No. 13-15503-FF

IN THE

United States Court of Appeals For the Eleventh Circuit

JANE DOE, PETER DOE, CLAUDIA BALCERO GIRALDO, CHRISTIAN A. ROCA BALCERO, SEBASTIAN J. ROCA BALCERO, PAULINA CECILIA GUTIERREZ MEJIA (ON BEHALF OF HERSELF AND THE ESTATE OF HUGO ALBERTO QUINTERO SOLANO), HUGO ALBERTO QUINTERO GUTIERREZ, AND ALL OTHER SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

DRUMMOND COMPANY, INC., AUGUSTO JIMENEZ, PRESIDENT OF DLTD, DRUMMOND CO., INC., DRUMMOND LTD., MIKE TRACY, JAMES ATKINS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF *AMICI CURIAE* DOLLY FILÁRTIGA, ABUKAR HASSAN AHMED, DR. JUAN ROMAGOZA ARCE, ALDO CABELLO, ZITA CABELLO, AZIZ MOHAMED DERIA, CARLOS MAURICIO, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ, AND BASHE ABDI YOUSUF FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE* AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Counsel for *Amici Curiae* certify that no *Amicus* represented by counsel is a corporation.

Further, pursuant to Eleventh Circuit Rule 26-1.1, counsel for *Amici Curiae* hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons filed by Appellees Drummond Co., Inc., *et al*., on January 17, 2014; the Certificate of Interested Persons filed by Appellee James L. Atkins on January 21, 2014; and the Amended Certificate of Interested Persons filed by Appellants Giraldo, *et al.*, on March 14, 2014, and adding the following:

Amici Curiae

Ahmed, Abukar Hassan

Arce, Dr. Juan Romagoza

Cabello, Aldo

Cabello, Zita

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TABLE OF AUTHORITIES

Cases

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief of *Amici Curiae* is respectfully submitted pursuant to Rule 29, Federal Rules of Appellate Procedure, in support of Plaintiffs-Appellants. *Amici* Dolly Filártiga, Abukar Hassan Ahmed, Dr. Juan Romagoza Arce, Aldo Cabello, Zita Cabello, Aziz Mohamed Deria, Carlos Mauricio, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi Yousuf are survivors of human rights abuses committed overseas who won lawsuits under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1992) ("TVPA") against the individuals responsible for their abuse.[1]

This case will determine whether survivors such as *Amici* can continue to pursue ATS claims within this Circuit for atrocities committed abroad. In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the United States Supreme Court held that such claims are actionable if they touch and concern the United States with sufficient force to displace the presumption against extraterritoriality. Having held their tormentors accountable in U.S. courts for war crimes, crimes against humanity, and other violations of international law, *Amici* are uniquely

[1] No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, or any other person or entity other than *Amici* and *Amici*'s counsel, made a monetary contribution intended to fund its preparation or submission. *Amici* are applying simultaneously herewith for leave of Court to file, pursuant to Federal Rule of Appellate Procedure 29(a).

qualified to speak on how claims for human rights abuses that occurred elsewhere nevertheless "touch and concern" the United States.

STATEMENT OF ISSUES

Amici herein present argument on the legal standards governing whether a claim under the Alien Tort Statute involving foreign conduct touches and concerns the United States with sufficient force to displace the presumption against extraterritoriality.

SUMMARY OF ARGUMENT

For over three decades, and in each case brought by *Amici*, federal courts have affirmed their power to hear ATS claims against U.S. residents and aliens present in the United States who are accused of violating human rights abroad. This line of authority remains intact. *Kiobel* does not impose a bright-line rule against all ATS claims involving conduct outside this country. Rather, it references a presumption against the extraterritorial application of U.S. law, which may be overcome when claims "touch and concern" the United States. Whether the presumption is ousted in any given case requires a full factual analysis.

Specifically, *Kiobel* requires that a trial court confronted with an ATS claim review two questions: first, whether the claim is in fact based on conduct that took place abroad, and second, if the answer is affirmative and the presumption against

extraterritoriality is triggered, whether the presumption is displaced by the aggregate of facts that "touch and concern" the United States.

In this case, the district court badly misread the *Kiobel* holding. It understood the Supreme Court in *Kiobel* to have established not a displaceable presumption but a fixed rule barring courts from considering ATS actions brought by aliens, in tort only, alleging violations of the law of nations, if those alleged violations occurred in the territory of other nations.

Having found that the challenged conduct in fact occurred in Colombia, the trial court went no further. It failed to conduct the full factual inquiry required to determine whether the presumption against extraterritoriality is displaced. In particular, it did not consider Defendants' residence, nationality, or other ties to the United States.

