16-15179-FF

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

REPLY BRIEF TO *AMICUS CURIAE* BRIEF OF LELAND KYNES

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Case No. 16-15179, Jara v. Barrientos

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

As specified in Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1-1 of the Eleventh Circuit Rules, Plaintiffs-Appellants, through undersigned counsel, submit that the following parties have an interest in the outcome of this case:

1. Aceves, William J. (California Western School of Law, Counsel for Amicus Curiae)
2. Aguirre, Luis Fernando (Amicus Curiae)
3. Alexander, Sarah P. (Constantine Cannon LLP, Counsel for Amicus Curiae)
4. Baez, Jose (The Baez Law Firm, Counsel for Defendant-Appellee)
5. Barrientos Núñez, Pedro Pablo (Defendant-Appellee)
6. Beckett, Mark D. (Cooley LLP, Counsel for Plaintiffs-Appellants)
7. Belsher, Amy (Cooley LLP, Counsel for Plaintiffs-Appellants)
8. Bunster, Manuela (Plaintiff-Appellant)
9. Cabello, Aldo (Amicus Curiae)
10. Cabello, Zita (Amicus Curiae)
11. Calderon, Luis (The Baez Law Firm, Counsel for Defendant Appellee)
12. Casto, William R. (Amicus Curiae)

13. Dalton, Honorable Roy B. (United States District Court for the Middle District of Florida, Trial Judge)
14. Dellinger, Richard (Lowdes, Drosdick, Doster, Kantor & Reed, Counsel for Plaintiffs-Appellants)
15. Directorate of Legal Affairs of the Ministry of Foreign Affairs of the Republic of Chile (Amicus Curiae)
16. Estate of Víctor Jara (Plaintiff-Appellant)
17. Farbstein, Susan H. (International Human Rights Clinic, Harvard Law School, Counsel for Amicus Curiae)
18. Flaherty, Martin S. (Amicus Curiae)
19. Giannini, Tyler R. (International Human Rights Clinic, Harvard Law School, Counsel for Amicus Curiae)
20. Guthrie, Benjamin K. (Foley Hoag LLP, Counsel for Amicus Curiae)
21. Halling, Gary L. (Sheppard Mullin Richter & Hampton LLP, Counsel for Amicus Curiae)
22. Herrera, Carlos Alberto (Amicus Curiae)
23. Hioureas, Christina G. (Foley Hoag LLP, Counsel of Record for Amicus Curiae)
24. Jara, Joan (Plaintiff-Appellant)
25. Jara, Amanda (Plaintiff-Appellant)

26. Katz, Stanley N. (Amicus Curiae)

27. Landers, Sean (The Baez Law Firm, Counsel for Defendant- Appellee)

28. Lobban Michael (Amicus Curiae)

29. Martinez, Jenny S. (Amicus Curiae)

30. Martinez, Victor A. (Amicus Curiae)

31. McCormack, Tim (Constantine Cannon LLP, Counsel for Amicus Curiae)

32. McLaughlin, Daniel (Center for Justice & Accountability, Counsel for Plaintiffs-Appellants)

33. Muňoz, Hector Jose (Amicus Curiae)

34. Moyn, Samuel (Amicus Curiae)

35. Rapp, Stephen J. (Amicus Curiae)

36. Roberts, L. Kathleen (Center for Justice & Accountability, Counsel for Plaintiffs-Appellants)

37. Salazar, Jaime Ricardo (Amicus Curiae)

38. Salgado, Hector (Amicus Curiae)

39. Sarkarati, Nushin (Center for Justice & Accountability, Counsel for Plaintiffs-Appellants)

40. Scheffer, David J. (Amicus Curiae)

41. Schmidt, Jonathan D. (Ropes & Gray LLP, Counsel for Amicus Curiae)

42. Schnarr, Brian M. (Sheppard Mullin Richter & Hampton LLP, Counsel for Amicus Curiae)

43. Stewart, Melissa A. (Foley Hoag LLP, Counsel for Amicus Curiae)

44. Suskin, Marc (Cooley LLP, Counsel for Plaintiffs-Appellants)

45. Troncoso Repetto, Claudio (Director of Legal Affairs, Ministry of Foreign Affairs of the Republic of Chile, Amicus Curiae)

46. Urrutia, Christian (Cooley LLP, Counsel for Plaintiffs-Appellants)

47. Kynes, Leland (Amicus Curiae)

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Counsel for Appellants hereby certify that Plaintiff- Appellants are not corporations.

