No. 15-1464

IN THE

Supreme Court of the United States

FARHAN MOHAMOUD TANI WARFAA,

Cross-Petitioner,

v.

YUSUF ABDI ALI,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the presumption against extraterritorial application of the Alien Tort Statute is displaced so as to give a District Court jurisdiction over an individual alleged to have committed torts abroad in violation of the law of nations where the claims' only connection to the United States is the defendant's residency in the United States years after the alleged tortious conduct took place.

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OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner, Farhan Mohamoud Tani Warfaa ("Warfaa"), has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. This petition is conditional in nature and may be considered only if the Court is disposed to grant the initial petition. Petitioner and Cross-Respondent, Yusuf Abdi Ali ("Ali"), hereby opposes the Cross-Petition.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 53a- 88a)[1] is reported at 811 F.3d 653. The memorandum opinion of the District Court (Pet. App. 26a-50a) is reported at 33 F. Supp. 3d 653.

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 2016. Warfaa filed his Conditional Cross-Petition pursuant to Supreme Court Rule 12.5. Ali filed an initial petition for writ of certiorari with this Court, which was docketed on May 4, 2016, as No. 15-1345. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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1. References to "Pet. App." are to the appendix to the petition for certiorari of Yusuf Abdi Ali, in Case No. 15-1345.

STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, was reproduced in the Appendix to the Ali petition (Pet. App. 91a-92a).

STATEMENT OF THE CASE

The Alien Tort Statute ("ATS") provides District Courts with original jurisdiction over "any civil action by an alien for a tort…committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This Court has interpreted this grant of jurisdiction as enabling federal courts to recognize private claims "for [a] modest number of international law violations" under federal common law. *Sosa v. Alvarez–Machain*, 542 U.S. 692, 714 (2004). In *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), this Court recognized that "a presumption against extraterritoriality applies to claims under the ATS." *Id.* at 1669.

Warfaa is a Somali national who alleges in this action that he is a victim of certain tortious violations of international law committed in Somalia by Ali, a former colonel of the Somali military. Years after the alleged tortious conduct, Ali acquired residency in the United States. Warfaa asserts jurisdiction for his claims under the ATS and the Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note). The District Court and the Fourth Circuit denied jurisdiction under the ATS. In a majority decision, the Fourth Circuit found that that the "[m]ere happenstance of [Ali's] residency, lacking any connection to the relevant conduct, is not a cognizable consideration

in the ATS context." *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016) (Pet. App. at 77a). The Fourth Circuit therefore concluded that "Warfaa's claims fall squarely within the ambit of *Kiobel's* broad presumption against extraterritorial application of the ATS." 811 F. 3d at 660 (Pet. App. at 76a). Warfaa contests this holding, asserting that Ali's residency in the United States years after the torts were allegedly committed suffices to overcome the presumption against the extraterritorial application of the ATS.

Since the Fourth Circuit's decision in this case, this Court has had occasion to elaborate on the extraterritorial analysis prescribed by *Kiobel* to determine the existence of jurisdiction for claims under the ATS. *RJR Nabisco, Inc. v. European Cmty.*, No. 15-138, 2016 WL 3369423, at **8-9 (U.S. June 20, 2016) (considering the extraterritorial reach of the Racketeer Influenced and Corrupt Organizations Act). *RJR Nabisco* confirms the soundness of the Fourth Circuit's analysis under *Kiobel.*

In a part of the *RJR Nabisco* decision joined by the Justices unanimously, the Court noted that "*Kiobel* [and another recent case in this Court considering extraterritoriality] reflect a two-step framework for analyzing extraterritorial issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted." *Id.* at *9.

For a statute such as the ATS that gives no "clear, affirmative indication that it applies extraterritorially," a court proceeds to the second step and determines whether:

> the case involves a domestic application of the statute, and we do this by looking at the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Id.

As to the focus of the Congress in enacting the ATS, the Court in *RJR Nabisco* noted that the *Kiobel* court did not have to make such a determination "[b]ecause 'all the relevant conduct' regarding [the violations in *Kiobel*] 'took place outside the United States.'" *Id.* at *8 (quoting *Kiobel*, 133 S. Ct. at 1670).