In effect, the court below treated the *Kiobel* concurrence written by Justice Alito on behalf of himself and Justice Thomas as if it had been the opinion of the Court. The concurrence would have barred **all** ATS claims alleging conduct on foreign soil: a bar that cannot be squared with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and dozens of later cases, including those in which *Amici* participated as plaintiffs. These cases were, however, by no means overruled by the Supreme Court in *Kiobel*, and they remain good law.

Properly read, the narrow holding of *Kiobel* does not condemn the ATS to oblivion. It permits certain ATS claims to proceed. First, the presumption against extraterritoriality is overcome when the defendant is a U.S. resident: the United States has long demonstrated an interest in denying safe haven to human rights abusers. Second, ATS claims may proceed when no alternative forum is available: absent competing claims of jurisdiction, there is less risk of international discord. Finally, ATS claims may be heard when they arise from the same set of facts as other claims properly before the court on their own merit.

In short, the district court's categorical bar would short-circuit the Supreme Court's framework for addressing ATS cases, and would substitute an approach that did not attract the votes of a majority of the Justices. Were it generalized, it would have barred most ATS suits brought in the past 30 years, including those in which *Amici* and hundreds of other victims of human rights abuses found their abusers here in this country, taking advantages of the protection of our laws, yet claiming immunity from the scrutiny of our courts.

ARGUMENT

I. *KIOBEL* DOES NOT LIMIT ALIEN TORT STATUTE CLAIMS TO VIOLATIONS OF INTERNATIONAL LAW OCCURRING WITHIN THE UNITED STATES.

A. *Sosa* and *Kiobel* Create a Framework for Recognizing Causes of Action under the ATS.

The Supreme Court has twice offered guidance on the scope of the Alien Tort Statute, 28 U.S.C. § 1350, and on both occasions left the courthouse door "ajar" to certain claims involving foreign conduct. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Read together, *Sosa* and *Kiobel* determine when courts may adjudicate claims of human rights abuses committed abroad under the ATS. To be actionable, such a claim must **both** (1) rest on the violation of an international norm that is "specific, universal, and obligatory" and comparable to the 18th century paradigms familiar to the framers (*Sosa*, 542 U.S. at 724, 732); **and** (2) "touch and concern" the United States "with sufficient force" to "displace" the presumption against extraterritoriality (*Kiobel*, 133 S. Ct. at 1669).

Neither *Sosa* nor *Kiobel* categorically bars ATS claims based on conduct abroad. In *Sosa*, one Mexican citizen sued another for acts committed in Mexico, putting the issue of extraterritoriality squarely before the Court. 542 U.S. at 698–99. Yet *Sosa* did not impose an absolute territorial bar on ATS claims, even while dismissing claims under the Federal Tort Claims Act precisely because they

occurred outside the United States. *Id*. Indeed, *Sosa*'s lengthy merits analysis of the ATS claim before the Court would have been superfluous if the location *ipso facto* precluded further consideration.

Kiobel endorsed *Sosa* and kept the courthouse door open, identifying a **displaceable** presumption against ATS claims arising outside the United States. 133 S. Ct. at 1664. The presumption discussed in *Kiobel* is distinct from the broader canon of statutory construction rejecting the extraterritorial application of U.S. laws. That rule of interpretation typically applies only to statutes that regulate conduct, whereas the ATS is "strictly jurisdictional." *Id.* (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010)). Regulatory statutes should not be read as prohibiting or sanctioning foreign conduct unless Congress expressly extended their reach. *See, e.g.*, *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

In *Kiobel*, however, it is the "principles underlying" the presumption against extraterritoriality, not the canon of statutory construction itself, that "constrain courts considering causes of action that may be brought under the ATS." 133 S. Ct. at 1664. Those principles include avoiding judicial interference in international relations, risking "foreign policy consequences not clearly intended by the political branches." *Id.*

The *Kiobel* presumption limits a court's power to craft implied rights of action for specific violations of international law. As a result, whether the presumption applies or is displaced turns on a case-specific, factual inquiry, not on statutory interpretation: "the question is not what Congress has done but instead what courts may do." *Id.* at 1669.

Although the *Kiobel* Court found nothing in the text or history of the ATS to rebut the presumption against extraterritoriality, this does not end the analysis. *Id*. Instead, courts must determine whether the "claims" – not just the conduct at issue – "touch and the concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality." *Id.*

The facts of *Kiobel* were insufficient to overcome the presumption. There, Nigerian plaintiffs had sued British and Dutch parent companies in New York for their subsidiaries' acts allegedly abetting Nigerian military abuses in Nigeria. *Id.* at 1662-63. The sole tie between those defendants and U.S. territory was their corporate presence in a New York investor-relations office, owned by a separate company and playing no role in the alleged violations. *Id.* at 1677-78 (Breyer, J., concurring).

