No. 18-12728

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Eloy Rojas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Juan Patricio Quispe Mamani, Teófilo Baltazar Cerro, Juana Valencia de Carvajal, Hermógenes Bernabé Callizaya, Gonzalo Mamani Aguilar, Felicidad Rosa Huanca Quispe, Hernán Apaza Cutipa,

Plaintiffs-Appellants,

v.

Gonzalo Daniel Sánchez de Lozada Sánchez Bustamante,
José Carlos Sánchez Berzaín,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida
Case Nos. 1:08-cv-21063-JIC and 1:07-cv-22459-JIC

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

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INTRODUCTION

In their appellate brief, as in their closing argument, Defendants offer a competing narrative for why eight unarmed civilians were gunned down by Bolivian soldiers. But Defendants' problem is that the *jury*, reviewing evidence from 40 witnesses over a three-week trial, concluded that those soldiers committed "deliberated" killings—a quintessentially fact-bound inquiry. Under a standard of review "heavily weighted in favor of preserving the jury's verdict," this Court should reject Defendants' attempt to retry their case long after the jury retired.

Defendants contend that this Court's 2011 *Mamani* decision, which dismissed an earlier version of the complaint as too "conclusory" to prove direct ATS liability, precludes the jury's verdict. If true, that would mean the jury—which considered detailed eyewitness accounts of soldiers specifically targeting and killing these unarmed decedents (none of which was alleged in the complaint this Court previously reviewed)—was not even *permitted* to infer that such killings were "deliberated." Tellingly, Defendants never address Plaintiffs' eyewitness testimony, which is the most probative evidence of whether the killings were actually intentional, rather than accidental or negligent. Defendants may prefer to disregard that evidence, but the jury was certainly not required to.

Defendants also strain to characterize their own evidence as "undisputed"—including, perplexingly, assertions about the most centrally disputed questions in the

case. *E.g.*, Br. 24 (describing as "undisputed facts" that there was "no evidence that any decedent was shot by a member of the military" or shot "intentionally"). That tactic may be understandable, as this Court *must* disregard any evidence the jury was not required to believe. But it is simply not credible, given extensive record evidence regarding each decedent's death.

Defendants also invoke as obstacles a series of heightened legal standards found nowhere in the TVPA or this Court's precedents. For example, they repeatedly point to a lack of evidence identifying the specific soldiers who pulled the trigger, or showing Defendants specifically "ordered" these killings. But under the jury instructions *that Defendants proposed*, which communicated verbatim the standard this Court set in 2011, such evidence is legally irrelevant. Defendants' belated plea for an elevated evidentiary standard cannot obscure that, in reality, the district court inverted the Rule 50 inquiry when it demanded that Plaintiffs exclude all inferences "*other than* deliberate killings."

These and other errors require reversal of the judgment below. And given that Defendants have no justification for the district court's errors in rejecting the proposed jury instruction and admitting the double-hearsay cables (on which Defendants continue to rely even on appeal), Plaintiffs are entitled to a new trial on the wrongful-death claims as well.

ARGUMENT

I. THE JURY'S TVPA VERDICT MUST BE REINSTATED

A. Defendants Ignore Plaintiffs' Evidence And Offer A Competing Narrative The Jury Rejected

Defendants agree that the primary question on appeal is whether a reasonable jury could find by a preponderance of the evidence that (i) Bolivian soldiers killed decedents, and (ii) the killings "were 'deliberate' in the sense of being undertaken with studied consideration and purpose.'" Defs.' Br. 23-24. Although Defendants contend that Plaintiffs "presented no evidence from which the jury could conclude that the deaths of Plaintiffs' decedents were the result of extrajudicial killings," *id.* 27, that hyperbole cannot be reconciled with the voluminous evidence detailed in Plaintiffs' brief.

1. *Defendants ignore extensive evidence that Bolivian soldiers killed decedents.*

Without addressing any particular decedent's death, Defendants repeatedly claim "[t]here was no evidence that any decedent was shot by a member of the military." Br. 24; *see id.* at 1, 16, 18, 24, 27, 31-33, 50. Defendants are wrong.

Take, for example, the killing of Raúl (whom, like most decedents, Defendants never mention). The jury heard detailed and direct *eyewitness testimony* that, in Ovejuyo on October 13, a group of 12 to 15 Bolivian soldiers aimed and shot at Raúl "from above" as the unarmed sixty-year-old desperately sought refuge by a

shop. Vol:5-Doc:500-9 at 26:19-29:14, 33:4-10, 37:8-18. The eyewitness watched in fear as Raúl, "a man [he had] known for a long time," fell dead immediately. *Id.* at 26:10, 29:9-14. The soldiers continued to shoot, "dat dat dat," for around 20 minutes, though no civilians were armed and the surrounding area was "very peaceful." *Id.* at 35:15-18, 37:19-38:14, 41:11-17, 45:5-24.

