16-15179

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

JOAN JARA, in her individual capacity, and in her capacity as the personal representative of the Estate of Victor Jara, AMANDA JARA TURNER, in her individual capacity, MANUELA BUNSTER, in her individual capacity,

Plaintiffs-Appellants,

—v.—

PEDRO PABLO BARRIENTOS NUNEZ,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, Counsel for Appellants hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Baez, Jose – Counsel for Defendant/Appellee.
2. Barrientos Núñez, Pedro Pablo – Defendant/Appellee.
3. Beckett, Mark D. – Counsel for Plaintiffs/Appellants.
4. Belsher, Amy – Counsel for Plaintiffs/Appellants.
5. Bhargava, Michael – Counsel for Plaintiffs/Appellants.
6. Bunster, Manuela – Plaintiff/Appellant.
7. Calderon, Luis – Counsel for Defendant/Appellee.
8. Dalton, Honorable Roy B. – United States District Court for the Middle District of Florida, Trial Judge.
9. Dellinger, Richard – Counsel for Plaintiffs/Appellants.
10. Estate of Víctor Jara – Plaintiff/Appellant.
11. Jara, Joan – Plaintiff/Appellant.
12. Jara, Amanda– Plaintiff/Appellant.
13. Landers, Sean – Counsel for Plaintiffs/Appellee.
14. McLaughlin, Daniel – Counsel for Plaintiffs/Appellants.

15. Roberts, L. Kathleen – Counsel for Plaintiffs/Appellants.

16. Sarkarati, Nushin – Counsel for Plaintiffs/Appellants.

17. Urrutia, Christian – Counsel for Plaintiffs/Appellants.

No publicly traded company or corporation has an interest in the outcome of this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Rule 28-1(c) of the Rules of the United States Court of Appeals for the Eleventh Circuit, appellants respectfully request oral argument. Oral argument should be heard in this matter as it could assist this Court in its consideration of the issues of law regarding the Alien Tort Statute, 28 U.S.C. § 1350 (2012), raised in this case.

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STATEMENT OF JURISDICTION

On September 4, 2013, Plaintiffs-Appellants (hereinafter "Plaintiffs") brought a civil suit against Defendant-Appellee (hereinafter "Defendant" or "Barrientos") in United States District Court for the Middle District of Florida, Orlando Division ("the District Court"), pursuant to both 28 U.S.C. § 1350 (2012), for claims arising under the Alien Tort Statute ("ATS"), and 28 U.S.C. § 1331 (2012), for claims arising under the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note 2012).

By Order dated April 14, 2015, the District Court dismissed Plaintiffs' ATS claims with prejudice. Doc. 93. The District Court entered a final judgment in this action on Plaintiffs' TVPA claims on June 29, 2016. Doc. 187.

Pursuant to 28 U.S.C. § 1291 (2012), this Court has jurisdiction to consider the appeal of this final decision. Appellants timely filed their Notice of Appeal on July 26, 2016 solely appealing the District Court's dismissal with prejudice of Plaintiffs' ATS claims. Doc. 188. This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE ON APPEAL

Whether the District Court erred in dismissing Plaintiffs' Alien Tort Statute (28 U.S.C. § 1350) claims by concluding that the presumption against extraterritoriality was not displaced where the defendant who was alleged to be responsible for crimes against humanity, cruel, inhuman and degrading treatment, and arbitrary detention is a U.S. citizen who has continuously resided in the United States for over twenty-six years and is using the United States as a "safe harbor," to avoid legal accountability in his native country.

STATEMENT OF THE CASE

I. Statement of Facts

The claims in this case arise from Barrientos's arbitrary detention, torture, cruel, inhuman and degrading treatment, and extrajudicial killing of Chilean folk singer and democratic activist Víctor Jara. Doc. 63 ¶ 2; Doc. 111 ¶ 2. These acts also separately constitute crimes against humanity as they were committed by Barrientos as part of a widespread or systematic attack against a civilian population in the days following the 1973 Chilean *coup d'état*. Doc. 63 ¶¶ 2, 27, 34-38; Doc. 111 ¶¶ 2, 26, 33-36.[1]

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[1] Plaintiffs' Second Amended Complaint (Doc. 63) included claims for torture and extrajudicial killing pursuant to the TVPA and ATS, as well as claims for crimes against humanity, arbitrary detention and cruel, inhuman and degrading treatment pursuant to the ATS. Plaintiffs' Third Amended Complaint (Doc. 111) was submitted after and in response to the ruling by the District Court, at issue here, that dismissed Plaintiffs' ATS claims and thus did not include claims under the ATS. As Plaintiffs state in the Third Amended Complaint, though, "Plaintiffs hereby preserve for appeal all ATS claims previously brought under Plaintiffs' original Complaint (Doc. 1), First Amended Complaint (Doc. 52), and Second Amended Complaint (Doc. 63)." Doc. 111 at 3 n.1. Accordingly, the factual allegations underpinning the Plaintiffs' ATS claims are incorporated into the Third Amended Complaint. To aid the Court, Plaintiffs cite to both the Second Amended Complaint and Third Amended Complaint where appropriate.

Barrientos, a U.S. citizen and long-time U.S. resident, served in 1973 as a Lieutenant and Section Commander in the Chilean Army. Doc. 63 ¶ 10; Doc. 111 ¶ 9. During the Chilean *coup* and the days that followed, Barrientos participated in the systematic arbitrary detention, torture, cruel, inhuman and degrading treatment, and extrajudicial killing of individuals that were perceived to be political opponents of the newly installed military junta. Doc. 63 ¶ 61; Doc. 111 ¶ 60.

Due to his political beliefs, the Chilean military detained Víctor Jara during the early days of the *coup* and eventually transported him to Chile Stadium, where he and many others were subject to arbitrary detention, cruel, inhuman and degrading treatment, torture, and extrajudicial killings. Doc. 63 ¶¶ 24-25; Doc. 111 ¶¶ 23-24. At Chile Stadium, Barrientos directly participated in, conspired with, and exercised direct and actual control over soldiers who committed such acts. Doc. 63 ¶ 29; Doc. 111 ¶ 28.