Noting first that "all the relevant conduct took place outside the United States," the Court then considered the extent of the defendants' ties to this country. *Id.* at 1669. The corporate defendants were amenable to suit in other nations, and

the Court held that "it would reach too far to say that mere corporate presence suffices" to displace the presumption. *Id.*

But this narrow holding still permits ATS claims that present stronger ties to the United States. All three concurrences – representing the views of seven justices – noted that the Court's holding was limited and "leaves much unanswered." *Id.* (Alito, J., concurring); *id.* (Kennedy, J., concurring). The Court left "for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Id.* at 1673 (Breyer, J., concurring).

This case presents that very issue. As lower courts apply *Kiobel* to new factual settings, it is vital that they apply the correct legal standard: the remedial rights of victims of atrocities depend upon it.

B. *Kiobel* Required the Court Below to Assess Whether the Claims "Touch and Concern" the United States.

The *Kiobel* opinion guides courts in determining whether and when an ATS claim displaces the presumption against extraterritoriality. *Kiobel* prescribes a clear, two-step approach: (1) first, to determine whether the conduct giving rise to the claims was "foreign," and hence whether the presumption against extraterritoriality was triggered;[2] (2) if so, then to adjudge whether the presumption

[2] Obviously, applying U.S. law to conduct in the United States raises no issue of extraterritoriality. *See Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

is nevertheless displaced because the claim sufficiently "touches and concerns" the United States. *See* 133 S. Ct. at 1669 (finding first that the "relevant conduct" occurred abroad and once that was established considering whether other factors displaced the presumption).

While the Court did not list all the elements potentially relevant to this latter inquiry, it identified such factors as: (1) the defendant's nationality and residence, *id.* at 1663-64; *id.* at 1677-78 (Breyer, J., concurring); (2) the extent of the defendant's presence in U.S. territory, *id.* at 1669; and (3) the availability of alternative fora for suit, *id.*

Here, however, the district court failed to consider anything beyond the location of the challenged conduct. It performed, in other words, only the first part of the *Kiobel* analysis, and stopped there: "What then is 'enough,' such that the **conduct** in Colombia touches and concerns the United States with sufficient force?" *Giraldo v. Drummond Co., Inc.*, No. 2:09-CV-1041-RDP, 2013 WL 3873960 at *5. (N.D. Ala. July 25, 2013) (emphasis added).

But *Kiobel* did not ask whether the **conduct** at issue touches and concerns the United States: it asked whether the **claim** does. 133 S. Ct. at 1669. A claim involves far more than the conduct that lies at its core. It is the "aggregate of operative facts giving rise to a right enforceable by a court." *Black's Law Dictionary* 204 (abridged 8th ed. 2005). Here, the district court did not consider

the "aggregate of operative facts," or even all of the facts expressly limned in *Kiobel:* the defendant's nationality and residence, the extent of its presence, and the availability of alternative fora. Instead, it considered only the location of the conduct at issue. *See Giraldo*, 2013 WL 3873960 at *8.

The court below, therefore, did not do what the Supreme Court directed trial courts to do. Contenting itself with the conclusion that the acts complained of occurred outside the United States, the court granted summary judgment on the ATS claims. *Giraldo*, 2013 WL 3873960 at *8 (corporate defendants), 2013 WL 3873965 at *3 (individual defendants).

This truncated analysis was error. That the conduct at issue took place on the soil of a foreign sovereign establishes a presumption, but it is a displaceable one. The party bringing an ATS claim must have an opportunity to present argument and evidence to oust the presumption. This follows from even the most cursory reading of *Kiobel*: had the Supreme Court's decision turned solely on the location of the allegedly tortious conduct, there would have been no reason for the Court even to discuss the presumption, much less to consider whether it was displaced. *Kiobel* directed trial courts in such cases to assess specific factors to determine whether to recognize an ATS claim, notwithstanding the location where it arose.

Other courts have applied the Supreme Court's teaching in *Kiobel* correctly, finding that certain ATS claims based on foreign conduct **do** sufficiently touch and concern the United States. In *Ahmed v. Magan*, for example, the court held that the *Kiobel* presumption was overcome, even though the abuses at issue had occurred in Somalia, because the defendant was a resident of the United States. No. 2:10-CV-00342, 2013 WL 4479077 at *2 (S.D. Ohio Aug. 20, 2013). Another court observed that a U.S. national living "in the same city as [the] court" was on fair notice that he could be subject to ATS claims for conspiring to commit persecution in Uganda. *Sexual Minorities Uganda v. Lively*, No. 12-CV-30051-MAP, 2013 WL 4130756, at *14 (D. Mass. Aug. 14, 2013). In *Mwani v. bin Laden*, the court observed that although the terrorist attack on the U.S. embassy in Kenya was not committed on U.S. soil, it "touched and concerned" the United States because it threatened U.S. interests, and an ATS case against the alleged perpetrators could proceed. No. Civ.-A-99-125 (JMF), 2013 WL 2325166, at *4-5 (D.D.C. May 29, 2013).