STATEMENT REGARDING ORAL ARGUMENT

Appellants do not oppose Amicus's request to participate in oral argument to defend the District Court's ruling in this case.

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INTRODUCTION

As Appellants established in the Opening Brief, the District Court erred in dismissing their ATS claims for lack of subject matter jurisdiction. The District Court failed to conduct the appropriate "fact-intensive" inquiry required by *Kiobel* and *Drummond* when determining whether claims "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality. Instead, it erroneously restricted its analysis to the situs of the alleged acts. The Amicus brief submitted in support of affirmance echoes the District Court's erroneous analysis while failing to engage with arguments Appellants advanced in the Opening Brief.[1]

This is this Court's first post-*Kiobel* ATS case to focus on natural persons rather than corporate defendants. Unlike the other post-*Kiobel* cases that have come before this Court, the defendant in this case is a natural person who directly committed human rights abuses and is now using the United States and U.S. citizenship as a safe harbor to avoid facing justice in his country of birth. Defendant moved to the United States when the military dictatorship for which he committed these human rights abuses lost power, and, after almost twenty years of U.S.

[1] Appellants filed the Opening Brief in this case on November 23, 2016. After Defendant failed to make an appearance, on July 5, 2017, the Court appointed Leland Kynes as amicus curiae to submit a brief to defend the District Court's ruling on appeal. *See* July 5, 2017 Order.

residency, applied for and became a U.S. citizen by lying to authorities when he became a person of interest in the torture and death of Víctor Jara. Defendant is using U.S. citizenship to insulate himself from criminal accountability in Chile.

When applying the guidance set forth by *Kiobel* and *Drummond*, this Court should find that Appellants' ATS claims touch and concern the United States with sufficient force to displace the presumption against extraterritoriality: The United States has a compelling interest in preventing itself from being used as a safe harbor by international human rights abusers who are attempting to use their subsequently obtained U.S. citizenship and presence in the United States as a vehicle to avoid accountability.

Accordingly, this Court has subject matter jurisdiction over Appellants' ATS claims and should reverse the District Court's decision.

ARGUMENT

I. Appellants' ATS Claims Present a Live Controversy

Appellants have presented cognizable international law claims, pursuant to the ATS, beyond the claims of extrajudicial killing and torture. These ATS claims continue to present a live controversy. By dismissing the ATS claims, the District Court erroneously left Appellants' claims of (1) crimes against humanity; (2) arbitrary detention; and (3) cruel, inhuman, degrading treatment, or punishment unadjudicated.

The party urging dismissal bears a "heavy burden" of establishing mootness. *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009). Amicus's claim that "there is no relief for the district court to grant," because "[i]t has already been granted," *see* Amicus Br. at 19, 21, does not come close to establishing this "heavy burden." Amicus fails to appreciate that Appellants' ATS claims and adjudicated TVPA claims are distinct claims, with distinct proofs and predicates, and distinct injuries, which, in turn, lead to distinct damages. Since a finder of fact can still award Appellants monetary damages for these specific injuries it follows that these claims are not moot.

In general, "[a] case becomes moot only when it is *impossible* for a court to grant *any* effectual relief." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *Erie v. Pap's A. M.,* 529 U.S. 277, 287 (2000)) (emphasis added). Accordingly, "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (citing *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)).

While both the ATS and the TVPA permit claims for torture and extrajudicial killing, the ATS is broader in scope and covers claims for: (1) crimes against humanity; (2) arbitrary detention; and (3) cruel, inhuman, degrading treatment, or punishment. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.* 416 F.3d 1242,

1246-52 (11th Cir. 2005) (recognizing that ATS and TVPA claims are not duplicative). These claims are unavailable under the TVPA.