Specifically, from September 12 through September 15, 1973, Barrientos exercised direct and actual control over soldiers at Chile stadium. *Id*. Moreover, during those days, Barrientos not only commanded the mass detention of civilians at Chile Stadium, but he also oversaw the arbitrary detention of Víctor Jara. Doc. 63 ¶¶ 29-30; Doc. 111 ¶¶ 28-29. In addition, during this period, Barrientos

conspired to subject detainees to crimes against humanity that included arbitrary detention, cruel, inhuman and degrading treatment, torture, and extrajudicial killings. Doc. 63 ¶ 3; Doc. 111 ¶ 3. Ultimately, Barrientos, individuals under his control, and his co-conspirators tortured and killed Víctor Jara, shooting him over forty times. Doc. 63 ¶ 78; Doc. 111 ¶ 76.

For the past forty years, Joan Jara, the widow of Víctor Jara and representative of his estate, and Víctor Jara's daughters, Manuela Bunster and Amanda Jara Turner, tried to determine who was responsible for the detention, torture, and death of their husband and father. Doc. 63 ¶ 50; Doc. 111 ¶ 49. Plaintiffs' repeated attempts to compel the Chilean authorities to investigate those responsible were, however, met with only limited success. Doc. 63 ¶¶ 39-51; Doc. 111 ¶¶ 38-50. Finally, after decades of efforts by Víctor Jara's family, in 2009, Barrientos was identified as one of the perpetrators of the detention, torture, and death of Víctor Jara. *Id.*; Doc. 77 at 11-12.

Although the acts in question occurred in Chile, Barrientos has lived in the United States for over twenty-five years. Doc. 63 ¶ 10; Doc. 111 ¶ 9. Barrientos entered the United States in December of 1989, shortly after the military dictatorship that controlled Chile for sixteen years lost its grip on power and the same month as the first democratic election of a Chilean president since the *coup*.

Doc. 63 ¶ 42; Doc. 111 ¶ 41; *see also* Doc. 130-5 (Barrientos Dep. Tr., Nov. 10, 2015) at 272-273.

Since 1989, Barrientos has continuously resided in the United States, specifically in Florida, and has taken full advantage of the benefits of living in this country. Doc. 63 ¶¶ 10-12; Doc. 111 ¶¶ 9-11. As a U.S. resident and citizen, Barrientos has worked in a variety of jobs, owned multiple businesses, bought and sold multiple properties, declared bankruptcy, fraudulently transferred assets in an admitted attempt to insulate them from Plaintiffs, and married a U.S. citizen. *Id.*; Joint Trial Ex. 11 (Def's Interrog. Resps.); Doc. 130-5 (Barrientos Dep. Tr.) at 276, 290-295, 298. Moreover, in 2010, over twenty years after Barrientos immigrated to the U.S., but a mere year after it was first publicly alleged that he tortured and killed Víctor Jara, Barrientos became a U.S. citizen. Doc. 130-5 (Barrientos Dep. Tr.) at 272-289. Indeed, in obtaining U.S. citizenship, Barrientos provided false statements under oath to the U.S. government concerning his involvement in the Chilean military and the 1973 *coup d'état*. *Id.*

In 2012, Plaintiffs discovered that Barrientos was living in the United States, in Deltona, Florida. Doc. 63 ¶ 8; Doc. 111 ¶ 7. That same year, the Court of Appeals in Chile charged Barrientos as a direct perpetrator in the killing of Víctor Jara. Doc. 48 at 3. Chile also requested that the U.S. extradite Barrientos so that

he could stand criminal trial in Chile. *Id.* In response to these charges, Barrientos has defiantly stated that he "simply will not" travel back to Chile in order to avoid Chilean legal process, and that instead he will remain in the United States. Doc. 84-1 at 32; Doc. 130-5 (Barrientos Dep. Tr.) at 240-41. Since Chile does not permit criminal trials *in absentia*, as long as Barrientos remains in the United States, Chile is unable to hold him accountable for his human rights violations. Doc. 48 at 3.

II. Course of Proceedings and Disposition in the District Court

In light of the fact that Barrientos is using the United States as a safe harbor to avoid legal accountability, Plaintiffs initially filed suit against Barrientos in the District Court, on September 4, 2013, asserting claims under the ATS and the TVPA. Doc. 1 ¶ 1. Barrientos initially failed to appear or file a responsive pleading. Doc. 35. Accordingly, on November 20, 2014, Plaintiffs obtained a default judgment from the District Court. Doc. 71.

On January 27, 2015, Barrientos finally retained legal counsel, made an appearance, and filed a motion to set aside the default judgment. Doc. 72. After

conferring with counsel for Barrientos, Plaintiffs consented to the lifting of the default judgment. Doc. 77.[2] Accordingly, on February 24, 2015, the District Court lifted the default judgment. Doc. 80. Subsequently, on March 3, 2015, Barrientos filed a motion to dismiss Plaintiffs' claims, asserting that the ATS and TVPA claims were time-barred under the statute of limitations, and that the District Court lacked subject matter jurisdiction over the ATS claims. Doc. 82.

On April 14, 2015, the District Court granted the motion in part: dismissing Plaintiffs' ATS claims with prejudice for lack of subject matter jurisdiction but denying Barrientos's motion to dismiss the TVPA claims. Doc. 93. In its reasoning, the District Court concluded that the Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), "forecloses all of Plaintiffs' ATS claims because the tortious conduct took place entirely outside of the United States." Doc. 93 at 8. The District Court reasoned that the alleged conduct did not "touch and concern" the "United States . . . with sufficient force,"

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[2] Plaintiffs consented to the lifting of the District Court's default judgment because they "welcome[d] the opportunity to fully litigate their claims against Defendant, and to give him an opportunity to be heard." Doc. 77 at 1.

and thus did not warrant displacing the presumption against extraterritorial application of U.S. law. *Id*. (quoting *Kiobel*, 133 S. Ct. at 1669).

The District Court's dismissal of the ATS claims was based on an analysis of only two factors. First, the District Court acknowledged that while Barrientos's U.S. citizenship and residency were relevant considerations, it concluded that citizenship is "insufficient to permit jurisdiction on its own." Doc. 93 at 9 (quoting *Doe v. Drummond Co.*, 782 F.3d 576, 596 (11th Cir. 2015)), *cert. denied*, 136 S. Ct. 1168 (2016)). Second, the District Court discounted Plaintiffs' argument that Defendant was using the United States as a safe harbor, and evading justice for the full panoply of his illegal acts, including his commission of crimes against humanity, dismissing on the basis that Plaintiffs could claim potential remedies for torture and extrajudicial killing under the TVPA. Doc. 93 at 9.

