sarukhán has never "admit[ed]" that he made the request "as a favor to Zedillo" without "instruction, order, or permission from his superiors" and his

In any event, Plaintiffs argument regarding the validity of the Mexican Government's request for immunity depends upon a Mexican trial court decision which was unanimously reversed on appeal. *See* D.E. 77. Plaintiffs have argued that the appellate court's decision is somehow less significant because it related to an issue of standing, but the appellate court decision plainly "revoke[d] the appealed judgment resolution and dismiss[ed] the [case]," rendering it a legal nullity. D.E. 77 at 34–35.[21] Moreover, the Mexican appellate court opinion

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"superiors" have never denounced the request. (Tellingly, Plaintiffs cite generally to a twelve-page Spanish language document in support of this assertion, because the English translation, D.E. 61-1 at 1–14, provides absolutely no support for it.) Far from rejecting the actions of Ambassador Sarukhán, the Mexican Government endorsed the immunity request. Indeed, the Mexican trial court's decision was appealed by the current President of Mexico, Enrique Peña Nieto, along with the Secretary of Foreign Affairs, José Antonio Meade Kuribreña. *See* D.E. 77 at 2. As the Mexican appellate court observed, "[t]he Secretary of Foreign Affairs' director General of Legal Affairs, *who represents the President of Mexico*, the Secretary of Foreign Affairs and the Ambassador of Mexico to the United States of America. . . . were dissatisfied with the [trial court's] judgment resolution and filed separate writs of review." *Id.* at 12. Thus, successive administrations (representing both the Partido Acción Nacional (PAN) and Partido Revolucionario Institucional (PRI) parties) have supported the immunity request and rejected the idea that the Mexican constitution somehow precludes former officeholders from receiving immunity in foreign courts.

[21] The Mexican appellate court did not need to address the merits of the Mexican trial court decision because it determined that the plaintiffs there lacked standing. Plaintiffs here argue that the Mexican trial court discussion of the merits therefore somehow survived, but nothing in the Mexican appellate court decision suggests that, and it is a truism that appellate courts need not address the merits when standing or other jurisdictional prerequisites are lacking. In any event, this Court need not interpret the fine points of Mexican law. *Cf., e.g.*, *Skaftouros v. United States*, 667 F.3d 144, 156 (2d Cir. 2011) (extradition judges "should avoid

recognized that the Mexican Government request was simply a diplomatic communication "from one Sovereign State to another Sovereign State," *id.* at 18, that the granting of immunity "is a sovereign act from the granting State," *i.e.*, the United States, *id.* at 25, and that, in this instance, "[t]he suggestion of immunity was made in keeping with international common law, based on case precedents in which the United States has reaffirmed its position on immunity for Heads of State, even after the official capacity has ended." *Id.*

In short, the validity of the Mexican Government immunity request under Mexican law was never relevant to the U.S. State Department in its determination of immunity. Even if the State Department were inclined to consider that factor following the Mexican trial court decision—and again, there is no evidence that it ever did—any relevance of the factor disappeared with the Mexican appellate court's "revocation" of the trial court decision and its "dismissal" of the underlying *amparo* petition.

2. The Maldonado Leza Declarations Are Irrelevant.

Like the *amparo* proceeding, the information contained in the Maldonado Leza declarations would not cure the fundamental defect in the Complaint. As noted above, the State Department explained that it based its Suggestion of

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making determinations regarding foreign law" out of respect for "comity" and "judicial modesty"); *Jhirad v. Ferrandina*, 536 F.2d 478, 484–85 (2d Cir. 1976) ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.").