Appellants' ATS claims are distinct torts that cause distinct injuries. Indeed, crimes against humanity are recognized as "distinct from their predicate criminal acts" and cause "unique harm to their victims and beyond." *See* Brief of Amici Curiae Ambassadors Stephen J. Rapp and David J. Scheffer, at 3.

Appellants have a "concrete interest" in adjudicating their ATS claims not only because they concern distinct torts and unique harms, but also because they can give rise to unique damages above and beyond those awarded on TVPA claims in the same case. Indeed, this is exactly what has transpired with trials in which both ATS and TVPA claims were advanced in district courts in this Circuit. *See, e.g.*, *Jean v. Dorélien*, No. 03-20161, Doc. 152 (S.D. Fla.) (jury awarded $900,000 for extrajudicial killing and $600,000 for crimes against humanity to relatives of Michel Pierre; $1,000,000 for torture, $500,000 for arbitrary detention and $500,000 for crimes against humanity to Lexiuste Cajuste); *Cabello v. Fernandez-Larios*, No. 99-0528, 2003 WL 26047259 (S.D. Fla.), *aff'd*, 402 F.3d 1148, 1161 (11th Cir. 2005) (jury awarded $2,000,000 for extrajudicial killing and $1,000,000 for crimes against humanity to estate of Winston Cabello).

As significantly, Amicus "confuses mootness with merits," asserting arguments that "go [] to the legal availability of a certain kind of relief" instead of

whether such relief would be effectual. *See Chafin*, 568 U.S. at 174 ("[P]rospects of success … are not pertinent to the mootness inquiry."). At issue here are monetary relief claims for past wrongs, which "[c]ourts have traditionally treated ... differently than injunctive relief claims for the purposes of mootness challenges." *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997).

Damages claims generally do not become moot because, unlike specific or injunctive remedies, a court's ability to award damages if warranted on the merits is usually not impacted by changed circumstances. *See* 13C Charles Alan Wright et al., Federal Practice & Procedure 3533.3 (3d ed. 2015) ("Claims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable.").[2] Here, there is no mootness issue because there is no question that the

[2] Indeed, Amicus cites no cases in which a monetary damages claim was found moot, *see* Amicus Br. at 19-22, and those it cites are inapposite. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-80 (1990) (challenge to statute's constitutionality mooted by change in law); *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332-35 (11th Cir. 2005) (similar); *Coral Springs Street Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1327-33 (11th Cir. 2004) (similar); *De La Teja v. U.S.*, 321 F.3d 1357, 1360-64 (11th Cir. 2003) (challenge to pre-removal detention mooted by removal order); *Brooks v. Georgia State Bd. Of Elections*, 59 F.3d 1114, 1118-19 (11th Cir. 1995) (district court's refusal to approve settlement agreement mooted by expiry of deadlines therein); *cf. Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (congressional member-elect's challenge to congressional resolution withholding his congressional seat remained a live controversy even after he was seated because he had also asserted a monetary damages claim for back pay).

finder of fact could grant further monetary relief if at trial Appellants prove they are so entitled.

Comparably, the standard Amicus seeks to create—namely, that once money damages are awarded on a claim, a court must enter a jurisdictional dismissal on all other claims that could be predicated on the same conduct or proven by "largely overlap[ping] evidence" Amicus Br. at 21, would be unprecedented. It enjoys no support beyond Amicus's own assertions. Giving effect to this argument would be an unprecedented expansion of the mootness doctrine, which this Court should reject.

II. Subject Matter Jurisdiction is Proper Under *Kiobel* and *Drummond*

A. Subject Matter Jurisdiction is Proper Under *Kiobel*

In defending the District Court dismissal, Amicus claims that the "trial court properly dismissed Appellants' ATS claims for lack of subject matter jurisdiction." Amicus Br. at 16. Amicus is incorrect; subject matter jurisdiction over Appellants' ATS claims is proper under the tests established in *Kiobel* and *Drummond*.

In *Kiobel*, the Supreme Court introduced a displaceable presumption against the extraterritorial application of claims under the ATS where such claims arise within the territory of a foreign sovereign. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). This presumption can be overcome where such

extraterritorial torts "touch and concern" the United States "with sufficient force." *Id*.