Plaintiffs subsequently filed a Third Amended Complaint, consistent with the District Court's order dismissing the ATS claims and, on June 13, 2016, proceeded to trial on the remaining TVPA claims. Doc. 111. The jury delivered its verdict on June 27, 2016, declaring Barrientos liable for the claims of torture and extrajudicial killing under the TVPA. Doc. 187.

On July 26, 2016 Plaintiffs appealed the decision of the District Court dismissing Plaintiffs' ATS claims. Plaintiffs challenged the District Court holding

that subject matter jurisdiction can never exist where the conduct underlying the claim occurs outside of the United States, even where the defendant is a U.S. citizen using the U.S. as a shield from prosecution in the country where the defendant committed the criminal conduct in question. Doc. 188.

III. Scope and Standard of Review

Whether the presumption against extraterritoriality precludes Plaintiffs' claims under the ATS is a question of subject-matter jurisdiction. *Drummond*, 782 F.3d at 593. This Court reviews questions of subject-matter jurisdiction *de novo*. *Chaney v. Tenn. Valley Auth.*, 264 F.3d 1325, 1326 (11th Cir. 2001). Accordingly, the Court should give no deference to the lower court's decision and apply the same standard of review as the District Court. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010) ("We review a district court order granting a motion to dismiss *de novo*, applying the same standard as the district court."). Since Barrientos's challenge of subject matter jurisdiction is solely based upon the allegations in the complaint, "the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised….the court must consider the allegations in the plaintiff's complaint as true." *McElmurray v. Consol. Gov. of Augusta-Richmond Cnty.*, 501 F.3d 1244,

1251 (11th Cir. 2007) (quoting *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)).

SUMMARY OF THE ARGUMENT

The District Court improperly dismissed Plaintiffs' ATS claims for lack of subject matter jurisdiction. In doing so, the District Court failed to conduct a "fact-intensive" inquiry into Plaintiffs' ATS claims, which, if properly carried out, would have established that the claims sufficiently "touch and concern" the United States to displace the presumption against extraterritoriality, thereby confirming subject matter jurisdiction.

Thirty years ago, the landmark case *Filartiga v. Pena-Irala* found that the ATS provides foreign nationals who are victims of human rights abuses a right to sue the perpetrators of those abuses in the United States federal courts, even when the underlying acts are committed abroad. 630 F.2d 876 (2d Cir. 1980). Since then, federal courts have consistently recognized that the ATS permits claims against individual defendants found in the United States for wholly extraterritorial violations of the law of nations, including arbitrary detention, torture, extrajudicial killing, genocide, and crimes against humanity. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (noting that federal courts had recognized international norms as enforceable under the ATS "for 24 years, ever since the Second Circuit decided *Filartiga*."); *see also infra* Section I.A.

The Supreme Court's decision in *Kiobel* did not disrupt this line of authority. Rather than imposing a categorical bar on ATS claims that arise abroad, the Supreme Court's decision instructs the lower courts, as this court explained in *Drummond*, to perform a "fact-intensive inquiry, requiring us to look closely at the allegations," to determine whether ATS claims "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality ("the *Kiobel* presumption"), as they do here. *Drummond*, 782 F.3d at 592 (citing *Kiobel*, 133 S. Ct. at 1669).

In granting Barrientos's motion to dismiss, the District Court ignored *Filartiga* and its progeny, and failed to conduct the "fact-intensive inquiry" required under *Kiobel* and *Drummond*. *See id.* A proper analysis shows that Plaintiffs' ATS claims displace the *Kiobel* presumption because: (i) Barrientos is a naturalized U.S. citizen and long-standing U.S. resident, Doc. 63 at ¶ 8; Doc. 111 at ¶ 7; (ii) Barrientos is not amenable to suit in any other jurisdiction and is purposefully using his U.S. citizenship and residency as a "safe harbor" from prosecution in his country of origin (Chile), Doc. 48 at 3; Doc. 130-5 (Barrientos Dep. Tr.) at 240-41; (iii) providing a "safe harbor" to atrocity perpetrators such as Barrientos is in direct conflict with U.S. national interests and the avowed foreign policy of both political branches of the U.S. government,

Doc. 84 at 18; and, (iv) the existence of Plaintiffs' claims under the TVPA counsel for maintaining their distinct claims under the ATS.

The Court should, accordingly, reverse the District Court's ruling and permit Plaintiffs' ATS claims to proceed. In the alternative, the Court should remand the case to the District Court with an order to conduct a proper "fact-intensive inquiry" analysis of the allegations as required by *Kiobel* and *Drummond*. *See Drummond*, 782 F.3d at 592.

ARGUMENT

I. The District Court Erred by Dismissing Plaintiffs' ATS Claims

A. *Pursuant to* Kiobel, *ATS Subject Matter Jurisdiction is Proper for Claims Against Individual Defendants Who Are Using the United States Territory as a Safe Harbor from Accountability for Human Rights Abuses Committed Abroad*

The ATS is a purely jurisdictional statute providing federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012); *Kiobel*, 133 S. Ct. at 1664. In doing so, the ATS gives courts the power to recognize certain violations of international law as federal common law. *Kiobel*, 133 S. Ct. at 1663 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004)).[3] Long-standing jurisprudence establishes that under certain circumstances, as here, subject matter jurisdiction over ATS claims is proper, including where the underlying conduct occurred abroad.

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[3] When determining what constitutes a violation of international law, courts should recognize only those claims based on norms of international law that are "specific, universal, and obligatory." *Sosa,* 542 U.S. 692 at 732 (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

In *Sosa,* the first Supreme Court case to directly address the ATS, the Supreme Court implicitly accepted the viability of subject matter jurisdiction over ATS claims arising out of solely extraterritorial conduct by engaging in a significant analysis of the plaintiff's allegations. *See Sosa*, 542 U.S. at 729. Notably, *Sosa* cited with approval *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), along with another ATS case, *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992) (involving torture in the Philippines), both of which – like Plaintiffs' ATS claims against Barrientos – involved claims against individual defendants who committed human rights abuses overseas and then sought safe harbor from legal accountability in the United States. *Sosa* 542 U.S. at 731–33. Since *Sosa*, the Supreme Court has continued to uphold ATS subject matter jurisdiction over natural persons who committed human rights abuses overseas who then sought to use the United States as a safe harbor. *See Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (citing with approval *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (upholding ATS and TVPA claims against a naturalized U.S. citizen for atrocities committed in El Salvador)); *Samantar v. Yousuf,* 560 U.S. 305, 325 (2010) (upholding ATS and TVPA claims against a U.S. permanent resident who had committed abuses in Somalia who challenged the claims on the grounds of sovereign immunity);

see also Doe v. Constant, 354 F. App'x. 543 (2d Cir. 2009) (affirming judgment of ATS liability against individual Haitian militia leader for conduct committed wholly in Haiti); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013) (awarding $15 million in damages under ATS for wholly extraterritorial conduct by U.S. legal resident and former Somali National Security Service officer); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005) (noting claim of ATS liability alleging wholly extraterritorial acts sufficient to maintain cause of action against former Colonel in the Haitian Armed Forces and then-current U.S. resident); *Lizarbe v. Rondon*, 642 F. Supp. 2d. 473 (D. Md. 2009) (permitting ATS claim against deported U.S. resident for wholly extraterritorial conduct in Peru); *Doe v. Saravia*, 348 F. Supp. 2d. 1112 (E.D. Cal. 2004) (affirming ATS judgment against U.S. resident for wholly extraterritorial acts committed while a member of El Salvadoran death squads).