In each of these cases, the trial courts performed the analysis dictated by the Supreme Court in *Kiobel*, considering whether the aggregate of operative facts overcame the presumption against extraterritoriality. In the case at Bar, the court below failed to do so. Accordingly, this Court should reverse and remand, with directions that the district court conduct the full factual inquiry that *Kiobel* requires.

C. Justice Alito's Proposed Categorical Bar of Foreign-Conduct Claims Was Not the Holding of the Court.

In *Kiobel*, only Justices Alito and Thomas would have required an ATS plaintiff to allege that the relevant tortious act in violation of international law took place in the United States. 133 S. Ct at 1670 (Alito, J., concurring). In their view, there is not a presumption against extraterritoriality: there is a rule against it. Once a "putative ATS cause of action [falls] within the scope of the presumption against extraterritoriality" because it involves foreign conduct, the claim is barred. *Id.*

The opinion of the Court in *Kiobel*, as well as the concurrences of other justices, rejected this bright line rule in favor of more flexible standards. *See id*. at 1669 (presumption can be displaced); *id*. (Kennedy, J., concurring) (noting that the Court was not addressing ATS claims for human rights abuses "covered neither by the TVPA nor by the reasoning and holding of [*Kiobel*]"); *id.* at 1670 (Breyer, J., concurring) (suggesting that foreign-conduct claims are actionable where the violation "substantially and adversely affects an important American national interest").

Yet here, the district court adopted Justice Alito's proposed "domestic conduct" test, insisting that ATS claims were actionable only "if the event on which the statute *focuses* did not occur abroad." *Giraldo*, 2013 WL 3873960 at *8 Since the alleged killings and war crimes occurred in Colombia, the court barred

the claims without any consideration of evidence presented by Plaintiffs to overcome the presumption. *Id.*

This was error. Nothing in the *Kiobel* opinion suggests that the location of the challenged conduct is dispositive. On the contrary, the Court was quite clear that any interpretation of the ATS must not focus on **conduct**, since, as a "strictly jurisdictional" statute, the ATS "does not directly regulate conduct." 133 S. Ct. at 1664. *See also Sosa*, 124 S. Ct. at 2755 ("In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

Other courts have made the same error. *See, e.g.*, *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, ___ F. 3d ___, No. 09-4483-CV, 2014 WL 503037 at *5 (2d Cir. Feb. 10, 2014) (ignoring *Kiobel*'s "touch and concern" holding, and concluding that ATS claims based on foreign conduct are automatically barred); *Balintulo v. Daimler AG*, 727 F.3d 174,189–90 (2d Cir. 2013) (same); *Ben-Haim v. Neeman*, No. 13-1522, 2013 WL 5878913 at *2 (3d Cir. Nov. 4, 2013) (unpublished) (same).

These decisions depart from the clear lessons of the Supreme Court, and should not be followed. To the extent that they suggest a categorical bar on foreign-conduct claims without performing a full factual inquiry to determine

whether the presumption against extraterritoriality should be displaced, they are inconsistent with *Kiobel*. This Court should correct this misreading.

D. A Categorical Bar on Foreign-Conduct Claims Cannot Be Squared with *Filartiga* and *Sosa*, Which Remain Good Law.

Finally, barring all ATS claims involving foreign conduct would run counter to *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and its progeny – a line of authority that was expressly endorsed by the Supreme Court in *Sosa*, 542 U.S. at 731. This would slam the courthouse door in the faces of human rights abuse survivors such as *Amici*, even when their abusers are physically present in the United States.

The Supreme Court has repeatedly affirmed *Filártiga* and similar cases involving claims against individual defendants for human rights abuses committed abroad. In *Sosa*, the Court cited *Filártiga* and two other ATS cases with approval: *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (involving war crimes in Bosnia) and *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992) (involving torture in the Philippines). 542 U.S. at 731–33. All three cases involved claims for conduct committed overseas, "suggesting that the ATS allowed a claim for relief in such circumstances." *Kiobel*, 133 S. Ct at 1675 (Breyer, J., concurring).

Since *Sosa*, the Court has implicitly affirmed the availability of ATS claims against individual perpetrators found in the United States after committing

atrocities abroad. *See Mohammad v. Palestinian* Authority, 132 S. Ct. 1702, 1709 (2012) (citing *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (upholding ATS and TVPA claims against a naturalized U.S. citizen for abuses committed in El Salvador)); *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) (holding that the Foreign Sovereign Immunities Act did not bar ATS and TVPA claims against a green-card holder who had committed abuses in Somalia).