In assessing whether a claim meets this test, *Kiobel* instructs lower courts to use the principles underlying the presumption against exterritorial application as a guide. These principles include, protecting against "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). *Kiobel* further requires lower courts to consider the nationality and residency of the defendant as well as the availability of other fora. 133 S. Ct. at 1669.

B. *Kiobel* does not Categorically Bar Claims Arising from Tortious Conduct Taking Place Outside the United States, as Amicus Contends

Amicus misconstrues the "touch and concern" test by claiming that *Kiobel* bars all ATS claims arising from "tortious conduct taking place entirely outside of the United States." *See* Amicus Br. at 11. This view is not supported by *Kiobel* which rejects such a restrictive and inflexible standard. In fact, the two justices in *Kiobel* espousing this view (Justice Alito and Justice Thomas), wrote a separate opinion precisely because the majority had rejected this "broader standard." *See* 133 S. Ct. at 1670 (Alito J., concurring). The remainder of the Supreme Court

endorsed a case-specific factual inquiry into whether the *claim*—not solely the tortious conduct—has a sufficient connection to the United States. *See generally* 133 S. Ct. 1659.

Kiobel made clear that ATS claims may still overcome the presumption even where the underlying tort was committed abroad, intentionally leaving open the question of whether the presumption could be displaced under different circumstances. *Id*. As Justice Kennedy observed, the majority was "careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]," remarking that in future cases involving "human rights abuses committed abroad," the reasoning of *Kiobel* may not even apply. *Id.* at 1669 (Kennedy, J., concurring).

Amicus concedes that the only question the Supreme Court definitively resolved in *Kiobel* was whether "mere corporate presence" would suffice to overcome the presumption. Amicus Br. at 11. While "mere corporate presence" was found insufficient, the Supreme Court left unanswered the question of what other non-tortious factors—such as the U.S. citizenship of the defendant—touch and concern the United States. Furthermore, as noted in Justice Breyer's concurrence, extraterritorial conduct may also "substantially and adversely" impact U.S. national interests, weighing in favor of displacement. *Id.* at 1671 (Breyer, J., concurring). This is entirely inconsistent with Amicus's contention that the presumption can be

displaced only where the tortious conduct occurs in the United States. *See* Amicus Br. at 11.

C. *Kiobel* Did Not Overturn the *Filartiga* Line of Cases

Amicus speculates, without citing any binding case law, that *Kiobel* overturned *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) and its progeny. *See* Amicus Br. at 12. As discussed at length in Appellants' Opening Brief, since *Filartiga* was decided in 1980, and especially since it was approvingly cited by the Supreme Court in *Sosa v. Alvarez*, 542 U.S. 692 (2004), circuit courts and the Supreme Court have continuously upheld subject matter jurisdiction over natural persons who have committed human right abuses abroad before coming to the United States. *See* Opening Br. at 16-17; *Filartiga*, 630 F.2d at 890; *Sosa*, 542 U.S. at 725; *see also, e.g., Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (citing with approval *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009)); *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010); *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005).

In *Sosa v. Alvarez*, the first Supreme Court case to directly address the ATS, the Supreme Court affirmed the appropriateness of subject matter jurisdiction over ATS claims arising out of solely exterritorial conduct by analyzing the merits of plaintiff's international law claims. *See* 542 U.S. at 729. In so doing, the Supreme Court relied on *Filartiga* and another important circuit court case, *In re Estate of*

Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), both of which involved individual defendants who committed human rights abuses abroad. *Id.*

In *Kiobel* the Supreme Court reaffirmed *Sosa* without distinguishing, much less overturning, *Filartiga* or any other "safe harbor" individual defendant case. *See* 133 S. Ct. at 1663. Indeed, Justice Breyer's concurrence notes that *Sosa*'s reliance on *Filartiga* and *Marcos*, both of which involved defendants residing in the United States who had fled their home countries, suggests "that the ATS allowed a claim for relief in such circumstances." *Id.* at 1675 (Breyer, J., concurring). At oral argument, Justice Kennedy further noted that *Filartiga* is a "binding and important precedent for the Second Circuit." Transcript of Oral Argument at 13:21-23, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). If the Supreme Court had intended to overturn this important and long-standing line of cases, it would have made that clear in *Kiobel*, which it did not do.