Defendants never address Plaintiffs' recitation (at 8-14) of eyewitness accounts of soldiers killing other decedents, either. For instance, Defendants ignore an eyewitness's description of Arturo and Jacinto being killed by soldiers who climbed hills in pursuit of unarmed civilians, firing "every time the straw would move" where they hid. Vol:3-Doc:480 at 32:12-36:19, 38:22-39:7, 42:14-44:1, 56:12-20. They ignore that an eyewitness saw five officers "positioning themselves to shoot" and killing Lucio. Vol:5-Doc:500-4 at 34:11-38:4, 41:3-15. And they ignore the eyewitness evidence regarding the remaining decedents. *See*, *e.g.*, Vol:3-Doc:478 at 73:17-76:15 (Marcelino shot when closing window with tanks and soldiers "ready to shoot" outside); Vol:3-Doc:479 at 74:13-75:9 (Roxana shot in head after watching civilians flee military tanks and trucks on street); Vol:3-Doc:479 at 87:10-93:23 (Teodosia shot "very quick[ly]" after witnessing another civilian's death and after soldiers "aimed at" her and her family); Vol:2-Doc:476 at 59:24-65:9 (Marlene shot after soldiers fired at houses for hours). In short, Defendants' contention (at 50) that there was "no evidence from which the jury could reasonably

have concluded that Plaintiffs' decedents were killed by *any* Bolivian soldier" is squarely foreclosed.

2. Defendants ignore extensive evidence that the killings were deliberated.

Substantial evidence also supported the jury's reasonable conclusion that the killings were deliberated, *i.e.*, "undertaken with studied consideration and purpose," rather than the result of "accident[]," "negligen[ce]," "personal reasons," or "precipitate shootings." Vol:2-Doc:455 at 9.

Once again, eyewitnesses told the story. As just noted, multiple eyewitnesses observed Bolivian soldiers pursuing, targeting, and killing *these decedents*, all of whom were fleeing, hiding, or at home when fatally shot. Pls.' Br. 8-15. Such activities are consistent only with deliberated killings, not accidental or negligent ones.

The jury also heard *from soldiers themselves* that they were ordered to "shoot at anything that moved," Vol:4-Doc:500-1 at 26:11-21; those who refused were replaced by those who were willing, *see, e.g.*, Vol:4-Doc:500-1 at 50:23-53:8; and officers threatened conscripts—even killing one—who hesitated to fire at unarmed civilians, Vol:3-Doc:481 at 51:4-52:15; Vol:4-Doc:500-1 at 48:9-23. Conscripts (and others) testified that soldiers were ordered to shoot "below the belt" at civilians *who posed no threat*, Pls.' Br. 30; were commanded not to assist wounded civilians,

id.; and followed officers who "sho[t] at anything that moved or screamed" over hours, *id.* at 9-10.

Contrary to Defendants' characterization (at 28), eyewitnesses consistently testified that there were *no armed civilians* and *no threats to soldiers* when and where soldiers shot each decedent. *See, e.g.*, Vol:4-Doc:500-1 at 36:23-37:10 (soldier in Warisata on September 20 never saw armed civilians); Vol:5-Doc:500-4 at 20:12-17, 43:21-44:10 (witness to Lucio's killing "never" saw an armed civilian "[a]t any point"); Vol:3-Doc:479 at 22:10-12; Vol:3-Doc:480 at 70:7-9 (priests never saw civilians with firearms in Río Seco); Vol:3-Doc:479 at 75:12-15 (Roxana's brother "absolutely" did not see civilians "with any kind of weapon"); Vol:3-Doc:480 at 56:12-20 (civilians in hills by Ánimas Valley were unarmed); Vol:5-Doc:500-9 at 35:15-18, 37:19-38:14, 41:11-17, 45:5-24 (soldiers in "very peaceful" Ovejuyo continually fired despite no armed civilians and no attacks on military). As they did in closing argument, Defendants dispute the significance of this evidence. But the jury was free to draw its own conclusions.

On top of all this (and more) direct evidence, the jury *also* considered overwhelming—and highly probative—circumstantial evidence from which it reasonably could infer that decedents were shot deliberately. *See* Pls.' Br. 31-32. Defendants disparage that evidence, describing Plaintiffs' entire case as "allegations of a pattern of indiscriminate shootings, without more." Br. 27. But given the

eyewitness testimony recounted above, Defendants cannot credibly contend that Plaintiffs' case was merely circumstantial, let alone based on "speculative inference." Br. 34.

In sum, the trial record provided a legally adequate factual basis for a reasonable jury to conclude that Bolivian soldiers killed all eight decedents with deliberation. That would be true under any standard, but particularly where the Court must "consider all the evidence, and the inferences drawn therefrom, in the light most favorable" to Plaintiffs. *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1360 (11th Cir. 2010).

3. This Court should disregard Defendants' contested evidence and theories.

Instead of taking Plaintiffs' evidence head on, Defendants relitigate the jury's verdict by offering the same counter-narrative they offered at trial. But this Court "must disregard all evidence favorable to the moving party that the jury is not required to believe," and credit evidence favorable to the movant only if it "is uncontradicted and unimpeached, at least to the extent [it] comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000). Essentially all the facts Defendants claim were "unrebutted" or "undisputed" were *squarely* rebutted. (Many others—including their odd attempt to put a non-party, Evo Morales, on trial in the Eleventh Circuit—are additionally irrelevant.) Indeed, Defendants never dispute that two witnesses testified that the military forced them

to fabricate statements about civilians' supposed violence and soldiers' supposed restraint. *See* Pls.' Br. 14. Such evidence could lead a reasonable jury to question *all* of Defendants' evidence, as "[c]redibility determinations" and "the weighing of the evidence" are "jury functions, not those of a judge." *Reeves*, 530 U.S. at 150.