Kiobel, moreover, reaffirmed *Sosa* without distinguishing – much less overturning – *Filártiga*. 133 S. Ct. at 1661. At oral argument, Justice Kennedy was careful to note that *Filártiga* is a "binding and important precedent." Tr. of Oral Argument at 13:21–23, *Kiobel* (No. 10-1491) (Feb. 28, 2012).

Congress has agreed. It endorsed the *Filártiga* line of cases when it extended the right to U.S. citizens to bring similar claims under the TVPA,[3] signed into law by President George H.W. Bush in 1992. *See* S. Rep. No. 102-249, at 3–5 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)"); 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.").

[3] The Alien Tort Statute limits its coverage to "any civil action brought by an alien, in tort only, . . . " 28 U.S.C. § 1350.

For survivors, the importance of an ATS remedy is underscored by *Amica* Dolly Filártiga's case. In 1976, Dolly Filártiga's brother Joelito was kidnapped and tortured to death in Paraguay by Américo Norberto Peña-Irala, the Inspector General of Police of Asunción, in retaliation for his father's outspoken criticism of Paraguay's dictator, General Alfredo Stroessner. *Filártiga*, 630 F.2d at 878-79. The Filártigas vainly tried to seek justice in Paraguay. Upon discovering that her brother's torturer was residing in the United States, Dolly Filártiga and her father filed suit under the ATS and became the first to use the statute successfully to seek justice for human rights violations.

In a landmark decision, the Second Circuit recognized the Filártiga family's claims under the ATS. *Id.* at 878. The plaintiffs were able to demonstrate all three of the jurisdictional prerequisites of the statute: they were aliens, their action sounded "in tort only," and the torture that they alleged was a violation of the law of nations, even when committed by a foreign government official against a citizen of the same nation. Twenty-five years later, Ms. Filártiga warned that without the ATS, "torturers like Américo Peña-Irala would be able to travel freely in the United States." Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004, at A21.

Filártiga opened the courthouse door to claims such as those of the other *Amici*, and both *Sosa* and *Kiobel* kept that door open. Concurring in the *Kiobel*

judgment, Justice Breyer, joined by three other justices, found that the facts of *Filártiga* would overcome any presumption against extraterritoriality that might otherwise arise. Joelito Filártiga's torturer was residing in New York City. In *Kiobel*, by contrast, the corporate defendants had only a "minimal and indirect American presence" that did not implicate a distinct interest of this country, such as denying safe haven to an "'enemy of mankind.'" 133 S. Ct. at 1678 (Breyer, J., concurring).

Because it did not even consider the existence or the extent of a national interest in adjudicating ATS cases, the district court's misapplication of *Kiobel* – if affirmed – would foreclose ATS claims like those raised in *Filártiga*, and would exclude even suits against U.S. residents. *See id.* at 1669 (Kennedy, J., concurring) (noting that the *Kiobel* Court was "careful to leave open a number of questions regarding the reach and interpretation" of the ATS). The number of survivors who would, as a result, have been denied a day in court is startling.[4] This

[4] *See, e.g., Samantar v. Yousuf*, 130 S. Ct. 2278 (2010); *Ochoa Lizarbe v. Rondon*, 402 F. App'x 834 (4th Cir. 2010); *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009); *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013); *Jara v. Barrientos*, No. 6:13-cv-01426-RBD-GJK, 2013 WL 4771739 (M.D. Fla. 2013); *Ochoa Lizarbe v. Hurtado*, No. 07-21783-Civ-Jordan, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. Mar. 4, 2008); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal.

result can be avoided. The *Kiobel* presumption is, as the Supreme Court intended, displaceable. And trial courts must provide ATS plaintiffs the opportunity to show that the presumption should not apply on the facts of their claims.

II. THE ATS APPLIES TO ABUSES COMMITTED ABROAD IN CASES NOT COVERED BY THE "REASONING AND HOLDING" OF *KIOBEL*.

In a strong signal to lower courts, Justice Kennedy wrote separately to emphasize that the Court did not foreclose ATS claims for "human rights abuses committed abroad" in cases "covered neither by the TVPA nor by the reasoning and holding of" *Kiobel*. 133 S. Ct. at 1669 (Kennedy, J., concurring).

Amici's cases present three classes of claims not covered by *Kiobel*: (1) cases against U.S. residents and aliens who have come here seeking safe harbor for abuses they committed abroad; (2) cases where there is no alternative forum; and (3) cases where the ATS claims are intertwined with other viable extraterritorial claims. In each scenario, the ATS claims "touch" the United States to a degree not found in *Kiobel*, and they "concern" U.S. interests not before the Court in that case.