The court in *Kiobel* did, however, review at length the circumstances behind the enactment of the ATS. The Court's conclusion, whether or not *dictum* offers considerable insight into the Congressional focus. The Court found:

> no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms…. The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States….. The ATS ensured that the United

> States could provide a forum for adjudicating such incidents.

133 S. Ct. at 1668.

If *Kiobel*'s analysis is correct and the focus of the ATS is the availability to foreigners of relief for injury linked to the United States, then the only conduct relevant to the reach of the statute consists of conduct that contributed to the injury suffered by the alien plaintiff. In the language of *Kiobel*, which speaks of the relevant conduct for such analysis as that which "touch[es] and concern[s] the territory of the United States," 133 S. Ct. at 1669, the events and relationships that alone may be considered in any "touch and concern" analysis are those that have some connection to the plaintiff's injury.

The courts below determined that the only event or relationship associated with the United States, notably the residence of Ali acquired years after the commission of the alleged torts, bore no nexus to the injuries suffered by Warfaa. The District Court found that "'[a]ll the relevant conduct' alleged in the Amended Complaint occurred in Somalia…carried out by a defendant who at the time was not a citizen or resident of the United States." *Warfaa v. Ali*, 33 F. Supp. 3d 653, 659 (E.D. Va. 2014), *aff'd*, 811 F.3d 653 (4th Cir. 2016) (Pet. App. at 31a). The Fourth Circuit confirmed that "[n]othing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States." 811 F.3d at 660 (Pet. App. at 76a). The Fourth Circuit noted that "[t]he only purported 'touch' in this case is the happenstance of Ali's after-acquired residence in the United States long after the alleged events of abuse." 811 F.3d at 661 (Pet. App. at 76a). It

concluded that "[m]ere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context." 811 F.3d at 661 (Pet. App. at 77a).

The dissent in the Fourth Circuit cited an association with the United States in military training that Ali obtained in the United States prior to the events in Somalia, as such training was disclosed by Defendant in a declaration to the District Court. 811 F.3d at 664 (Gregory, J., concurring in part and dissenting in part) (Pet. App. at 85a-86a). The dissent declined, however, to make a link between this training and Defendant's alleged actions in Somalia. 811 F.3d at 664 (Pet. App. at 86a) ("This is not to suggest that the U.S. Government condoned or endorsed defendant's conduct."). In the absence of any nexus between this training and the conduct relevant to the alleged torts, the training cannot figure in the jurisdictional analysis under the ATS since the training would be outside the Congressional focus in enacting the ATS as elucidated by this Court in *Kiobel*. *See* 133 S. Ct. at 1668-69.

Warfaa argues that "Ali's residency should…have been considered a significant touch upon this nation, resulting in the displacement of the *Kiobel* presumption." Conditional Cross-Pet. at 15. Given the focus of the ATS, however, to provide aliens with a means of redress for injury connected to the United States, the acquiring by Ali of residency in the United States long after the alleged injury cannot figure in the conduct subject to the "touch and concern" analysis mandated by *Kiobel*. 133 S. Ct. at 1669. The Fourth Circuit's denial of ATS jurisdiction is therefore correct.

FACTUAL BACKGROUND

District Court Proceedings

Ali was a colonel in the Somali National Army in the late 1980s, serving in the Fifth Battalion, in northern Somalia. Pet. App. at 26a-27a. Two plaintiffs, then proceeding anonymously as Jane and John Doe, the latter of whom is the Respondent to the instant Petition, sued Ali under the TVPA and the ATS for alleged actions taken in his official capacity on behalf of Somalia. *Id.* at 28a.