Even taking Defendants' evidentiary claims at face value, however, most can be disregarded as contradicted, impeached, or derived from their experts or other interested witnesses. *See* Pls.' Br. 32-34.

The events in Warisata. Defendants claim "[t]here was unrebutted evidence presented at trial that in Warisata, [(1)] the military convoy transporting hostages was ambushed," and (2) Marlene was killed "during [the] ambush of [the] convoy as it drove through the town." Br. 10, 28. On the contrary, an American student on the caravan, who refuted that tourists were "hostages," stated that it passed through Warisata "safely" and he "did not see or hear any gunshots in Warisata when [it] went through the town"—notwithstanding an earlier confrontation *outside* of town. Vol:2-Doc:477 at 36:25-40:9, 53:19-54:14. Second, the jury heard that Marlene's home in Karisa Town (one of four towns in the broader Warisata District) was a 20-to-25-minute distance from where the caravan passed through Warisata Town. Vol:2-Doc:476 at 52:11-20, 59:10-62:10, 65:1-6. It also heard that soldiers walked through her neighborhood firing indiscriminately for hours. Pls.' Br. 8-10.

The events in El Alto and La Paz. Defendants likewise invoke (at 28-29) purportedly "[u]ndisputed evidence" of "crises" in El Alto and La Paz "in each of the areas where decedents died." Again, that evidence was *in no way* "undisputed." For starters, Defendants' evidence of these "crises" was contested. *Compare, e.g.*, Defs.' Br. 4, 10, 11, 28 (citing "dynamite"-armed protestors) *with* Vol:3-Doc:480 at 149:23-150:4 (soldier contradicting report of dynamite); *see* Vol:2-Doc:476 at 70:13-75:16 (explaining demonstrations in Bolivia are commonplace); Vol:4-Doc:483 at 50:21-24 (La Paz mayor explaining "[t]here was a relative normalcy in the city" on October 12 before military action); Vol:3-Doc:479 at 9:13-15, 71:16-24 (protests did not prevent ordinary tasks like "go[ing] to the store and buy[ing] bread, soda, ice cream"). Moreover, much of Defendants' evidence did not come from "disinterested" witnesses. *Reeves*, 530 U.S. at 151; *see, e.g.*, Br. 29 (citing Supp.App.-Vol:2-Doc 488 at 130:21-131:4, 150:2-20 (Defendants' expert's testimony); App.-Vol:4-Doc:500-2 at 139:05-143:13 (General's testimony)).

More to the point, Defendants discuss "crises" only in generalities. But the jury was entitled to credit Plaintiffs' extensive evidence that, notwithstanding temporally or geographically distant conflicts, decedents were killed in areas of El Alto and La Paz where and when witnesses "never" saw an armed civilian "[a]t any point." Vol.5-Doc:500-4 at 20:12-17, 43:21-44:10; *see* Pls.' Br. 34 n.3. Several eyewitnesses even used maps to show that decedents' killings were removed from

any purported crises. *See, e.g.*, Vol:3-Doc:480 at 33:20-36:11, 44:16-20 (Arturo and Jacinto killed in hills away from conflict); Vol:5-Doc:500-9 at 29:25-39:14 (eyewitness drawing map of Lucio's killing in Ovejuyo).

The "irreconcilable" verdict. Defendants repeatedly suggest (at 3, 19-20, 29) that decedents' killings could not have been deliberated because the jury rejected Plaintiffs' wrongful-death claims. But Defendants have not cross-appealed the district court's holding "that the jury's verdict is not irreconcilably inconsistent." Vol:5-Doc:514 at 2 n.4. As Plaintiffs explained (at 50-52), the jury necessarily understood the conjunctive wrongful-death "willful *and* intentional" standard to differ from the TVPA's "deliberated" one. *See* Defs.' Br. 20 (conceding jury understood no-wrongful-death standard as "not intentional, not willful, *and* not malicious") (emphasis added). That conclusion is reinforced by the later punitive-damages instruction, which linked the term "willful[]" to both "wanton" and "malicious." Vol:2-Doc:455 at 26. Regardless, "allegedly inconsistent jury verdicts" are irrelevant to the Rule 50 analysis, where "only the sufficiency of the evidence matters." *Connelly v. Metropolitan Atlanta Rapid Transit Auth.*, 764 F.3d 1358, 1363-1364 (11th Cir. 2014).

Prosecutors' report. Defendants argue (at 12) that they and the soldiers were vindicated by a post-incident report prepared by Bolivian prosecutors. But they neglect to mention that the report explicitly excludes any examination of *their*

liability. Supp.App.-Vol:2-Doc:497-2 at 1002.22 (explaining constitutional provision restricted investigation's scope). And they ignore the report's conclusion: "The tragic outcome of these confrontations shows that in some instances, the actions of the joint military and police forces *** whose irreparable outcome was death and grievous bodily harm *** may be considered *criminal conduct with direct regard to the perpetrators*[.]" *Id.* at 1002.32 (emphasis added). Even Defendants' own cited evidence thus accords with extrajudicial killings by soldiers.

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Ultimately, the question for this Court is not whether it would side with the jury's judgment or with Defendants' narrative, but rather whether "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions based on the evidence presented." *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999). The jury was entitled to credit Plaintiffs' evidence—which was far more than a "scintilla" (Defs.' Br. 22)—over Defendants'.