2004); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Reyes v. López Grijalba*, No. 02-22046-Civ-Lenard/Klein, 2002 WL 32961399 (S.D. Fla Jul. 12, 2002). In each of these cases, application of the holding of the Alabama district court would have denied jurisdiction, because the conduct at issue took place outside the United States. By no means is this list exhaustive.

A. ATS Claims May Proceed Against U.S. Residents and Aliens Seeking Refuge from Liability for Their Abuses.

ATS claims against U.S. residents and aliens who violate human rights abroad vindicate a longstanding interest of the United States: preventing this country from becoming a safe harbor for violators of international law.

The Founders' generation understood that they had extended federal court jurisdiction under the ATS to violations of international law committed overseas. Writing in 1795 – just six years after the enactment of the Judiciary Act of which the ATS was section nine – Attorney General William Bradford observed that the statute permitted federal suits against U.S. nationals who had aided and abetted a French attack on British Sierra Leone. *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795).[5] Under such circumstances, ATS jurisdiction was necessary to preserve the foreign policy of the fledgling nation. Providing safe harbor to violators of international law, and not offering a judicial remedy to their alleged victims, risked the reprisal of other nations, and could make the sheltering state "an accomplice in the injury." Emmerich de Vattel, *Law of Nations*, bk. 2, ch. 6, § 77 (1758).

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[5] [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a **civil** suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations . . . .

1 Op. Att'y Gen. 57, 59 (1795) (emphasis added).

This was equally true when the violations were committed by "foreigners, who afterwards take refuge in [a sovereign's] territories." T. Rutherforth, *Institutes of Natural Law*, bk. 2, ch. 9, § 12 (1832); *accord Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (noting that international norms impose a "duty not to permit a nation to become a safe harbor for pirates (or their equivalent)").

The same is true today: all three branches of government recognize the compelling national interest in denying safe haven to international law violators. Congress specifically noted that the TVPA was meant, *inter alia*, to reinforce the denial to torturers of "safe haven in the United States," while reaffirming that the ATS had been serving this laudable function for non-citizen plaintiffs. H.R. Rep. No. 102-367, at 4 (1991); *see Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filártiga* line of cases."). Indeed, the TVPA is just one of several statutes[6] designed to complement the ATS and to let human rights violators know that, should they come to this country, they will be subject to the rule of law, a policy expressed in multiple Congressional

[6] *See, e.g.*, Human Rights Enforcement Act, Pub. L. No. 111-122, § 2(b), 123 Stat. 3480 (2009); Genocide Accountability Act, Pub. L. No. 110-151, § 2, 121 Stat. 1821 (2007); Child Soldiers Accountability Act, Pub. L. No. 110-340, § 2(c), 122 Stat. 3735 (2008).

hearings.[7] As Judge Kaufman wrote for the Second Circuit in *Filártiga*, 630 F.2d at 890:

> Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Moreover, the Executive Branch has unequivocally stated that "recognizing a cause of action in the circumstances of *Filartiga* [*viz.*, foreign plaintiffs, foreign conduct, defendant residing in the U.S.] is consistent with the foreign relations interests of the United States." Supp. Br. of the United States as *Amicus Curiae* in *Kiobel*, 2012 WL 2161290, at *13. As the United States noted, denying a cause of action against perpetrators found in the United States could risk "international discord," 133 S. Ct. at 1664, and "give rise to the prospect that this country would be perceived as harboring the perpetrator." *Id.* at *4.

[7] *See, e.g., No Safe Haven: Accountability for Human Rights Violators in the United States, Subcommittee on Human Rights and the Law*, 110th Cong. (2007), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg43914/pdf/CHRG-110shrg43914.pdf; *No Safe Haven: Law enforcement Operations Against Human Rights Violators in The US., House Committee on Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. (2011), http://tlhrc.house.gov/hearing_notice.asp?id=1217.

Finally, as Justice Breyer recognized, the Supreme Court's endorsement of *Filártiga* and its progeny in *Sosa* must be read in light of the longstanding policy of "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 1674 (Breyer, J., concurring).

The U.S. Court of Appeals for the Eleventh Circuit has followed this long tradition. In the case of *Amicus* Dr. Juan Romagoza Arce, for example, this Court affirmed the availability of ATS claims against defendants found on U.S. soil for atrocities committed abroad: "[a]bsent a cause of action in the United States courts, some of the most egregious cases of human rights violations might go unheard because [the responsible] regimes . . . often possess the most woefully inadequate legal mechanisms for redressing those abuses." *Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006).