Warfaa, then proceeding anonymously, and another plaintiff, also proceeding anonymously, filed their complaint on November 10, 2004, in the United States District Court for the Eastern District of Virginia. Pet. App. at 28a. Pursuant to an order of that court, issued on April 29, 2005, their complaint was dismissed voluntarily, and, on June 13, 2005, Warfaa and the same co-plaintiff recommenced their suit in the same court, again proceeding anonymously. *Id.* For most of its duration, the subject proceedings were stayed in order to allow the United States Department of State an opportunity to submit its views as to: (1) whether it objects to the action going forward on the ground that Ali should have immunity, and (2) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. Pet. App. at 1a. In April of 2012, after the subject case briefly resumed, the District Court granted a consent motion further to stay proceedings pending the decision of this Court in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). After this Court issued its decision in *Kiobel, supra,* in April of 2013, the District Court judge, in consideration of the then recent recognition of The Federal Republic of Somalia

Government by the United States, dispatched a letter to the State Department, advising the State Department that the District Court had decided to continue the stay of the case in order to afford the State Department an opportunity to advise the court if allowing the subject litigation to proceed would have any negative effect on the foreign relations of the United States and requesting that any opinion to be given be received by the District Court on or before September 19, 2013. Pet. App. at 1a-3a. Responding to the District Court's invitation to file a statement of interest, the United States responded, on September 19, 2013, by "declin[ing] to express views on the subject." Pet. App. at 4a-7a.

Subsequently, *i.e.*, on or about November 30, 2013, the then Prime Minister of The Federal Republic of Somalia, Abdi Farah Shirdon, issued a diplomatic letter to Secretary of State John Kerry, requesting, *inter alia*, a designation of immunity for Ali, pursuant to 28 U.S.C. § 517, and that the State Department take action to obtain the dismissal of this case, a copy of which diplomatic letter was filed by undersigned counsel with the District Court on December 4, 2013. Pet. App. at 8a-16a.

Following the filing of the said diplomatic letter from the Somali Prime Minister to the Secretary of State, the District Court did, on January 24, 2014, extend the stay for a further 120 days "to allow counsel to seek a response from the United States Department of State regarding the diplomatic letter sent by the Federal Republic of Somalia on November 11, 2013, in which the Prime Minister request[ed] 'foreign official' immunity for defendant Yusuf Abdi Ali." Order, Jan. 24, 2014, *Warfaa*, ECF No. 82; *see also* Pet. App. 8a- 16a. However, on April 24, 2014, the

United States, citing the precarious security situation within Somalia at that time, which prompted the State Department to cancel a planned February 2014 diplomatic mission to Somalia to clarify the immunity request for Ali, reported to the District Court that "...the United States is not in a position to present views to the Court concerning this matter at this time." *Warfaa*, ECF No. 85.

Thereafter, on April 25, 2014, the District Court lifted the stay and ordered Warfaa to file an amended complaint. On May 9, 2014, Warfaa, using his true name, filed an amended complaint against Ali, while the other original plaintiff dismissed her claims against Ali. Ali then moved to dismiss the amended complaint, arguing that he was entitled to common law "official acts" immunity. Pet. App. at 26a-50a, *passim*. Although the issue had not been raised in said motion to dismiss, the District Court directed the parties in advance of the hearing of the motion to dismiss to be prepared to address the implications of the *Kiobel* decision as regards the Respondent's claims under the ATS. *Id.*

The District Court then held a hearing on the motion to dismiss the amended complaint on July 25, 2013. Pet. App. 17a-25a, *passim*. In its ruling dismissing Respondent's ATS claims, the District Court pointed out that "'[a]ll of the alleged conduct", which was said to have been carried out by Ali, "who at the time was not a citizen or resident of the United States," occurred in Somalia, and that Warfaa "has alleged no facts showing that [Petitioner's] violations of international law otherwise 'touch[ed] and concern[ed] the territory of the United States." Pet. App. at 31a.

The District Court also rejected Ali's claims of common law immunity, on the "official acts" principle, because his alleged acts violated *jus cogens* norms, citing the Fourth Circuit's holding in *Yousef v. Samantar,* 699 F. 3d 763 (4th Cir. 2012), as controlling. Pet. App. at 42a.

Ali timely appealed from the District Court's order denying his plea of common law immunity from suit on August 13, 2014. By agreement of the parties, the District Court then proceeded to enter final judgment in favor of Ali on all of Warfaa's ATS claims. Warfaa appealed the District Court's dismissal of the ATS claims on September 5, 2014. *Warfaa*, ECF No. 119.