Kiobel, a U.S. Supreme Court decision involving a corporate defendant with a limited presence in the United States, reaffirmed *Sosa* without distinguishing – much less overturning – that case, or any other case where an individual defendant was found liable for extraterritorial human rights abuses. 133 S. Ct. at 1663; *see also id.* at 1675 (Breyer, J., concurring) (persuaded that *Sosa*'s reliance on *Filartiga* and *Marcos* suggests "that the ATS allowed a claim for relief in such

circumstances."); Tr. of Oral Arg. at 13:21–23, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), (No. 10- 1491) (Kennedy, J., noting that *Filartiga* is a "binding and important precedent."). Indeed, nothing in the *Kiobel* majority opinion evidences that the Court intended to overturn the established line of cases allowing for subject matter jurisdiction over individual defendants who sought safe harbor in the United States following their commission of human rights abuses, even when such conduct is wholly extraterritorial. *See* 133 S. Ct. at 1664-68.

In *Kiobel*, the Supreme Court endorsed a presumption against the recognition of claims under the ATS where they allege only extraterritorial conduct, but left open the possibility that the ATS could reach human rights violations committed abroad where such claims "touch and concern" the United States "with sufficient force" to "displace" that presumption. 133 S. Ct. at 1669. The *Kiobel* decision instructs lower courts applying the ATS to be guided by the principles underlying the presumption against extraterritoriality. These guiding principles include protecting against both "unintended clashes between our laws and those of other nations which could result in international discord," and "the danger of unwarranted judicial interference in the conduct of foreign policy." *Id*. at 1664 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)); *see also RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016).

The specific facts alleged in *Kiobel* itself – a case premised on the vicarious liability of corporate defendants amenable to suit in other jurisdictions – were insufficient to displace the presumption. *See* 133 S. Ct. at 1669 (finding that the foreign defendants' "mere corporate presence" in the United States does not sufficiently "touch and concern" the United States to displace the presumption). *Kiobel*'s narrow holding, as noted by Justice Kennedy, was "careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]," and, that in future cases involving "human rights abuses committed abroad," the particular "reasoning and holding," of *Kiobel* may not apply and, therefore, "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Id*. (Kennedy, J., concurring).

B. *This Court Permits Subject Matter Jurisdiction Over ATS Claims, Even When a Claim is Premised on Extraterritorial Conduct, if the Claim Touches and Concerns the United States with Sufficient Force to Displace the* Kiobel *Presumption*

This Court has explicitly rejected the position that *Kiobel* imposes a categorical bar on ATS claims premised on extraterritorial underlying conduct. *Doe v. Drummond Co.*, 782 F.3d 576, 585, 593 (11th Cir. 2015). Rather, this Court has stressed the "narrow holding" of *Kiobel* and echoed Justice Kennedy's

concurrence that "other cases may arise with allegations of serious violations of international law principles protecting persons" that are not covered "by [*Kiobel*'s] reasoning and holding." *Id*. at 585, 600-01 (quoting 133 S. Ct. at 1669 (Kennedy, J., concurring)); *see also id.* at 585 ("All three of the concurrences in *Kiobel* averred that the Court clearly and intentionally left these questions [of displacement of the presumption under different circumstances] unanswered."). Accordingly, this Court joined the Supreme Court in leaving the door ajar to the long-standing *Filartiga* line of cases, including many of this Court's important precedents. *See, e.g., Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

Plaintiffs' claims present this Court with its first *Filartiga*-type case following *Kiobel*. To date, this Court has on three occasions considered the *Kiobel* presumption against extraterritoriality for ATS claims in a more limited context: *Cardona v. Chiquita Brands Int'l, Inc.*; *Baloco v. Drummond Co.* (*Baloco II*); and *Doe v. Drummond Co. See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 1842 (2015), *and cert. denied sub nom. Does 1-144 v. Chiquita Brands Int'l, Inc.*, 135 S. Ct. 1853 (2015);

Baloco v. Drummond Co. (*Baloco II*), 767 F.3d 1229 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015); *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), *cert. denied,* 136 S. Ct. 1168 (2016). Just as in *Kiobel*, the defendants in all three of these cases were multinational corporations; two of the cases also included the corporation's officers as defendants. *Id.*

All three of these post-*Kiobel* ATS cases were premised on strikingly similar facts, which can be "meaningfully distinguish[ed]" from the circumstances at issue.[4] Specifically, *Cardona*, *Baloco II* and *Drummond* all involved the alleged vicarious liability of U.S.-based multinational corporations and/or corporate officers for human rights abuses perpetrated by third-party Colombian paramilitary forces in Colombia. *See Cardona*, 760 F.3d at 1187 (defendants were corporations

[4] In *Drummond*, the Court noted that the analysis in its two prior *Kiobel* presumption decisions, *Cardona* and *Baloco II*, was not as exhaustive as it was in *Drummond* and "may not clearly address the scope and interpretation of *Kiobel's* touch and concern test." 782 F.3d at 600. Nevertheless, the *Drummond* Court was compelled to abide by the decisions in *Cardona* and *Baloco II* and bar the exercise of jurisdiction in light of the similarities among the claims at issue in all three cases. *Id*. ("In the absence of any evidence or allegations that meaningfully distinguish Plaintiffs' claims or compel a different conclusion, we must adhere to the results required by our precedent.").

allegedly supporting Colombian paramilitary forces in their commission of crimes in Colombia); *Baloco II*, 767 F.3d at 1233 (defendants were corporations and corporate officers allegedly supporting Colombian paramilitary forces in their commission of crimes in Colombia); *Drummond*, 782 F.3d at 580 (defendants were a corporation, a wholly owned subsidiary, and two corporate officers allegedly aiding and abetting Colombian paramilitary forces in their commission of crimes in Colombia); *see also In re Chiquita Brands Intern., Inc.*, 690 F. Supp. 2d. 1296, 1299 (S.D. Fla. 2010) (predecessor to *Cardona* discussing illegal acts at issue committed by Colombian terrorist organization).