Immunity on a determination that the Complaint related to President Zedillo's actions in his *official* capacity. D.E. 38 at 6; D.E. 38-1 at 2–3. To be sure, the Legal Adviser noted in his letter that "Plaintiffs' allegations that former President Zedillo should be held liable for lower level officials' tortious conduct simply by virtue of his position as President at the time do not provide a sufficient reason to question that initial assessment." D.E. 38 at 6. But that "initial assessment" was the State Department's "presum[ption] that actions taken by a foreign official exercising the powers of his office [are] taken in his official capacity." D.E. 38-1 at 2; *see also* D.E. 38 at 6. In other words, Plaintiffs' allegations—both those relating to the conduct of lower level officials and those few actually relating to President Zedillo—did not provide a sufficient basis for questioning the presumption that a president exercising the powers of his office acts in an official capacity, and is therefore immune from suit. Allegations purporting to link President Zedillo more directly with the massacre (allegations which, it must be noted again, are entirely false) do nothing to cure Plaintiffs' official capacity problem.

In any case, the Maldonado Leza Declarations certainly *do not* "implicate Zedillo directly in the Acteal Massacre." *Contra* App. Br. at 32. Maldonado Leza says nothing about President Zedillo's involvement in the massacre. *See generally* D.E. 37-1, 37-2. Rather, as Plaintiffs note, Maldonado Leza testified about meetings attended by individuals who "had direct connections with three cabinet

level positions . . . all of whom reported directly to Defendant Zedillo." App. Br. at 8 n.6. In other words, the affiant met with people at least two levels below the President. Moreover, the declarations do not support the inference that the Acteal Massacre was planned at these meetings. Maldonado Leza expressly acknowledges that "at no time was it openly stated that Acteal was going to be attacked." D.E. 37-1 at 6. However, fifteen years later, he speculates that the participants silently understood "that any operation against the Polhó Checkpoint would necessarily involve some type of deployment of resources with the purpose of eliminating opponents residing in Acteal who were maintaining the Polhó Checkpoint." *Id.*

In short, Plaintiffs seek to amend their Complaint to include allegations stemming from an individual who, fifteen years ago, attended meetings with individuals at least two degrees removed from President Zedillo, where plans were discussed to crack down on an unauthorized Zapatista roadblock. This hardly constitutes a direct link between President Zedillo and the Acteal Massacre. But even if Plaintiffs could allege direct involvement (and they never could), it would not matter, for the State Department's determination turned on the fact that the lawsuit complains of "official" actions, direct or indirect.

3. The Mexican Constitution Does Not Waive Sovereign Immunity as a Matter of Customary International Law.

The final red herring in Plaintiffs' barrel of fish is their argument that the Mexican Constitution implicitly waives sovereign immunity for former officials, including heads of state. Plaintiffs contend that "[c]onsidered collectively, Articles 108, 111 and 114 of Mexico's Constitution limit head of state immunity to one year after the president leaves office. Thereafter, immunity is *constitutionally waived*." App. Br. at 29 (citing D.E. 43-5 at 4, 8). Like their argument regarding the validity of the Mexican Government's immunity request, this one depends upon the dubious opinion of their "expert" tax lawyer and a now reversed decision of the Mexican trial court.[22]

[22] Plaintiffs incorrectly assert that "the position of the foreign government on immunity takes precedence over the position of the United States." App. Br. 27, 31. To be sure, a foreign government's explicit waiver of immunity controls where the State Department has not spoken on immunity, *see*, *e.g.*, *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988), but no case has ever held that a U.S. court should defer to a foreign government—rather than the U.S. State Department—when the State Department has suggested immunity. Arguing otherwise, Plaintiffs cite *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987), but in that pre-*Samantar* case the foreign government and the State Department *both* said no immunity should apply. (Moreover, in that case, the Philippine Government made an express waiver of immunity. *Id.* at 1110.) Here, of course, Mexico has never withdrawn the request for immunity; to the contrary, it appealed a Mexican trial court decision ordering the withdrawal of the request—and won. D.E. 77 at 12. As the Mexican appellate court stated, "Mexico's Ambassador in the United States of America conveyed to that country's Department of State the rejection by the Mexican government of any internal [U.S.] proceeding that violates Mexico's sovereignty by exercising jurisdiction to hear cases regarding events that occurred