B. Defendants, Like The District Court, Invert The Proper Legal Standard And Adopt A Novel Legal Test

Defendants do not address the district court's inversion of the legal standard, which required Plaintiffs to exclude all reasonable inferences "*other than* deliberate killings." Pls.' Br. 33 (quoting Vol:5-Doc:514 at 19). Instead, they commit the same error, insisting that Plaintiffs *disprove* their alternative theories. *See, e.g.*, Br. 33-34 (arguing Plaintiffs must rule out other scenarios "as opposed to" deliberated

shootings). Yet whether the killings were deliberated was a factual question the properly-instructed *jury* was asked to decide. Vol:2-Doc:455 at 9.

1. Defendants ask this Court to hold that it is somehow "impossible" for a jury to find extrajudicial killings without identifying the specific soldier "who actually shot" each decedent and "inquiring into the shooter's state-of-mind." Br. 2, 31, 33; *see id.* at 33 (supposed failure to proffer "evidence of the identity of any shooter" is "exactly why Plaintiffs' case fails"). But if that were the test, much of the existing TVPA precedent—and nearly all the case law Plaintiffs cited (at 27-28), including from within this Circuit—is wrong.

In *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2014 WL 4898210, at *13 (S.D. Fla. Sept. 30, 2014), a killing was deemed "deliberated" even though it was carried out by an unidentified "subordinate" in a paramilitary outfit. In *Fritz v. Islamic Republic of Iran*, 320 F. Supp. 3d 48, 84 (D.D.C. 2018), deliberation in the killings of U.S. soldiers by unidentified militants was inferred from the servicemen's wounds and other circumstantial evidence. And in *Warmbier v. Democratic People's Republic of Korea*, No. 18-977, 2018 WL 6735801, *16 (D.D.C. Dec. 24, 2018), the court found "more than sufficient" evidence of deliberation based on North Korea's general record of torture and the severity of the decedent's injury, despite no indication of who inflicted the harm.

Defendants neither meaningfully address Plaintiffs' cases *nor* offer a single authority of their own. They relegate discussion of Plaintiffs' cases to a footnote (and even then cite only two), suggesting that even if those cases did not identify a specific killer, "the deliberated nature of the deaths was not in question." Br. 33 n.4. But that is simply to say that, in those cases, "deliberation" was established by means other than by identifying the specific killer—which is exactly Plaintiffs' point.

2. Defendants' novel theory apparently rests on a flawed insistence that proof of deliberation cannot be circumstantial, because otherwise "a reasonable jury would have to speculate" about a soldier's "state-of-mind." Defs.' Br. 33-34. But it is unclear what, other than perhaps a direct confession, Defendants would *not* consider too "speculative." *Cf. id.* at 24 (even "evidence of a plan to kill civilians" would not establish "deliberated, extrajudicial killings").

The reality is that determining a mental state "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Indeed, even in homicide cases, where *mens rea* must be proven beyond a reasonable doubt, "it is generally understood" that "deliberation" "is not susceptible of direct proof, and may be ascertained or determined only by deduction from external or objective manifestations." HOMICIDE: PRESUMPTION OF DELIBERATION OR PREMEDITATION FROM THE CIRCUMSTANCES ATTENDING THE KILLING, 96 A.L.R.2d 1435, § 1(a); *see*,

e.g., *Hays v. State of Ala.*, 85 F.3d 1492, 1500 (11th Cir. 1996) (rejecting challenge to deliberated-murder conviction based on circumstantial evidence of defendant's state-of-mind). As the jury was properly instructed, "there's no legal difference" between direct and circumstantial evidence in TVPA cases, either. Vol:2-Doc:455 at 3; *see Doe v. Drummond, Co.*, 782 F.3d 576, 607 (11th Cir. 2015) (explaining "general principles of domestic law" are instructive for interpreting TVPA).[1]

3. Defendants also argue that it is "impossible to prove" deliberation without proof that they gave "orders to use lethal force." Br. 2; *see id.* at 1, 16, 18, 34, 37, 40, 45-47. Under binding command-responsibility precedent, however, a jury may find "a commander liable for acts of his subordinates, *even where the commander did not order those acts*." *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002) (emphasis added); *see Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming TVPA liability for former officials who "neither ordered *** nor participated in" underlying crimes). Whether Defendants ordered the killings is legally irrelevant under the theory the jury accepted. *See* Pls.' Br. 37-38; *see*

[1] Notably, "[n]o particular period of deliberation is essential," 40 AM. JUR. 2D HOMICIDE § 43, and "deliberation may be formed while the killer is pressing the trigger that fired the fatal shot," *Hays*, 85 F.3d at 1500.

generally Br. of *Amici Curiae* Retired U.S. Military Commanders and Law of War Scholars ("Military *Amici* Brief").[2]

4. Defendants' position ultimately boils down to the notion that *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011), a case that did not address Rule 50 or sufficiency of the evidence, nevertheless demands some heightened proof beyond what Plaintiffs presented at trial. That rings hollow: Defendants proposed (and the district court accepted) jury instructions that track *Mamani*'s language verbatim.

Regardless, Defendants misconstrue *Mamani* in two basic respects.[3] First, Defendants still ignore that *Mamani* did not analyze command-responsibility liability, but rather *primary* liability. Thus, whether "*these defendants*, in their capacity as high-level officials[,] committed extrajudicial killings," is irrelevant. Defs.' Br. 31 (quoting *Mamani*, 654 F.3d at 1155); *see* Military *Amici* Brief 21-22 (noting that Defendants' "reading would extinguish the command responsibility doctrine as a means of holding leaders accountable for failures of command").