As in *Kiobel*, there was no suggestion that any of the defendants in *Cardona*, *Baloco II* or *Drummond* had directly perpetrated the atrocities at issue or that they had then affirmatively sought out U.S. territory as a safe harbor to avoid legal accountability in another jurisdiction, as is the case here. Moreover, *Kiobel, Cardona*, *Baloco II* and *Drummond* all involved multinational corporations, which are presumably amenable to suits in different forums. *See Kiobel,* 133 S. Ct. at 1669 ("Corporations are often present in many countries."). In contrast, Plaintiffs' claims focus solely on the liability of a natural person, who is a U.S. citizen and long-standing resident. The holdings of *Cardona*, *Baloco II* and *Drummond,* in

which the Court declined to displace the *Kiobel* presumption, are thus not controlling of the outcome here, given the distinct circumstances at issue.

Rather, the guiding interpretation of *Kiobel* laid out in *Drummond* is that "if *some relevant aspects of the claim* occur within the United States, we must determine whether the presumption is displaced." *Id.* at 592 n. 23 (emphasis added). A claim is the "aggregate of operative facts giving rise to a right enforceable by a court." *Black's Law Dictionary* 204 (abridged 8th ed. 2005); *see also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014) ("We also note that the [*Kiobel*] Court broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."). Plaintiffs' ATS claims contain relevant aspects occurring within the United States. Barrientos has not only been living in the United States for decades but has purposefully availed himself of the protections and privileges of U.S. citizenship to avoid prosecution in his country of origin — a mere one year after it was first alleged that he tortured and killed Víctor Jara, but twenty years after he moved the United States, Barrientos applied for U.S. citizenship in what was clearly an attempt to obtain the additional legal protections, actual and perceived,

afforded to U.S. citizens. *See infra* Section II, A-B; *see* Doc. 63 ¶ 8; Doc. 111 ¶ 7; Doc. 48 at 5; Doc. 130-5 (Barrientos Dep. Tr.) at 240-41. Accordingly, Barrientos's use of the United States as a safe harbor is a crucial aspect of Plaintiffs' claims which has occurred and continues to occur in the United States.

This Court provides that where, as here, relevant aspects of Plaintiffs' claims occur in the U.S., courts must engage in a "fact-intensive inquiry" to determine whether Plaintiffs' claims sufficiently touch and concern the United States to warrant displacement of the *Kiobel* presumption, particularly where, as here, "an ATS claim involves a U.S.-citizen defendant." 782 F.3d at 586, 592.

This fact-intensive inquiry requires courts "to look closely at the allegations and evidence in the case." *Id*. at 591. While the location of a defendant's conduct is "relevant and carries significant weight," it is by no means dispositive or the sole factor that courts should consider. *Id.*; *see also id.* at 593 n. 24 (citing *Al Shimari*, 758 F.3d at 528) ("[I]t would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct."). Rather, additional factors of potential relevance to the *Kiobel* presumption include: Defendant's citizenship, status, residency or other ties to the United States; U.S. national interests, such as not providing a safe harbor to individual human rights perpetrators; minimizing any other risk of judicial interference in foreign policy

concerns; and avoiding the creation of conflicts between the laws of the United States and of the country where the conduct took place. *Kiobel*, 133 S. Ct. at 1664; *Drummond*, 782 F.3d at 595-97; *see also* 133 S. Ct. at 1671 (Breyer, J., concurring). The District Court failed to conduct this required inquiry.

C. *The District Court Did Not Engage in the "Fact-Intensive Inquiry" Required Under* Kiobel *and* Drummond

In disregarding the legal framework established by *Kiobel* and this Court's holding in *Drummond*, the District Court committed a series of reversible errors. The District Court relied solely on the extraterritorial nature of Barrientos's conduct to foreclose Plaintiffs' claims, yet failed to properly engage in a "fact-intensive inquiry" to determine if the claims touched and concerned the United States with sufficient force to displace the presumption. Doc. 93 at 8 (citing *Kiobel,* 133 S. Ct. at 1669) ("*Kiobel* forecloses all of Plaintiffs' ATS claims because the tortious conduct took place entirely outside the United States.").

While *Kiobel* focused on how these underlying principles typically constrain courts from exercising jurisdiction, it did not rule out that these policies might favor recognizing an ATS claim based on extraterritorial violations of international law, such as when the defendant is using the U.S. as a safe harbor and is otherwise subject to our country's laws. *See Drummond,* 782 F.3d at 595 (concluding that

U.S. citizenship is a relevant factor in displacing the *Kiobel* presumption on account that "the foreign policy concerns that the presumption against extraterritorial application is intended to reduce may be assuaged or inapplicable.").

The District Court acknowledged, and summarily dismissed, Barrientos's U.S. citizenship and residency as factors in its touch and concern analysis, Doc. 93 at 9 (citing *Drummond*, 782 F.3d at 596); however, it examined the factors in isolation from, rather than in conjunction with, the "aggregate of operative facts giving rise to," the claims. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014) (quoting *Black's Law Dictionary* 281 (9th ed. 2009); *see also* Doc. 93 at 9 (stating that U.S. citizenship, as a "factor[,] is insufficient to permit jurisdiction on its own."). In contrast, *Drummond* counseled that while a defendant's U.S. citizenship is a relevant, though not independently dispositive factor, it must be considered "in conjunction with any other relevant factors; further analysis is required." 782 F.3d at 596; *see also id.* at 586 ("when an ATS claim involves a U.S.-citizen defendant or where events underlying the claim occur both domestically and extraterritorially, the courts must engage in further analysis."). Moreover, the lower court failed to constrain its analysis to the principles underlying the presumption against extraterritoriality, as required by

Kiobel, to avoid unwarranted judicial interference in foreign policy or clashes between our laws and the laws of foreign countries.