Indeed, the ATS case of *Amicus* Dr. Romagoza illustrates the deep ties between such claims and the United States. He was among the many innocent civilians tortured by government officials during the civil war in El Salvador in the 1970s and 1980s. A medical doctor, Dr. Romagoza was detained in a raid on his church clinic, and tortured for 22 days in National Guard headquarters, enduring electric shocks, beatings, rape, asphyxiation, and cigarette burns. His torturers shot him in his left hand and taunted him that he would never perform surgery again.

Although Dr. Romagoza received asylum in the United States in 1983, his nightmare followed him: the general officers who had command over his torturers retired to Florida. Dr. Romagoza and other victims filed ATS and TVPA claims against Generals Carlos Eugenio Vides Casanova and José Guillermo García. In 2002, a jury returned a verdict against the generals and this Court affirmed, equitably tolling the plaintiffs' claims because redress was unavailable in El Salvador. *Arce v. Garcia*, *id*. at 1259 (11th Cir. 2006).

Dr. Romagoza's case drew national attention. In 2007, he testified before the Senate Judiciary Subcommittee on Human Rights and the Law. Moved by his story, Senators Tom Coburn (R-OK) and Richard Durbin (D–IL) drafted a letter to Executive Branch officials, praising the verdict in the ATS suit and urging criminal and immigration investigations.[8] The Justice Department agreed: in 2012, Dr. Romagoza testified in removal proceedings against General Vides Casanova, which resulted in a finding of removability. *See* Julia Preston, *Salvadoran May Face Deportation for Murders*, N.Y. Times, Feb. 24, 2012, at A17.

Although Dr. Romagoza was tortured in El Salvador, his ATS claims so "touched and concerned" the United States that Congress and the Executive spoke with one voice: human rights abusers who come to the United States to enjoy the

[8] Letter from Sen. Tom Coburn and Sen. Richard Durbin to Att'y Gen. Michael B. Mukasey and Sec'y of the Dept. of Homeland Sec. Michael Chertoff, Nov. 20, 2007, *available at* http://cja.org/downloads/2007followupbyDurbinCoburn.pdf.

protection of our law must also bear the law's burden. They are amenable to suit in our federal courts under a statute that is nearly as old as the United States.

B. ATS Claims May Proceed When There is No Adequate Alternative Forum.

In *Kiobel*, the Court considered claims against foreign nationals that could have been brought in the defendants' home countries. *See* Tr. of Oral Argument, at 14:19-25, *Kiobel* (No. 10-1491) (Oct. 1, 2013) (conceding that the U.K. and the Netherlands were available alternative fora). Since multinationals corporations are "often present in many countries," and hence amenable to suit elsewhere, the Court held that "it would reach too far to say that mere corporate presence suffices." 133 S. Ct. at 1669. The Court's reasoning does not suggest, however, that the courts should **bar** an ATS claim where there is **no** adequate, alternative forum with stronger ties to the defendant.

The Court did **not** consider cases such as those of *Amici* and other human rights abuse victims who typically have no other possible place to pursue justice. *Kiobel* does not bar such cases because the risk of international discord is minimal. When no other adequate forum is available, it is consistent with U.S. international commitments to hear ATS claims against persons subject to the personal jurisdiction of U.S. district courts. Indeed, the Senate Report accompanying the TVPA referred to U.S. duties under international law and specifically listed among

them the "obligation . . . to provide means of civil redress to victims of torture." S. Rep. No. 102-249, at 3 (1991).

Where the United States is the sole available forum, traditional notions of justice and conflict resolution favor adjudicating the dispute, rather than letting the aggrieved party go without redress. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) ("Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . the district court may conclude that dismissal would not be in the interests of justice.").

Amici could not have sought civil remedies in the places where their abuse occurred, either because the local judicial system was inadequate, or simply because the defendant, by then physically present in the United States, was beyond the reach of any other jurisdiction. *See, e.g.*, *Filártiga*, 630 F.2d at 876.

Adjudicating such cases is consistent with the rationale of *Kiobel*. Where the U.S. is the only available forum, there is no risk of conflicting assertions of jurisdiction creating "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1661 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

Yet the district court's categorical bar to ATS claims based on foreign conduct would have prevented *Amica* Cecilia Santos from securing a judgment for

crimes against humanity, a judgment cited without reservation by the Supreme Court. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012).

In 1980, Ms. Santos was arrested by the National Police in San Salvador. She was electrocuted and tortured with acid while in custody, where she remained for three years. Nicolas Carranza, the Vice-Minister of Defense of El Salvador who exercised control over the National Police during the time of her torture, had by 1991 become a U.S. citizen living in Memphis, Tennessee. Years later, Ms. Santos joined four other survivors to sue Carranza for crimes against humanity, torture, and extrajudicial killing under the ATS and TVPA.