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[2] Although Defendants criticize the two *amici* briefs as "insufficient substitute[s] for expert testimony," Br. 44 n.7, they address applicable legal standards, for which no expert testimony is needed.

[3] Defendants (like the district court) also conflate extrajudicial killings under the TVPA with crimes against humanity under the ATS. *See* Br. 27 n.3 (quoting *Mamani* passage addressing "widespread or systematic" attack requirement from crime-against-humanity ATS standard). Their confusion highlights Plaintiffs' basic point (at 38-39) that the ATS standard is narrower than the TVPA standard.

Rather, *Mamani*'s recognition that even the allegations in the (otherwise-deficient) 2008 complaint may be "consistent with" *direct* extrajudicial-killing liability for "the shooters," 654 F.3d at 1155 n.8, fits perfectly with the jury's finding that each decedent "died as a result of an extrajudicial killing by a member of the Bolivian military." Vol:2-Doc:455 at 8.

Second, *Mamani* is a post-*Iqbal* case centrally concerned with ATS pleading standards. 654 F.3d at 1156 ("The Complaint in this case has all of the flaws against which *Iqbal* warned *** and runs into the limitations that [the Supreme Court] set for ATS cases[.]"). In finding that complaint "highly conclusory," *id.* at 1156—even appending it to prove the point, *id.* at 1157-1171—*Mamani* in no way foreclosed the possibility that more specific pleadings and, eventually, evidence developed at trial, could sustain a jury verdict. *See Mamani v. Berzaín*, 825 F.3d 1304, 1308 (11th Cir. 2016) (noting that Plaintiffs' second amended complaint, amended "in light of" *Mamani*, "added close to one hundred paragraphs of allegations").

Defendants are mistaken (at 4) that the evidence before the jury "turned out to be no different from the allegations" previously before this Court. Rather than "attempt to escape" *Mamani*, Defs.' Br. 29, Plaintiffs litigated this case in direct response to it—by, for example, amending their complaint and developing eyewitness testimony "consistent with" (in fact, substantiating) extrajudicial-killing liability for "the shooters," 654 F.3d at 1155 n.8; *see* Pls.' Br. 39-40. Indeed, most

of the evidence supporting the jury's findings of deliberated killings and Defendants' liability was not even alleged in the 2008 complaint, including the eyewitness accounts detailing the circumstances of each decedent's death, that no civilians were armed (though the military coerced false contrary statements), and that soldiers received explicit orders to shoot unarmed civilians (and were threatened or even shot if they declined), along with extensive evidence regarding Defendants' command responsibility. *Compare* Vol:1-Doc.77 (2008 complaint) *with* Vol:1-Doc:174 (2013 complaint). The additional evidence alleged and later introduced established that the soldiers acted with deliberation and "connect[ed] what these defendants personally did to the [soldiers'] wrongs"—just as *Mamani* required. 654 F.3d at 1155 n.8.

C. To The Extent Such Evidence Was Required, The Jury Heard Ample Evidence Of A Preconceived Plan

Because the jury found Defendants secondarily liable under a command-responsibility theory, Plaintiffs were not required to prove the deaths resulted from a "preconceived plan" to kill civilians. Vol:5-Doc:514 at 17; *see* Pls.' Br. 35-41. Defendants do not contend that the TVPA demands such proof; instead, they acknowledge that Plaintiffs must merely "adduce evidence from which a jury reasonably could conclude that the deaths were extrajudicial killings." Defs.' Br. 32; *id.* at 1.

Defendants nevertheless insist (at 32-33) that proof of a preconceived plan was necessary because at summary judgment the district court found an "evidentiary void" without it. But any such finding would have been error: At summary judgment, as at trial, Plaintiffs argued the plan was *one* way to prove deliberation, but it was not the *only* way. Pls.' Br. 37, 41. Even if the district court believed that the summary-judgment record necessitated such proof, Defendants never address Plaintiffs' cases (at 40-41) explaining that the trial record is the relevant one under Rule 50. That record reveals more-than-sufficient evidence to infer extrajudicial killings, both from the evidence described above *and* from a "preconceived plan."

1. Plaintiffs introduced ample evidence of a plan as to each Defendant.

Plaintiffs proffered far more than a "mere scintilla of evidence" (Defs.' Br. 36) of a "preconceived plan" for each Defendant. *See* Pls.' Br. 44-49. Defendants' response suffers from multiple fatal flaws.

For starters, Defendants never deny the district court's acknowledgement that the record "*permit[s] the reasonable inference* that the decedents' deaths resulted from the Bolivian military's *implementation* of a plan to kill civilians." Vol:5-Doc:514 at 9 (first emphasis added); *see Montgomery*, 168 F.3d at 1289 (Rule 50 motion should be denied if reasonable jurors could "reach different conclusions based on the evidence presented"). Nor do Defendants dispute Plaintiffs' cases (at

43) demonstrating that "circumstantial evidence *alone* may establish a plan's existence." That alone requires reversal.