The Eleventh Circuit has also adopted this approach. In *Doe v. Drummond Co.*, this Court stressed the "narrow holding" of *Kiobel* and declined the opportunity to overturn its own important *Filartiga* line of precedents. *See* 782 F.3d 576, 585 (11th Cir. 2015); *see also Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Cabello*, 402 F.3d 1148; *Jean*, 431 F.3d 776; *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996). Instead, in *Drummond* this Court relied on both *Sosa* and *Filartiga*. *See* 782 F.3d at 606 n.8.

D. ATS Subject Matter Jurisdiction in this Case is Proper Under *Drummond*

The Eleventh Circuit has already rejected Amicus's argument that *Kiobel* imposes a categorical bar on ATS claims premised on extraterritorial conduct. As the Court noted "it would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct." *Drummond*, 782 F.3d at 593 n.24 (emphasis in original). Moreover this Court emphasized in *Drummond* that "some relevant aspects of the claim" will be deemed to concern the United States where the defendant is a U.S. citizen. *Id.* at 586 n.12 (noting that "[a]ll plaintiffs pursing claims under the ATS will be foreign nationals; however, the citizenship or corporate status of the defendant and the location or impact of relevant conduct may provide a key distinction from *Kiobel*."). The determination of whether "claims have a U.S. focus and adequate relevant conduct occurs within the United States," requires a "fact intensive inquiry." *Id.* at 592.

In arguing that Appellants' ATS claims do not meet this standard, Amicus misinterprets both "claims" and "focus." First, Amicus contends that "claim" and "relevant conduct" refer only to the underlying tort. Amicus Br. at 14. This is incorrect: 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, 524 (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 the 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.").

This Court in *Drummond* clearly employed this accepted definition of claim. If only tortious conduct were relevant, the Court would not have highlighted non-tortious "relevant" parts of the claim, such as the defendant's citizenship, and drawn a distinction between the claims and "the events underlying the claim." *See* 782 F.3d 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.").

Second, the "focus" test introduced in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) is inapposite here. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (noting "since the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms."). That test was not adopted by the majority in *Kiobel*,[3] or by the Eleventh Circuit. As Amicus correctly notes, the Eleventh Circuit's test "amalgamates" the focus test with

[3] The only mention of the "focus test" in *Kiobel* is in Justice Alito's concurrence. *See* 133 S. Ct. at 1670 (Alito, J., concurring). Justice Alito notes he wrote separately to set out this broader standard, which was not adopted by the majority. *Id.*

Kiobel's touch and concern test, resulting in the guidance described above. Amicus Br. at 13. This standard has not changed in light of *RJR Nabisco, Inc. v. European Cmty.*, the Supreme Court's most recent articulation of the focus test. *See* 136 S. Ct. 2090 (2016) (making no inquiry into the sources of jurisdiction for the claims at issue). *Nabisco*, like *Morrison* before it, interpreted the Congressional intent underpinning conduct-regulating statutes. *See id.*; *see also Morrison*, 561 U.S. 247. To the extent *Nabisco* can be read to endorse the *Morrison* focus test for ATS claims—a test the *Kiobel* majority did not adopt—it is through mere *obiter dicta* that is not binding on this Court. *See, e.g., Shalala v. Schaefer*, 509 U.S. 292 (1993) (finding *dicta* in prior Supreme Court case not controlling on outcome of later case).

III. The Cases Amicus Relies on Can Be Meaningfully Distinguished

A. Natural Person Defendants are Different from Corporate Defendants

Amicus claims that "nothing in the jurisdictional inquiry set out in *Kiobel* and *Drummond Co.* required a different result in this case where the defendant is an individual instead of a corporation." Amicus Br. at 16. Amicus's contention misses the point as it fails to consider inherent differences between corporations and natural persons.