The District Court's analysis did not properly account for, let alone consider in the aggregate, *inter alia*, Barrientos's status as an individual – rather than corporate – defendant, his long-term residency in the United States, his having availed himself of the protection of the laws of the United States, his affirmative use of U.S. territory to evade prosecution in his country of origin, or the U.S. interest in not providing a direct perpetrator with safe harbor. *See, e.g.*, *Al Shimari*, 758 F.3d at 527 (noting the need to review the alleged facts in aggregate). Indeed, the District Court discounted this important U.S. interest since distinct claims for torture and extrajudicial killing remained cognizable under the TVPA. Doc. 93 at 9. However, the existence of Plaintiffs' TVPA claims, if relevant at all, counsels for maintaining, not dismissing, the ATS claims.

In light of the District Court's failure to properly determine whether Plaintiffs had presented facts upon which subject matter jurisdiction can be based, *Adams v. Bain*, 697 F.2d 1213,1219 (4th Cir. 1982), this court should apply *de novo* the touch-and-concern analysis, as discussed below, to the pertinent allegations and facts in the record.

II. Plaintiffs' ATS Claims Deeply "Touch and Concern" the United States, Displacing the *Kiobel* Presumption

Plaintiffs' ATS claims deeply touch and concern the United States, warranting displacement of the *Kiobel* presumption within the framework set forth by *Kiobel* and *Drummond*. First, Barrientos is a longtime U.S. resident and naturalized U.S. citizen. Doc. 63 ¶¶ 10-12; Doc. 111 ¶¶ 9-11. Second, Barrientos is affirmatively using the United States, the only jurisdiction where he is amenable to suit, as a safe harbor from accountability in his home country for violations of international law. Third, both the executive and legislative branches of the U.S. government have expressed that jurisdiction under the circumstances at issue accords with U.S. foreign policy. Fourth, the availability of viable TVPA claims is irrelevant to the analysis of whether subject matter jurisdiction exists under the ATS. To the extent the Court considers Plaintiffs' TVPA claims, they should weigh in favor of maintaining, not foreclosing, the ATS claims.

A. *Barrientos's U.S. Citizenship and Long-Standing Residency are Relevant Factors in Favor of Displacing the* Kiobel *Presumption*

Claims involving defendants who are United States citizens and long-time residents clearly touch and concern the United States and thus weigh towards displacing the *Kiobel* presumption. The "narrow holding" of *Kiobel* left open the possibility that "other cases may arise with allegations of serious violations of

international law principles protecting persons" that are not covered "by [*Kiobel*'s] reasoning and holding." *Drummond*, 782 F.3d. at 585, 600-601 (quoting 133 S. Ct. at 1669 (Kennedy, J., concurring)). Claims involving serious violations committed by individual citizens fall into this category; indeed, Justice Breyer noted in his *Kiobel* concurrence that he "would find jurisdiction under this statute where . . . the defendant is an American national." 133 S.Ct. at 1671 (Breyer, J., concurring). Jurisdiction is warranted under such circumstances because "U.S. residents who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts." *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013) (finding the *Kiobel* presumption displaced because "as a permanent resident of the United States, the presumption against extraterritoriality has been overcome."); *see also Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (noting that the U.S. State Department recommended against immunity for U.S. resident based on general rule that U.S. residents enjoying benefits of U.S. law should be subject to the jurisdiction of U.S. courts).

Even if citizenship and long-time residency of a natural person are not alone dispositive, this Court has recognized the relevance of these factors in determining whether a claim sufficiently touches and concerns the territory of the United States.

See Drummond, 782 F.3d at 595 (citing *Al Shimari*, 758 F.3d at 530) (holding that defendant's status as a U.S. corporation, and individual defendants' status as U.S. citizens are relevant factors that touch and concern the territory of the United States); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015) (noting that "a defendant's U.S. citizenship" may be relevant in conjunction with other factors toward displacing the presumption against extraterritoriality).

By virtue of Barrientos's citizenship and long-time residency, his gross abuses of human rights deeply touch and concern the United States. As the Third Amended Complaint alleges, "Barrientos is citizen of the United States[,]…resides in Deltona, Florida, has owned property in Florida, including a home…operated businesses in Florida, and paid Florida taxes on those businesses." Doc. 63 ¶ 8; Doc. 111 ¶ 7. Since Barrientos's entry into the United States in 1989, he has resided continuously in Florida and has availed himself of the benefits of U.S. law, including but not limited to: buying and selling real property, owning businesses, entering into bankruptcy proceedings, and transferring his assets into a trust in an attempt to shield them from civil liability arising out of the present suit. Doc. 63 ¶¶ 8, 10-12; Doc. 111 ¶¶ 7, 9-11; Joint Trial Ex. 11 (Def's Interrog. Resps.).

Moreover, there is a direct relationship between Barrientos's U.S. citizenship and Plaintiffs' claims against him. After living in the United States for twenty years, and a mere one year after it was first alleged that he tortured and killed Víctor Jara, Barrientos applied for U.S. citizenship in hope of obtaining additional legal protections afforded to U.S. citizens. Doc. 63 ¶ 8; Doc. 111 ¶ 7; Doc. 48 at 5; Doc. 130-5 (Barrientos Dep. Tr.) at 240-41. Notably, as Barrientos has admitted, when applying for U.S. citizenship he lied to U.S. government officials with regard to his military service and his involvement in the military *coup* in Chile. Doc. 130-5 (Barrientos Dep. Tr.) at 276; 290-295, 298. As an individual who has taken full advantage of his U.S. residency and citizenship, and who has done so with the apparent intent to avoid liability for his extraterritorial crimes, Barrientos should also be subject to the jurisdiction of U.S. courts. *See, e.g.*, *Magan*, 2013 WL 4479077 at *2 (displacing *Kiobel* presumption where claims made against U.S. resident); *Samantar*, 699 F.3d at 777 (noting residents enjoying benefits of U.S. law should be subject to the jurisdiction of U.S. courts).

B. *Barrientos's Use of the United States as a Safe Harbor After Committing Human Rights Abuses in Chile, Where He Is No Longer Amenable to Jurisdiction, is a Factor in Favor of Displacement of the* Kiobel *Presumption*

ATS subject matter jurisdiction is proper when a natural person defendant is using the United States as a safe harbor. Justice Breyer, concurring in the *Kiobel* Court's judgment but not its reasoning, explained in his concurrence that he would find ATS jurisdiction where "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." 133 S. Ct. at 1671 (Breyer, J., concurring).