Beyond that, Defendants simply quarrel with each piece of evidence in isolation, rather than viewing the record as a whole. *Cf. Sykes v. United States*, 373 F.2d 607, 609-610 (5th Cir. 1966) (trier of fact "is entitled, in fact bound, to consider the evidence as a whole"). Even then, their description is riddled with mischaracterizations. For example, Canelas's testimony belies Defendants' claim (at 36) that he "simply had no context, and provided none, for Berzaín's stray comments." Canelas provided the precise context: Berzaín spoke at Lozada's home to other party leaders about how to quash future dissent similar to the unarmed protests the prior administration faced. Vol:4-Doc:482 at 91:1-25.

Here, as throughout, Defendants simply close their eyes to evidence a reasonable jury could believe. For example:

- Defendants wrongly describe (at 36) Canelas's testimony as "the full extent of Plaintiffs' evidence of a plan," ignoring copious evidence of the same. *See* Pls.' Br. 45-49.
- Defendants wrongly assert (at 40) that there is "zero evidence" that elite soldiers were used. *See* Pls.' Br. 44; *see, e.g.*, Vol:5-Doc:500-6 at 18:13-19, 46:6-10 (anti-terrorist force called "Chachapumas" deployed to Sorata and Warisata, "respond[ing] directly to" Lozada's direction).
- Defendants attempt to minimize Lozada's role by wrongly claiming (at 40) he "issued only two orders." *See* Pls.' Br. 48-49 (detailing various tactical and other orders).

- Defendants assert (at 40) that Lozada's September 20 order to use force "was not typed until after 5:00 p.m., more than one hour after [Marlene] died." But their cited report is internally contradictory. *See* Supp.App.-Vol:2-Doc:506-7 at 0009-0002 (indicating "event occurred" at "6:00 p.m.").

- Defendants contend (at 39) that "there is no evidence that Defendants even knew about" the Republic Plan, but their own witness testified that it was known throughout "[e]very single unit" of "the entire Army." Vol:5-Doc:500-6 at 110:12-17.[4]

Inaccuracies aside, Defendants again merely pitch an alternate narrative based on inferences drawn in *their* favor rather than "in favor of the nonmoving party." *Reeves*, 530 U.S. at 150-151. They even suggest that Berzaín's various damning comments—such as threatening to "kill 50, a hundred, a thousand" civilians or expressing that "if there are five dead, it doesn't matter if it's 50 more," Pls.' Br. 44-45—"at most" reflect his "strict approach." Defs.' Br. 41-42. But it is the *jury's* job to "resolve the conflict between *** competing inferences," *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988)—not a court's.

[4] Defendants misleadingly state (at 39) that when the Republic Plan was introduced, "Plaintiffs disavowed the very purpose for which they now advocate." In fact, counsel merely clarified (Supp.App.-Vol:2-Doc:478 at 24:22-23) that Plaintiffs did not rely on the plan *itself* for proof of its implementation, given earlier testimony that the Lozada administration "launch[ed]" the plan in September 2003. Vol:4-Doc:485 at 19:8-17, 25:4-14; *see* Vol:4-Doc:489 at 55:15-16 (Plaintiffs describing "Republic Plan" as "plan that was implemented").

2. The district court erred in failing to distinguish between liability for each Defendant.

Plaintiffs sued two Defendants in this case—and their liability need not rise or fall together, or rest on a single evidentiary theory. Rather than address Plaintiffs' argument (at 46-47) that the district court committed reversible error in failing to "analyze the liability of each Defendant separately," Defendants commit the same mistake. For example, they dismiss Berzaín's subsequently corroborated pledge to use "elite troops" to kill civilians (Pls.' Br. 44-47), supposedly because Lozada did not "'assent' to such a plan" (Defs' Br. 37). Even if correct, that says nothing about *whether Berzaín harbored such a plan*. In light of the command-responsibility theory the jury accepted, there was ample evidence to conclude that Lozada was liable simply because he knew or should have known of Berzaín's plan and did not prevent it. *See* Pls.' Br. 47-49. At a minimum, however, the district court committed reversible error in vacating the jury's verdict without considering each Defendant's liability separately.

D. The Jury Properly Found Defendants Liable Under The Command-Responsibility Doctrine

Defendants argue, as an alternative ground for affirmance, that substantial evidence does not support the jury's verdict that Defendants are liable for the extrajudicial killings under the command-responsibility doctrine. As Defendants recognize (at 44 n.6), "[t]he district court did not address" this issue, *see* Vol:5-

Doc:514 at 12 n.10, and therefore the typical course is for the district court to resolve it in the first instance. *See, e.g.*, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609 (11th Cir. 1991) (declining to address in first instance whether defendant met evidentiary burden on summary judgment).

Should this Court opt to decide this issue, however, it may easily hold that Plaintiffs presented sufficient evidence supporting the jury's command-responsibility verdict, particularly in light of the highly deferential standard of review. *See* Pls.' Br. 28-29 & n.2. As with extrajudicial-killing evidence, the jury heard substantial evidence related to all three elements of a command-responsibility claim. *See* Military *Amici* Brief 9-23.

First, Plaintiffs presented extensive evidence of Defendants' "effective control" over the soldiers who killed decedents. *Ford*, 289 F.3d at 1290-1291. As President and Captain General of the Armed Forces and Minister of Defense, respectively, Lozada and Berzaín unquestionably had *de jure* command of the Bolivian troops in September and October 2003. Pls.' Br. 16.