Fourth Circuit Proceedings

The Fourth Circuit affirmed the District Court's rulings, dismissing Respondent's claims under the ATS and allowing his claims under the TVPA to proceed, rejecting Ali's claim of "official acts" common law immunity and his invitation to to have the Fourth Circuit overrule its 2012 holding in *Samantar, supra*, where a panel of the Fourth Circuit had concluded that foreign officials are never entitled to common law immunity for acts committed in an official capacity if a plaintiff in a civil suit alleges violations of *jus cogens* norms of international law. Pet. App. at 53a-82a, *passim.* The Fourth Circuit explained its decision thus by stating, *ipse dixit,* that it was bound by the holding in *Samantar*, *inter alia,* and, perforce, that it had decided collectively not to exercise its power to overrule another panel of the Fourth Circuit, outside the *en banc* context, as a "matter of prudence." Pet. App. at 80a-81a. With regard to Warfaa's ATS claims, the Fourth Circuit held that they fell squarely within the ambit

of *Kiobel's* broad presumption against extraterritorial application of ATS jurisdiction because all of the relevant conduct occurred outside of the United States, in Somalia, and that nothing in Warfaa's case involved U.S. Citizens, the U.S. Government, or events in the United States. The Fourth Circuit stated that the only purported "touch" in the case *sub judice* is the happenstance of Ali's after-acquired residency in the United States, long after the alleged events of abuse, and went on to state that this "touch" is not enough to overcome the *Kiobel* presumption.

There was also an opinion written by one of the judges on the panel, concurring in part and dissenting in part. Pet. App. at 79a-88a. The dissent addressed that aspect of the majority opinion pertaining to the dismissal of the ATS claims, opining that because Ali had extensive contacts with the United States, he should have been subject to the jurisdiction of the United *States. Id.*

Conditional Cross-Petition for Certiorari

Ali filed a Petition for a Writ of Certiorari on May 2, 2016, docketed as Record No. 15-1345, seeking this Court's review of the Fourth Circuit's immunity decision, citing, *inter alia,* that the Fourth Circuit's decision reinforces a circuit split, contravenes settled principles of domestic and international law, and risks reciprocal treatment of U.S. officials abroad.[2]

Warfaa filed his Conditional Cross-Petition for Certiorari with this Court on June 3, 2016, purporting to

2. Warfaa filed a Brief in Opposition to the Petition for Certiorari on July 5, 2016.

take issue with the Fourth Circuit's holding that Warfaa's subject claims fell "squarely within the ambit of *Kiobel's* broad presumption against extraterritorial application of the ATS."

REASONS FOR DENYING THE PETITION

The decision of the Fourth Circuit Court of Appeals is correct. Moreover, it does not conflict with any decision of this Court or of any other Court of Appeals or with the views of the political branches of the government entitled to deference from this Court.

I. The Fourth Circuit's Decision is Correct.

This case concerns the attempted assertion by an alien under the ATS of jurisdiction for torts committed abroad based on the alleged tortfeasor's acquiring of residency in the United States long after the alleged commission of the torts. The Fourth Circuit Court of Appeals rejected this claim to jurisdiction relying on "*Kiobel's* broad presumption against extraterritorial application of the ATS." 811 F.3d at 660 (Pet. App. at 76a). Since the decision in *Kiobel*, this Court has confirmed "that if the conduct relevant to the focus [of the ATS or any other statute without clear extraterritorial reach] occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 2016 WL 3369423 at *9.

After an extensive review of the ATS's history, the *Kiobel* court reasoned that the Congressional focus of the ATS was this country's "[]abilty to provide judicial

relief to foreign officials injured in the United States." *Kiobel*, 133 S. Ct. at 1668. Given this focus, the conduct relevant to the reach of the ATS consists of conduct that contributes to the injury suffered by the aggrieved alien. An application of this test to the instant facts warrants the conclusion that Ali's acquisition of residency in the United States long after the alleged infliction of injury on Wafaa cannot represent conduct relevant to any ATS extraterritorial analysis. The Fourth Circuit correctly found no jurisdiction in Ali's residency to consider Wafaa's claims.