Plaintiffs' claims present this exact scenario: the United States has a distinct interest in preventing this nation from becoming Barrientos's safe harbor, shielding him from liability for his most serious crimes. Barrientos's residency in the United States, the only jurisdiction where he is now amenable to jurisdiction, is no accident. Rather, Barrientos chose to seek safe harbor in the United States following his commission of atrocities in Chile and the loss of the protection from prosecution the Pinochet dictatorship afforded. Doc. 63 ¶ 42; Doc. 111 ¶ 41. Moreover, as discussed above, Barrientos also purposefully applied for and gained

citizenship through self-admitted misrepresentations *shortly after* it was alleged that he tortured and killed Víctor Jara: he lied about his service in the Chilean military and his involvement in the 1973 Chilean *coup*. Doc. 130-5 (Barrientos Dep. Tr.) at 276, 290-295, 298.

The risk that the United States becomes a safe harbor for human rights abusers is particularly acute in cases involving natural persons. As the *Kiobel* Court reasoned, foreign multinationals may be "present in many countries," and claims of human rights abuses by such multinational corporations often may be adjudicated in the jurisdiction where the conduct is claimed to have occurred. *Kiobel*, 133 S. Ct. at 1669. Indeed, in *Kiobel*, the plaintiffs conceded that their claims could have been brought in the defendants' home countries. Tr. of Oral Arg. at 14:19-25, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), (No. 10- 1491) (Oct. 1, 2013). In contrast, as an individual, Barrientos is present only in the United States and subject only to adjudication by U.S. courts. *See* Supp. Br. for the U.S. as Amicus Curiae, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), (No. 10-1491), 2012 WL 2161290, at *19 (arguing that the exclusive presence of an individual foreign perpetrator in the United States warrants an ATS claim). Accordingly, the U.S. interest in not becoming a harbor for international human rights violators should weigh more heavily in cases

involving natural persons. That Barrientos has sought safe harbor in the United States, the sole forum where he is now amenable to suit, strongly favors displacing the *Kiobel* presumption, particularly when taken in conjunction with the other factors discussed herein.

C. *Both the Executive and Legislative Branches Of the United States Government Have Expressly Stated that ATS Jurisdiction Under the Circumstances at Issue Accords with United States Foreign Policy*

Kiobel instructs the lower courts presented with claims under the ATS to be guided by the principles underlying the presumption against extraterritoriality. 133 S. Ct. at 1664. Here, those principles favor jurisdiction. There is no concern that the United States is creating a conflict with the law of Chile, which seeks Barrientos's extradition for the crimes at issue. *See id*. at 1664 (noting one of the underlying purposes of the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord."); Doc. 48 at 3. Moreover, both the executive and legislative branches maintain that holding individual human rights abusers accountable is in the interest of the U.S. *See id.* (presumption seeks to avoid unwarranted judicial interference in foreign policy). Thus, these factors weigh strongly in favor of displacing the *Kiobel* presumption.

The executive branch has made clear that the U.S. has a strong interest in allowing ATS claims, such as Plaintiffs', to be heard in U.S. courts. Supp. Br. for the U.S. as Amicus Curiae, *Kiobel,* 133 S. Ct. 1659 (2013), (No. 10-1491), at *4, *13. In *Filartiga*, a case factually analogous to the one at hand,[5] the government noted "there is little danger that judicial enforcement [of ATS claims] will impair our foreign policy efforts." Mem. for the U.S. as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), (No. 79-6090), 1980 WL 340146, at *22-23. The executive branch reaffirmed this position three decades later in *Kiobel* where the Solicitor General unequivocally stated that "recognizing a cause of action in the circumstances of *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." Supp. Br. for the U.S. as Amicus Curiae, *Kiobel*, 133 S. Ct. 1659 (2013) (No. 10-1491), at *13.

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[5] As a U.S. citizen and long-term resident, Barrientos has stronger ties to the United States than the defendant in *Filartiga*, who was present in the U.S. only as an undocumented alien and subject to deportation at the time of the suit. 630 F.2d at 878-79.

Moreover, the executive branch urged the Court in *Kiobel* to issue a narrow ruling leaving open the possibility of adjudicating ATS cases against individual torturers living on U.S. soil, cautioning that a bar to such claims could risk international discord and "give rise to the prospect that this country would be perceived as harboring the perpetrator." *Id.* at *4. Quoting from the government's memorandum in *Filartiga,* the Solicitor General emphasized that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *Id.* at *19. Thus, the U.S. executive branch has been unequivocal that barring such claims is not only inconsistent with U.S. interests but also could be harmful to those interests.[6]

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[6] The executive branch has also voiced its support for ATS claims based on extraterritorial conduct at Congressional hearings, declaring a commitment to "ensuring that no human rights violator or war criminal ever again finds safe haven in the United States." *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the S. Comm. on the Judiciary*, 111th Cong., at 10 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.). President Obama also recently issued an executive order calling for a comprehensive approach to atrocity prevention and response, stating that "preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States." *See* Exec. Order No. 13,729, 81 Fed. Reg. 32,611 (May 18, 2016).

Congress has agreed with the executive branch. It endorsed the *Filartiga* line of cases when it extended the right of U.S. citizens to bring similar claims under the TVPA. *See* S. Rep. No. 102-249, at 3–5 (1991); H.R. Rep. No. 102-367, at 4 (1991) (the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filartiga* line of cases.").[7] Since the ATS limits jurisdiction to aliens, Congress enacted the TVPA "to extend a civil remedy also to U.S. citizens who may have been tortured abroad." S. Rep. No. 102-249, at 4-5; *see also* H.R. Rep. No. 102-367, at 3 (noting TVPA adopted "to ensure that torturers are held legally accountable for their acts."). The TVPA is but

[7] In discussing the interplay between the TVPA and the ATS, the Supreme Court recognized that Congress "not only expressed no disagreement with our view of the proper exercise of the judicial power [in the *Filartiga* line of cases] but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail." *Sosa*, 542 U.S. at 731.

one example of this congressional commitment to denying safe harbor in the U.S. to perpetrators of human rights crimes committed overseas.[8]

Any further foreign policy concerns are put to rest by the fact that Chile, the only other country with a potential interest in the case, supports the U.S. adjudication of Plaintiffs' claims. *See generally* Doc. 48 (Affidavit of Francisco Javier Ugás Tapia, Director of Legal Affairs at the Chilean Ministry of Interior and Public Security, submitted in support of Plaintiffs' Motion for Default Judgment). Accordingly, any "international discord" would arise not from finding subject matter jurisdiction, but from failing to do so.