But the waiver argument is futile for another reason: In order for a sovereign nation to waive the immunity of its officials, the waiver must be express. *See Lafontant v. Aristide*, 844 F. Supp. 128, 134 (E.D.N.Y. 1994). In *Lafontant*, Judge Weinstein analyzed the head-of-state immunity doctrine and concluded that "[w]aiver of head-of-state immunity is analogous to waiver provisions in the Vienna Convention of Diplomatic Relations, which provide that the immunity of diplomatic agents may be waived by the sending state. *Such waiver must be explicit*." *Id.* (emphasis added). Thus, even though the Government of Haiti had itself issued an arrest warrant for its former president, Judge Weinstein rejected the plaintiffs' waiver argument because "there ha[d] been no *explicit* waiver of President Aristide's immunity." *Id.* at 134 (emphasis added); *compare, e.g.*, *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987) (noting that "waiver must be express," and recognizing the Philippine government's express waiver of immunity of former president Marcos); *In re Doe*, 860 F.2d 40, 43–44 (2d Cir. 1988) (recognizing Philippine government's express waiver of former president Marcos's immunity and noting that "[t]he language of that waiver . . . could scarcely be stronger").[23]

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within national [Mexican] territory in which [former President Zedillo] allegedly participated in his official capacity as President of Mexico." *Id.* at 20.

[23] The FSIA recognizes that states may impliedly waive *their own* immunity, but only in limited circumstances. *See* 28 U.S.C. § 1605(a)(1). "Federal courts

The requirement of express waiver protects against "inadvertent, implied, or constructive waiver in cases where the intent of the foreign state is equivocal or ambiguous." *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47, 49 (2d Cir. 1982). Plaintiff's argument that a now-reversed Mexican trial court decision interpreting penumbras of the Mexican constitution could somehow constitute a waiver of sovereign immunity is precisely the type of "inadvertent, implied, or constructive waiver" that the express-waiver requirement is designed to prevent. The only express foreign governmental statement on the issue of immunity in this case is the Mexican government's *request* for immunity, not any waiver of it.[24]

Accordingly, even if the Mexican trial court's decision had not been unanimously reversed, it did not constitute an explicit waiver of President Zedillo's immunity.

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have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991). In any event, the Supreme Court has made clear that the FSIA does not apply to the immunity of foreign *officials*. *Samantar*, 560 U.S. at 325.

[24] Likewise, Mexico has not waived immunity for its former officials against civil suits in the United States by signing the Rome Convention of the International Criminal Court (ICC). The Rome Convention amounts to an express waiver of sovereign immunity against criminal prosecution in the ICC. Simply stated, "the application of immunity by international tribunals in criminal cases is irrelevant to the question of how individual nations treat each others' leaders in civil cases." *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260, 265–66 (D.D.C. 2012), *aff'd* 711 F.3d 178 (D.C. Cir. 2013).

CONCLUSION

The District Court properly dismissed this action in deference to the State Department's determination that President Zedillo is immune from suit. The State Department's determination, in turn, was based on its conclusion that the Complaint concerns alleged acts and omissions taken in President Zedillo's *official* capacity. Plaintiffs' proposed amendments do not address the defect that prompted dismissal. Thus, the District Court acted well within its discretion in choosing not to *sua sponte* grant leave to Plaintiffs to file a futile amendment.

President Zedillo, who is widely regarded as an historic champion of human rights and democracy, has suffered under the shadow of this calumnious lawsuit for over two years. Though the allegations in the Complaint are false, it has been clear from the outset that President Zedillo should not have to dignify the Complaint with a response, because he is immune from suit. This Court should affirm.

Respectfully submitted,

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Dated: December 30, 2013.

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Dated: December 30, 2013

s/Jonathan M. Freiman
Jonathan M. Freiman

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I hereby certify that, on December 30, 2013, the Proof Brief of Defendant-Appellee Ernesto Zedillo Ponce de Leon was filed and served electronically via CM/ECF and six copies of the brief and were sent via FedEx Priority Overnight to:

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