Kiobel, and all cases considered by this Court after *Kiobel*, are distinguishable. In those cases, the Supreme Court and the Eleventh Circuit

considered whether ATS claims alleged against multinational corporate defendants "touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application." *See Kiobel*, 133 S. Ct. at 1699; *Baloco v. Drummond Co. (Baloco II)*, 767 F.3d 1229, 1233 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015); *Drummond*, 782 F.3d at 580; *In re Chiquita Brands Intern., Inc.*, 690 F. Supp. 2d. 1296, 1299 (S.D. Fla. 2010). Though instructive, none of these cases considered allegations involving a U.S. citizen and long-standing resident natural person who directly committed human rights violations or used the U.S. as a safe harbor.

In these corporate defendant cases, the lynchpin of the plaintiffs' jurisdictional case was the allegation that the defendant multinational corporation had a United States presence. However, as explained in *Kiobel* "[c]orporations are often present in many countries, and it would reach too far to say that [Dutch Petroleum Corporation's] mere corporate presence suffices" for purposes of establishing ATS jurisdiction. 133 S. Ct. at 1671. This Court echoed that view in *Drummond* noting that "plaintiffs could not simply 'anchor ATS jurisdiction in the nature of the defendants as United States corporations.'" *Drummond*, 782 F.3d at 589 (citing *Cardona v. Chiquita Brands Intern., Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014)).

On issues of nationality and presence, there are inherent differences between a corporation and a natural person. Corporations can have a "mere corporate

presence" in the United States and simultaneously be "present in many countries" at any given time. *Kiobel*, 133 S. Ct. at 1669. In contrast, a natural person's presence is singular. Justice Kennedy noted this key distinction between *Sosa* and *Kiobel* observing that in *Sosa* "the only place," plaintiffs could sue "was in the United States.... In this case, the corporations have residences and presence in many other countries where they have much more—many more contacts than here." Transcript of Oral Argument at 13:21-23, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

B. Defendant's use of the United States as a Safe Harbor Distinguishes this Case from *Kiobel* and post-*Kiobel* Eleventh Circuit Jurisprudence

None of the defendants in the cases discussed above used the United States as a "safe harbor." In this case, however, Defendant's presence in the United States implicates the "distinct American interest" in not "providing a safe harbor for" torturers. *See Kiobel*, 133 S. Ct. at 1671 (citing *Sosa*, 542 U.S. at 732 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.") (quoting *Filartiga*, 630 F.2d at 890 (alteration in original))) (Breyer, J., concurring).[4] This interest is

[4] Importantly, four justices in *Kiobel* accepted that the use of the U.S. as a safe harbor by a defendant would constitute a U.S. interest sufficient to displace the presumption against extraterritoriality. *See* 133 S. Ct. at 1670-1678 (Breyer, J., concurring, (joined by Justices Ginsburg, Sotomayor and Kagan)). In addition, a fifth justice noted that *Kiobel* was "careful to leave open a number of significant questions regarding the reach and interpretation" of the ATS and that the "proper implementation of the presumption against extraterritoriality may require some

further heightened where, as here, the person is a U.S. citizen and long-standing resident. *See* Brief of Amici Curiae Legal Historians, at 4 (noting that "under the law of nations, if a sovereign did not remedy wrongs committed by its 'subjects,' it risked becoming an accomplice in the wrongs, which could lead to international discord and strife.").

Amicus's assertion that Defendant no longer has "safe harbor" in the United States because Appellants have prevailed on their TVPA claims is unavailing. As discussed above, Defendant was held accountable for only a portion of the international violations for which he is responsible. Moreover, Amicus's argument is premised on assumptions that were not known at the time the District Court decided this issue. At the procedural stage relevant to this appeal, when Appellants' ATS claims were dismissed, there was no guarantee that their TVPA claims would even survive to trial, nonetheless succeed.