Amica Santos could not have pursued her claims in the courts of El Salvador. The U.S. Court of Appeals for the Sixth Circuit acknowledged this when it rejected Carranza's claim that El Salvador's 1993 Amnesty Law excused him from liability even in the United States. *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming jury verdict). The Supreme Court endorsed the *Carranza* decision in *Mohamad*, noting congressional intent to hold individual commanders liable for acts committed by their subordinates, including, implicitly, acts taken within the territory of a foreign sovereign. *See Mohamad*, 132 S. Ct. at 1709.

The decision in *Kiobel*, far from imposing a categorical bar on claims based on foreign conduct, requires that lower courts engage in a case-by-case analysis of the extent to which the claims "touch and concern" the United States. When a

defendant is physically present in this country, and the plaintiff has no alternative forum, any presumption against extraterritoriality is overcome. *Kiobel* provides no support for the contrary conclusion, erroneously reached by the court below.

C. ATS Claims May Proceed When They are Intertwined with Other Viable Extraterritorial Claims, Since Dismissal Would Not Address *Kiobel* Concerns.

Kiobel has no effect on parallel claims under the Torture Victim Protection Act, which is, by its own explicit terms, extraterritorial. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (noting the TVPA addresses "human rights abuses committed abroad"); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 09-4483-CV, 2014 WL 503037 (2d Cir. Feb. 10, 2014) (holding that *Kiobel*'s "territorial constraints on common-law causes of action under the ATS" do not "apply to the statutory cause of action created by the TVPA," whose text and history clearly indicate "extraterritorial application").[9]

When TVPA claims are viable and **will** be litigated, dismissing ATS claims based on the same facts does nothing to address the concerns raised in *Kiobel*. In particular, the Court's caution to avoid interpretations of U.S. law that carry "foreign policy consequences not clearly intended by the political branches," 133 S. Ct. at 1664, is inapplicable in such circumstances. Congress, by enacting the

[9] TVPA claims "arise under" a federal statute, and therefore cases raising such claims have their jurisdictional basis in the general federal-question provisions of 28 U.S.C. § 1331. *See Arce v. Garcia*, 434 F.3d 1254, 1257 n. 8 (11th Cir. 2006).

TVPA, has expressed its clear intent that such claims may be adjudicated in a U.S. court.

Thus severing the ATS claims from the case of *Amici* Aldo and Zita Cabello, for example, would have served little purpose, because – as this Court recognized – the same evidence that established a conspiracy to commit torture and extrajudicial killing under the TVPA supported the predicate allegations of crimes against humanity under the ATS. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1152 (11th Cir. 2005) (*per curiam*).

On October 17, 1973, Winston Cabello, a Chilean economist, was tortured and summarily executed by Chilean military officers. Cabello was detained and killed along with 12 other prisoners incarcerated for their opposition to former dictator Augusto Pinochet. Their torture and murders were part of an operation known as the "Caravan of Death," in which a Chilean death squad executed 72 suspected political dissidents. *Id.*

Cabello's surviving relatives brought suit against Armando Fernando Larios, a co-conspirator in his execution then residing in Miami-Dade County, for torture and extrajudicial killing under the TVPA and crimes against humanity under the ATS. A federal jury returned a $4 million verdict against Larios, which this Court affirmed. *Id.* at 1161 (noting that evidence of the widespread and systematic nature of the atrocities was relevant to both ATS and TVPA claims). Because the

Cabello survivors' ATS and TVPA claims arose from the same facts, severing the ATS claims would not have kept the underlying dispute from being heard in a U.S. court. The concerns over extraterritoriality expressed by the *Kiobel* Court were simply not relevant in such circumstances.

As *Amici*'s case shows, facts integral to a TVPA claim often provide the basis for the allegation of a "violation of the law of nations" within the ATS, and *vice versa*. This common nucleus of facts will be heard in a federal court irrespective of the fate of the specific ATS claims. So where parties litigate properly-pleaded 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 is displaced.

CONCLUSION

If the *Kiobel* Court had intended to limit the ATS to violations of international law committed on U.S. soil, the Court would have had no need to consider whether the defendants' "corporate presence" sufficiently touched and concerned U.S. territory. A categorical bar on ATS claims based on foreign conduct is contrary to *Kiobel*'s holding and rationale. Only two Justices supported the categorical prohibition proposed in Justice Alito's concurrence.

Such an interpretation of the law would also deprive individuals situated similarly to *Amici* of their right to present claims against their abusers found on U.S. soil.

Because the court below granted summary judgment on ATS claims based on a fundamental misreading of the Supreme Court's decision in *Kiobel*, this Court should reverse the decision of the district court, and remand this case for a determination of whether Plaintiffs' claims adequately "touch and concern" the United States.

Respectfully submitted,

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March 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, automatically effecting service on all counsel of record.

March 21, 2014

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