Given the express views of both political branches of the U.S. government and the Government of Chile, any foreign policy concerns related to the

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[8] For example, the Human Rights Enforcement Act established a section within the Criminal Division of the Department of Justice with a specific mandate to enforce human rights laws, including the prosecution of extraterritorial crimes. *See* Human Rights Enforcement Act, Pub. L. No. 111-122, § 2(b), 123 Stat. 3480 (2009) (codified at 28 U.S.C. § 509B (2012)). Moreover, since 2007 alone, the legislative branch has held three hearings entitled "No Safe Haven" to address how Congress can ensure that the United States is not a sanctuary for human rights abusers. *See e.g.,* No Safe Haven: Accountability for Human Rights Violators in the United States, Hearing before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee, Hrg. 110-548, 110th Cong. (2007).

adjudication of Plaintiffs' ATS claims would arise from the *failure* to adjudicate the claims. Thus, U.S. foreign-policy interests weigh heavily in favor of displacing the presumption.

D. *Plaintiffs' TVPA Claims Against Barrientos Counsel for Maintaining, not Dismissing, their ATS Claims*

In its ruling, the District Court dismissed the Plaintiffs' ATS claims while allowing the TVPA claims to proceed. Doc. 93 ¶¶ 10-13.[9] In doing so, the District Court reasoned that the existence of the TVPA claims supported the dismissal of the ATS claims given that the TVPA provided Plaintiffs with a remedy against Barrientos for torture and extrajudicial killing and thus negated any concerns that the United States was providing a safe harbor to human rights abusers. Doc. 93 at 9. This reasoning is flawed in its logic and its conclusion.

First, nothing in the ATS indicates that its subject matter jurisdiction depends on whether viable TVPA claims exist. This is unsurprising as the ATS

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[9] *Kiobel* has no effect on parallel claims under the TVPA, which is extraterritorial. *Drummond*, 782 F.3d at 601-602 (holding that the TVPA applies extraterritorially and that "jurisdiction over TVPA actions under § 1331 is not constrained by the presumption against extraterritoriality.").

was enacted in 1789 as part of the Judiciary Act of 1789, centuries before the TVPA, and has not been materially altered since enacted. *Compare* Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350), *and* 28 U.S.C § 1350 (2012) (demonstrating only non-material phraseological changes made). Any analysis of whether there is subject matter jurisdiction under the ATS is therefore an analysis that the District Court should conduct completely independent of the TVPA.

Indeed, the ATS and the TVPA, while overlapping in regard to certain actionable claims, are distinct statutes with different scopes. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1250-51 (11th Cir. 2005) (holding that plaintiffs can bring distinct claims for torture under the ATS and the TVPA). The TVPA was enacted to "enhance the remedy already available under" the ATS. S. Rep. No. 102-249, at § II (1991). Accordingly, the TVPA specifically provides a remedy to U.S. citizens; the ATS, in contrast, is only actionable by foreigners. *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring); *see also* H.R. Rep. No. 102-367(I), at 86 (1991) ("The TVPA…would also enhance the remedy already available under [the ATS] in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA

would extend a civil remedy also to U.S. citizens who may have been tortured abroad.").

Since the TVPA extends only to extrajudicial killing and torture, it does not in itself adequately deny safe harbor to human rights abusers who have committed a broader spectrum of heinous conduct, including crimes against humanity, arbitrary detention, and cruel, inhuman or degrading treatment. *See* 28 U.S.C. § 1350 (2012). By contrast, the ATS reaches these crimes.[10] Doc. 63 ¶¶ 6-7. These distinct ATS-specific claims require additional findings of fact and give rise to separate grounds of liability and for damages. Indeed, Plaintiffs have alleged that Barrientos committed crimes against humanity, arbitrarily detained Víctor Jara and subjected him to cruel, inhuman or degrading treatment, claims not encompassed by the TVPA. Doc. 63 ¶¶ 52-62; Doc. 111 ¶¶ 51-61.

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[10] *See Cabello v. Fernandez–Larios,* 402 F.3d 1148, 1151–52 (11th Cir. 2005) (affirming judgment under the ATS for extrajudicial killing, torture, crimes against humanity, and cruel, inhuman or degrading treatment); *Garcia v. Chapman*, 911 F. Supp. 2d. 1222, 1235 (S.D. Fla. 2012) ("prolonged arbitrary detentions and torture have both been recognized as violations of the law of nations cognizable under the ATS.")

Second, when TVPA claims are viable and will be litigated, as here, dismissing ATS claims based on the same facts does nothing to address the concerns raised in *Kiobel*. In particular, the Supreme Court's caution to avoid interpretations of U.S. law that carry "foreign policy consequences not clearly intended by the political branches," is inapplicable in such circumstances. 133 S. Ct. at 1664. Congress, by enacting the TVPA, has expressed its clear intent that such claims may be adjudicated in a U.S. court – as is the case here. Thus severing the ATS claims from Plaintiffs' case served little purpose, because the same evidence that was presented at trial to prove Barrientos's liability for torture and extrajudicial killing under the TVPA largely overlaps with the evidence that would have been required to prove Plaintiffs' distinct ATS claims. *Cf. Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1152, 1161 (11th Cir. 2005) (*per curiam*) (noting that evidence of the widespread and systematic nature of the atrocities was relevant to both ATS and TVPA claims). So where parties litigate properly-plead TVPA claims based on conduct occurring outside the United States, no purpose is served by excluding ATS claims for other violations of international law. In these cases, too, the *Kiobel* presumption should be displaced.

In light of the Congress's intent in passing the TVPA and the clear statutory text of the ATS, there is nothing that indicates that ATS subject matter jurisdiction

depends, in any way, on whether actionable TVPA claims are potentially available. Were the District Court ruling to stand, however, Barrientos would never have to account, and Plaintiffs would never be able to seek redress for the legally distinct crimes covered by the ATS, including arbitrary detention, cruel, inhuman or degrading treatment and crimes against humanity, because Plaintiffs alleged torture and extrajudicial killing pursuant to the TVPA. Letting such a finding stand will significantly diminish the ATS and the role of the United States as a leader in the protection and enforcement of human rights.

CONCLUSION

For the reasons discussed herein, Plaintiffs respectfully request that this Court reverse the District Court's ruling that their ATS claims are barred and reinstate Plaintiffs' ATS claims, or, in the alternative, remand the case with directions that the District Court conduct the fact-intensive inquiry required.

Respectfully submitted, Dated: November 23, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 8,945 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2016, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of the electronic filing to the following:

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