C. *Warfaa v. Ali* Is Neither Controlling Nor Instructive in this Case

In an attempt to minimize these crucial differences, Amicus draws a misguided parallel between this case and the Fourth Circuit's decision in *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. 2016). *See* Amicus Br. at 16-17. *Warfaa* is not analogous to this case. First, the defendant in *Warfaa* was not a U.S. citizen and, according to

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further elaboration and explanation" in future cases. *Id*. at 1669 (Kennedy, J., concurring).

the Fourth Circuit Court of Appeals, the defendant's presence in the United States was "mere happenstance." *Id.* at 660-61. As discussed above, U.S. citizenship of a defendant is a significant relevant factor in the Eleventh Circuit's test. *See Drummond*, 782 F.3d at 586 ("when an ATS claim involves a U.S. Citizen defendant ... the courts must engage in further analysis"); *see also Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (noting he "would find jurisdiction under this statute where ... the defendant is an American national"). Second, the majority in *Warfaa* specifically found that the plaintiffs had not alleged that the defendant had sought "safe haven" in the United States. *See* 811 F.3d at 661 n.9.

In contrast, the record in this case compiled during discovery shows Defendant sought safe harbor in the United States following his commission of atrocities in Chile and the loss of the protection from prosecution in Chile. *See* Doc. 63 ¶ 42; Doc. 111 ¶ 41; Barrientos Dep. Tr., Nov. 10, 2015, at 271-72. Additionally, Defendant applied for and gained U.S. citizenship through admitted misrepresentations shortly after he became aware that he was a person of interest, in Chile, for the torture and death of Víctor Jara. Barrientos Dep. Tr. at 271-88. In doing so, Defendant lied about his service in the Chilean military and his involvement in the 1973 Chilean Coup. *See* Opening Br. at 41-42. Moreover, in light of a pending criminal case in Chile, and corresponding pending extradition request, Defendant has maintained that he "simply will not" travel back to Chile.

See Doc. 84-1 at 32; Barrientos Dep. Tr. at 239-400. Accordingly, unlike the defendant in *Warfaa*, Defendant is using his presence in the United States and his U.S. citizenship as a safe harbor.

IV. Appellants' ATS Claims Touch and Concern the United States

The "narrow holding" of *Kiobel* left open the possibility that "other cases may arise with allegations of serious violation of international law principles protecting persons" that are not covered "by [Kiobel's] reasoning and holding." *See Drummond*, 782 F.3d at 585, 600-601 (quoting *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring)). Instances involving a U.S. citizen who is using the United States as a safe harbor to avoid accountability in a foreign country, falls squarely within one of those "other cases." *Id.*

Accordingly, this Court should permit ATS subject matter jurisdiction where, as here, "the defendant is an American national, or [] 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." *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

Such a finding would be consistent with the *Filartiga* line of cases involving natural person defendants. In *Filartiga*, an alien plaintiff brought ATS claims against a foreign natural person for damages suffered through acts of torture in a

foreign state. 630 F.2d at 876. Like *Filartiga*, this case involves a natural person defendant who committed human rights violations in a foreign state. As a U.S. citizen and long-term resident, Defendant has even stronger ties to the United States than the defendant in *Filartiga*, who was present in the United States only as an undocumented alien and subject to deportation at the time of the suit. *See id.* at 878-79.

Plaintiffs' ATS claims deeply touch and concern the United States, including through relevant conduct in the United States:

(1) Defendant has lived and maintained his residence in the United States for decades. Doc. 63 ¶¶ 10-12; Doc. 111 ¶¶ 9-11.

(2) Defendant purposefully availed himself of U.S. residency just when his cloak of protection—the dictatorship of Pinochet—was coming to an end. Doc. 63 ¶ 42; Doc. 111 ¶ 41; *see also* Barrientos Dep. Tr. at 271-72. In seeking residence, Defendant denied having any role in the overthrow of a democratic government—a lie. *See* Barrientos Dep. Tr. at 284.

(3) Then, after almost twenty years of residing in the United States, when allegations emerged that Defendant was Mr. Jara's killer, Defendant applied for and received U.S. citizenship, *once again* making material misrepresentations to U.S. authorities. *See id.* at 271-288.

> (4) Chile requested that the U.S. extradite Barrientos so that he could stand criminal trial in Chile. Doc. 48 at 3. In response to these charges, Defendant has defiantly stated that in order to avoid Chilean legal process, he "simply will not" travel back to Chile, and that instead he will remain in the United States. Doc. 84-1 at 32; Barrientos Dep. Tr. at 239-400. 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.