Both men also had *de facto* control throughout the relevant period, during which time the chain of command functioned properly. Vol:4-Doc:485 at 19:8-14. Contrary to Defendants' claim (at 45) that "[t]he President can only provide orders of a general concept," the evidence shows Lozada directed the military to "mobilize and immediately use the force necessary to restore public order" in response to

public demonstrations, Vol:4-Doc:497-3; Vol:5-Doc:506-14, and issued various tactical orders to implement that directive, *see* Pls.' Br. 16.

Likewise, contrary to Defendants' assertion (at 46) that "Berzaín did not give any orders to the military at all," the jury heard that he announced his authority at the start of the Sorata operation by declaring, "I give the orders around here," Vol:2-Doc:476 at 91:6-9, and later repeatedly insisted that "the military were not going to move" without letters he personally drafted, Vol:4-Doc:485 at 89:19-90:16, 92:1-23; Vol:5-Doc:506-26. Defendants' attempt (at 46) to cabin Berzaín to a purely "administrative" role also fails in view of the testimony that he issued threats against community leaders as his helicopter fired machine-gun rounds at unarmed civilians. Vol:2-Doc:476 at 92:19-93:14; 95:1-2.[5]

Second, Plaintiffs presented extensive evidence that Defendants "knew or should have known" that soldiers "had committed, were committing, or planned to commit" extrajudicial killings. *Ford*, 289 F.3d at 1288. Multiple witnesses testified that Defendants dismissed warnings that their brutal military campaign would lead to "tragedy" and "generate deaths." *See* Pls.' Br. 31. In fact, Defendants expressly recognized that their use of military force would result in innocent civilian deaths.

[5] Defendants' assertion (at 46 n.8) that "the command responsibility doctrine does not apply to a civilian leader outside of armed conflict" is foreclosed, as they recognize, by the very case they cite. *Drummond*, 782 F.3d at 609-610.

See, e.g., Vol:4-Doc:482 at 91:19-25 ("What we're going to use are elite troops *** and we will kill 50, a hundred, a thousand."); Vol:4-Doc:483 at 26:22-27:2 ("[I]f there are five dead, it doesn't matter if it's 50 more, as long as we solve the problem."); Vol:4-Doc:482 at 35:2-14 ("Well, there have to be deaths, but also gasoline.").

It is also uncontroverted that Lozada and Berzaín personally received contemporaneous reports on the military operations and resulting civilian deaths. *See* Pls.' Br. 17; *see, e.g.*, Vol:3-Doc:481 at 98:11-99:16, 101:2-13 (Berzaín's admitting he spoke with Lozada about Marlene's death); Vol:4-Doc:485 at 154:7-14 (Lozada's testifying about regular reports). Indeed, the Bolivian media reported on the events in detail, and the public responded with hunger strikes, large-scale demonstrations, and calls for Lozada's resignation. *See* Pls.' Br. 17-18; Vol:3-Doc:478 at 58:25-60:6 (describing church-organized hunger strike). While Lozada and Berzaín were overseeing the military operations, several members of their cabinet, including the Vice President, resigned; a previously aligned party left their political coalition; and the Catholic Church withdrew its support. Vol:4-Doc:485 at 93:4-94:8.

Third, the jury heard that neither Lozada nor Berzaín took action—despite their knowledge and effective control—to "prevent" the violence or "punish" the soldiers who committed it. *Ford*, 289 F.3d at 1288. To the contrary, Defendants

issued the Supreme Decree, authorizing continued military operations to restore the "normal operation of the country's economic activity," *after* the first civilian deaths occurred. Pls.' Br. 17-18. After their political support crumbled in the wake of news of the widespread killings, Defendants fled to the United States. *Id.* at 18.

Defendants primarily attempt to dismiss the jury's reasonable reliance on the foregoing evidence by protesting that "there is no link between any orders by Defendants and any extrajudicial killings by the military." Br. 46. In doing so, Defendants conflate command-responsibility and aiding-and-abetting standards, misleadingly quoting a portion of a case discussing the latter for the incorrect point that "the TVPA requires evidence of 'active participation' by defendants." Br. 38 n.5 (quoting *Drummond*, 782 F.3d at 608). As already explained, command responsibility does not require that Defendants "ordered" or "participated in" any killings. *Arce*, 434 F.3d at 1259. And even if some "link" were necessary, the jury reasonably could have drawn one based on the extensive evidence recounted above—including from the Prosecutors' report on which Defendants rely. *See* Supp.App.-Vol:2-Doc:497-2 at 1002.28 ("[T]he Army acted based on specific orders from their natural hierarchical superiors[,] [including] written orders from the former President [Lozada] in which he instructs the forces[.]").

II. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL WITH RESPECT TO THEIR WRONGFUL-DEATH CLAIMS

A. The Misleading And Prejudicial Wrongful-Death Instructions Require A New Trial

In response to Plaintiffs' argument (at 50-52) that the district court abused its discretion in failing to give an accurate wrongful-death instruction, Defendants argue (at 49) that "the wrongful death instruction actually given by the district court is an accurate statement of Bolivian law." That inverts the test, which turns on the accuracy of the proposed instruction the court *refused* to give—as Defendants elsewhere recognize. *See* Br. 23 (test is whether "(1) the *requested instruction* correctly stated the law," (2) that instruction was relevant, and (3) nonmoving party was prejudiced (quoting *Burchfield v. CSX Transp., Inc.*, 636 F.3d 1330, 1333-1334 (11th Cir. 2011) (emphasis added)).