II. The Fourth Circuit's Decision Does Not Conflict with the Decisions of this Court or of any other Court of Appeals or with the Views of the Political Branches.

Contrary to Warfaa's contentions, Conditional Cross-Pet. at 11-30, the Fourth Circuit decision conflicts neither with the decisions of this Court, the decisions of the other Circuits, nor the views of the Political Branches of our Government entitled to any deference from this Court.

A. The Fourth Circuit's Decision that Post-Tort Residency Cannot Confer Jurisdiction Comports with the Decisions of this Court.

Warfaa asserts that "the Fourth Circuit decision conflicts with Supreme Court precedent," citing *Kiobel* and *Sosa*. Conditional Cross-Pet. at 11-15. Warfaa is not correct.

In *Kiobel*, this Court determined that the ATS could not provide jurisdiction for claims by Nigerian nationals

residing in the United States alleging violations of the law of nations by certain corporations "where all the relevant conduct took place outside the United States." 133 S. Ct. at 1669. This Court accordingly determined that the District Court lacked jurisdiction over the claims, notwithstanding the "corporate presence" of the defendant corporations in the United States. *Id.*

Far from departing from the reasoning of this Court in *Kiobel*, the Fourth Circuit decision applied the identical analysis. Finding that "[n]othing in this case involved U.S. citizens, the U.S. Government, U.S. entities, or events in the United States," the Fourth Circuit correctly concluded that "Warfaa's claims fall squarely within the ambit of *Kiobel's* broad presumption against extraterritorial application of the ATS." 811 F.3d at 660 (Pet. App. at 76a). It determined, properly, that "[m]ere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context." 811 F.3d at 661 (Pet. App. at 77a).

In *Sosa*, this Court rejected a claim brought, in part, under the ATS by a Mexican abducted to the United States alleging that the United States, Drug Enforcement Agency (DEA) agents, and others, had violated his civil rights in the abduction. 542 U.S. at 697-99. While the case helped to define the scope of the torts for which jurisdiction might lie under the ATS, the alleged instigation and planning of the abduction by a U.S. government agency meant that this Court did not have to consider and did not consider the extraterritorial reach of the ATS. *Id.* at 697. There can accordingly be no conflict between *Sosa* and the Fourth Circuit decision which concerns itself with whether the ATS provides jurisdiction over an alien whose

only connection to the United States was a residence established long after the commission of the torts that are the subject of the suit.

Warfaa asserts that *Sosa* is nonetheless relevant to the ATS analysis here because *Sosa* referred with approval to two Court of Appeals decisions, *Filártiga v. Peña–Irala*, 630 F.2d 876 (2d Cir. 1980), and *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992), *cert. denied sub nom. Marcos-Manotoc v. Trajano*, 508 U.S. 972 (1993), that allowed for jurisdiction where the connection of the United States to the claims was the residence of the defendants in the United States after the commission of the alleged torts. Conditional Cross-Pet. at 13. *Sosa's* references to these cases, however, pertain wholly to the causes of action for which the ATS might provide jurisdiction and not to the territorial reach of the ATS. *See, e.g.,* 542 U.S. at 724-25 ("We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga*…has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.") (citation omitted).

Whether or not *Filártiga* and *Marcos* reflected an appropriate extraterritorial analysis at the time they were decided, this Court's subsequent decisions in *Kiobel* and *RJR Nabisco* would mandate a different outcome today. Indeed, it may be concluded that neither the Second nor Ninth Circuits would reach the same decision in a current case on the issue of the extraterritorial reach of the ATS. As Warfaa acknowledges, Conditional Cross-Pet. at 17-19, three recent cases decided by the Second Circuit have concluded, as did the Fourth Circuit, that the residence of

the alleged tortfeasors in the United States unrelated to the commission of the alleged torts cannot alone provide a basis for the exercise of jurisdiction under the ATS. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 2016 WL 2620283, at *1-4 (2d Cir. May 9, 2016); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013). As the Second Circuit noted in holding in *Mastafa* that the court had no jurisdiction over defendants alleged to have illicitly diverted money to the Saddam Hussein regime in Iraq, "in identifying the conduct which must form the basis of the violation *and* the jurisdictional analysis under the ATS, precedents make clear that neither the U.S. citizenship of defendants, nor their presence in the United States, is of relevance for jurisdictional purposes." 770 F.3d at 188 (emphasis original).