Thus, Defendant is using his U.S. citizenship and his residence in the U.S. to insulate himself from criminal liability in Chile, making the United States a central concern, indeed, a *focus*, of Appellants' ATS claims.

In addition, the principles underlying the ATS further support displacement of the *Kiobel* presumption. The United States has a strong foreign policy interest in allowing ATS claims, such as Appellants', to be heard in U.S. courts where the defendant resides in the United States. This interest is stronger still where the defendant has become a citizen and is using this country as a safe harbor from prosecution. *See* Supp. Br. for the United States as Amicus Curiae, *Kiobel*, 133 S. Ct. 1659 (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); Mem. for the United States as Amicus Curiae, *Filartiga*, 630 F.2d 876

(No. 79-6090), 1980 WL 340146, at *22-23. ("[T]here is little danger that judicial enforcement [of ATS claims] will impair our foreign policy efforts").

Indeed, Chile, the only other country with an interest in holding Defendant accountable, has submitted an amicus curiae brief in this proceeding stating "[t]he Ministry of Foreign Affairs has no objection to the exercise of jurisdiction by a U.S. court over the specific claims brought by the family and estate of Víctor Jara under the ATS … the action brought by the Plaintiffs is important to Chile's substantial interest in ensuring that the victims of human rights violations committed under the Pinochet regime have access to pursing accountability for the perpetrators of those acts." Amicus Brief Legal Affairs Directorate of Chile, at 5. Thus, dismissal of Appellants' ATS claims here could actually constitute "judicial interference in the conduct of foreign policy" and cause the sort of "international discord" the *Kiobel* Court sought to avoid. *See* 133 S. Ct. at 1664.

These factors are highly relevant and, in the aggregate, weigh heavily in favor of finding that Appellants' ATS claims sufficient touch and concern the territory of the United States.

Neither the District Court nor Amicus adequately considered these multiple relevant factors in the aggregate, focusing instead on whether Defendants' citizenship alone sufficed. Nor did either engage with *Kiobel*'s instruction that courts be guided by the principles underlying the presumption. In fact, Amicus

ignored entirely Appellants' arguments that these principles favor recognizing an ATS claim in this case. *See* Opening Br. at 25, 34-39. This analysis does not satisfy the "fact-intensive" inquiry required by the Eleventh Circuit.

V. The District Court's Dismissal "With Prejudice" Was An Error

Because the District Court dismissed Appellants' ATS claims for failure to invoke its subject matter jurisdiction in error, it was also an error to dismiss them with prejudice. *Penaloza v. Drummond, Inc.*, 662 Fed. App'x 673, 678 (11th Cir. 2016); *see also* Fed. R. Civ. P. 12(b)(1). Accordingly, if the Court were to find that the dismissal of these claims was error but that the Amended Complaint contains insufficient facts to permit jurisdiction, it should remand this case with instructions that any dismissal be entered without prejudice.

To the extent the Court finds ATS subject matter jurisdiction can be exercised over natural persons who committed human rights abuses overseas before seeking safe harbor in the United States, but that the allegations in the Amended Complaint are insufficient to make this showing, Appellants also request an opportunity to amend their complaint to plead additional facts—including certain facts elicited in discovery—that support the District Court's subject matter jurisdiction. *See, e.g.*, Barrientos Dep. Tr.; Doc. 84-1.[5]

[5] The District Court's dismissal of the ATS claim with prejudice denied Appellants an opportunity to conform the complaint to facts revealed during discovery and evidence adduced at trial.

CONCLUSION

For the reasons discussed herein, Appellants respectfully request that this Court reverse the District Court's ruling and reinstate their ATS claims, or in the alternative, remand the case with directions that the District Court conduct the fact-intensive inquiry required, or in the alternative, remand the case with directions that the order be entered without prejudice and that Appellants be given an opportunity to amend their complaint.

Dated this 18th day of September, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This motion complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because the motion (as indicated by word processing program Microsoft Word) contains 5,379 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 for PC in 14-point Times New Roman.

Dated this 18th day of September, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 18, 2017, I electronically filed the foregoing via this Court's CM/ECF system, which automatically sends an electronic notification to all counsel of record.

Dated this 18th day of September, 2017

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