Defendants do not dispute that the first two prongs of the *Burchfield* test are satisfied. Although they (at 49) characterize the instruction as a "more partisan" "interpretive gloss," they never contest that Plaintiffs' expert report was the *only* authority submitted on this issue, cited specific provisions of Bolivian law, and was never challenged. Defendants instead focus on *Burchfield*'s prejudice prong, dismissing Plaintiffs' concern as quibbling over "particular[] word[ing]." Br. 48. But that ignores Plaintiffs' argument (at 52) that, because of the court's error, the

jury misunderstood the "willful *and* intentional" instruction to "impose an intent standard higher than the one Bolivian law actually requires." *See* p. 10, *supra*.

Neither of Defendants' other harmlessness arguments withstands scrutiny. Their first point—that Plaintiffs "were permitted to argue" that decedents' deaths were a "probable consequence" of soldiers' actions, Br. 49-50—disregards that "in all cases, juries are presumed to follow the court's instructions," regardless of counsel's description of the law. *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009); Vol:2-Doc:455 at 2 ("You must follow the law as I explain it[.]").

Defendants' second argument—that "Plaintiffs presented no evidence at trial as to the identity or state of mind of any shooter who caused any death," Br. 50—fares no better, for the reasons explained above (and as supported by the jury's TVPA verdict). In fact, by Defendants' own logic, if this Court concluded that there *was* legally sufficient evidence of "deliberation" to reinstate the TVPA verdict, a new trial on the wrongful-death claims would have to follow.

B. The Admission Of The State Department Cables Requires A New Trial

In arguing that the hearsay cables were properly admitted, Defendants fail at each step of the public-records-exception analysis.

First, though conceding that the cables are not based on "first-hand *** report[s]," Defendants rely on out-of-circuit cases to argue that "lack of personal knowledge is not a proper basis for exclusion of a report *** under Rule 803(8)."

Br. 52 (quoting *Alexander v. CareSource*, 576 F.3d 551, 562-563 (6th Cir. 2009)). Binding and "well established" precedent from *this Circuit*, however, provides that a report must be based on the preparer's "own observations and knowledge." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009). Defendants acknowledge (at 51 n.14) that *Mazer* "held" that "Rule 803(8) could not be used as a basis for admitting hearsay statements contained within a public report," but claim that "Plaintiffs have not identified any such 'double hearsay' statements in the State Department cables." That is demonstrably false. *See* Pls.' Br. 53 (cables "rife with highly prejudicial second-level hearsay"), 54-55 (highlighting accounts of "unidentified third parties"); *see also* Vol:4-Doc:487 at 112:9-10 ("They all contain hearsay statements within the documents."). Even the district court (in initially excluding the cables) recognized that "they are clearly based not on the preparer's personal observations, but on the statements of others." Vol:2-Doc:408 at 36.

Next, Defendants argue (at 51) that the Court should look past this lack of personal knowledge because "similar legally mandated government reports" (not State Department cables) have been admitted elsewhere. But the two out-of-circuit cases Defendants cite concern "factual findings from a legally authorized investigation" under subsection *three* of Rule 803(8)(A), rather than the "legal duty to report" that Defendants claim permits the cables under subsection *two*. Br. 50-51 (acknowledging that cases involve "SEC investigative memo" and "investigative

report prepared by Coast Guard"). Such formal factual findings—*e.g.*, administrative orders following "preliminary investigation, detailed investigation, public hearing, and an administrative review," *Union Pac. R.R. Co. v. Kirby Inland Marine*, 296 F.3d 671, 679 (8th Cir. 2002)—differ drastically from the cables' reporting on "unconfirmed rumors" and the like. *See* Pls.' Br. 54-55.

Second, Defendants contend (at 52) the cables are trustworthy because "they were signed by high-level embassy officials." But Plaintiffs have never argued that the *State Department* is untrustworthy; rather, it is the (anonymous) *hearsay* contained within the reports that is unreliable—particularly given testimony (unaddressed by Defendants) that "the Bolivian government coerced false statements." Pls.' Br. 55.

Third, Defendants argue that admission of the cables was harmless because they "simply corroborated what the uncontested evidence already demonstrated." Br. 53-54 (cables "merely cumulative"). Even aside from the tired characterization of evidence as "uncontested," Defendants' extensive reliance on the cables *in this appeal* belies that assertion. *See* Br. 10-11, 28-29 (citing Vol:4-Doc:497-28 to Vol:4-Doc:497-30; Supp.App.-Vol:2-Doc:488 at 150:2-20). And confronted with their own counsel's description of the cables as "*the most important piece of evidence in this case*," Pls.' Br. 55-57, Defendants tellingly offer no response.

CONCLUSION

This Court should reverse the judgment below, enter judgment on the jury's TVPA verdict, and remand for a new trial on Plaintiffs' wrongful-death claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

On behalf of Plaintiffs-Appellants, I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that the foregoing brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,498 words.

Dated: February 25, 2019

s/ James E. Tysse

James E. Tysse

CERTIFICATE OF SERVICE

I, James E. Tysse, counsel for Appellants and a member of the Bar of this Court, certify that on February 25, 2019, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

s/ James E. Tysse

James E. Tysse