Similarly, in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015), the Ninth Circuit held that the residence in the United States of the alleged tortfeasor cannot alone afford jurisdiction under the ATS. As the court noted:

> It may well be, therefore, that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*. But the Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national.

Id. at 594 (footnote omitted) (emphasis original).

B. The Fourth Circuit's Decision Does Not Conflict with the Decisions of any other Circuit.

As shown above, the Fourth Circuit decision comports with the decisions of the Second and Ninth Circuits holding that the residence of the defendant not connected with the commission of the torts that are the subject of the claim cannot alone provide jurisdiction under the ATS. *See In re Arab Bank, PLC Alien Tort Statute Litigation*, 2016 WL 2620283 (2d Cir. May 9, 2016); *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015); *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). The Eleventh Circuit Court of Appeals, the only other Circuit Court to consider the issue, reached the identical result in *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), holding that, "[a]lthough the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own." *Id.* at 596 (determining that two U.S. corporate defendants and individual defendants who were citizens of the U.S. at the time of the alleged tortious acts were not subject to jurisdiction under the ATS where all of the tortious conduct occurred abroad).

In his cross-petition, Warfaa seeks to establish a conflict within the Circuits on the basis of their willingness to consider the residency of a defendant among other factors in analyzing whether any conduct for ATS jurisdictional purposes took place in the United States. Conditional Cross-Pet. at 15-21. Warfaa has not cited and cannot cite to a single Court of Appeals that has held, contrary to the ruling of the Fourth Circuit in this case,

that the residence of a defendant established after the commission of the alleged tortious acts can without more create jurisdiction under the ATS.

C. The Fourth Circuit's Decision does not Conflict with the Views of the Political Branches entitled to Deference from this Court.

Warfaa adduces statements of the Executive and Legislative branches regarding the implications for foreign policy of having alleged tortfeasors assume residency in the United States as an argument for an interpretation of the ATS that would grant jurisdiction over a defendant grounded solely in such residency. There are ample remedies available to these Branches to address any such concerns, including exclusion proceedings under the immigration laws and the amendment of the ATS to expand its territorial reach. As this Court noted in *Kiobel* when discussing the need that claims under the ATS touch and concern the United States "with sufficient force to displace the presumption against extraterritorial application…. If Congress were to determine otherwise, a statute more specific than the ATS would be required." 133 S. Ct. at 1669.

Even if the Executive Branch had voiced concerns in this case about the residence in the United States of individuals committing torts abroad, the issue would relate to "a pure question of statutory construction...well within the province of the Judiciary.... While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Republic of Austria v. Altmann,* 541 U.S. 677, 701 (2004) (rejecting an Executive Branch recommendation as to the application

of the Foreign Sovereign Immunities Act to claims based on pre-enactment conduct) (quotation marks and citation omitted).

If the State Department had chosen "to express its opinion on the implications of exercising jurisdiction over [this] particular petitioner[] in connection with [his] alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 702 (footnote and emphasis omitted) Instead, after the District Court invited the State Department to advise the court of the Department's views (Pet. App. at 1a-3a), the Justice Department submitted a Statement of Interest to the District Court in which it noted that "the United States respectfully declines to express views." Statement of Interest (Sep. 19, 2013) (Pet. App. 4a-7a).

In view of the decision of the State Department not to make a recommendation in this case and the opportunities available to the Executive and Legislative Branches to address any policy issues that the residency in the United States of alleged foreign tortfeasors might pose, this Court should apply its precedents of statutory construction and conclude, as did the Fourth Circuit, that subject matter jurisdiction is not available under the ATS.

CONCLUSION

Warfaa's Conditional Cross-Petition for a writ of certiorari should be denied.

Respectfully submitted,

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