No. 15-___

IN THE

Supreme Court of the United States

FARHAN MOHAMOUD TANI WARFAA,
Cross-Petitioner,
v.
YUSUF ABDI ALI,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns a war criminal who committed atrocities in Somalia, yet managed to find safe haven by residing in the United States. The circuits are split regarding whether, in performing the *Kiobel* touch and concern analysis, courts may consider facts and circumstances other than those underlying the extra-territorial tortious conduct, including the defendant's current residency. The question presented is:

Whether a claim against an individual defendant who committed war crimes, crimes against humanity, and other serious violations of international law abroad touches and concerns the United States such that the Alien Tort Statute confers federal jurisdiction over the claim where that defendant sought safe haven in the United States, obtained lawful permanent residency in the United States, and continues to reside in the United States, availing himself of the benefits and privileges associated with living in the United States.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner, Farhan Mohamoud Tani Warfaa, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. This petition is conditional in nature and should be considered only if the Court is disposed to grant the initial petition.

OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2016. Warfaa files this conditional cross-petition pursuant to Supreme Court Rule 12.5. Petitioner and Cross-Respondent, Yusuf Abdi Ali, filed an initial petition for writ of certiorari with this Court, which was docketed on May 4, 2016, as No. 15-1345. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

STATEMENT OF THE CASE

Beginning with the landmark case *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and continuing for

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

more than 30 years, federal courts consistently applied the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to permit claims by foreign persons against individual defendants for violations of the law of nations—such as torture, war crimes, and crimes against humanity—irrespective of where the violations were committed. In *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), this Court endorsed a presumption against the application of the ATS to claims alleging only extraterritorial conduct. But the Court recognized where such claims "touch and concern" the United States "with sufficient force" the presumption will be displaced. *Id.* at 1669.

Thus, the Court did not create in *Kiobel* a categorical bar to ATS claims based on extraterritorial conduct. Rather, as Justice Kennedy expressly noted in his concurring opinion, the majority was "careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]." 133 S.Ct. at 1669 (Kennedy, J., concurring). Namely, the Justice wrote, 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.*

Justice Kennedy's remarks proved to be prescient. Since this Court decided *Kiobel*, district courts and courts of appeals have been in disarray over how the "touch and concern" test applies to ATS claims involving extraterritorial conduct. While some courts have performed the factual analysis required by *Kiobel*, others have interpreted the *Kiobel* holding as establishing an extraterritorial bar to ATS claims, such that claims alleging only extraterritorial tortious

conduct must be dismissed, without regard to other relevant conduct (such as seeking safe haven in the United States) that could establish sufficient ties between the defendant and the United States. Under the reasoning of the latter cases, an individual may commit torture or other serious violations of international law abroad, establish residency in the United States, and here find safe haven, escaping consequences for even the grossest of human rights violations.

That is precisely what happened in the instant case. In the matter below, Warfaa, a victim of war crimes who was abducted from his home in Somalia, savagely beaten and abused over the course of three months, shot five times with a pistol and then left for dead, sought redress for his injuries under the ATS. In affirming the district court's dismissal of Warfaa's claims pursuant to *Kiobel*, the Fourth Circuit found dispositive that the alleged violations of international law occurred wholly in Somalia. The Fourth Circuit incorrectly held that Ali's flight to the United States and lawful permanent residence status here were irrelevant conduct and "[m]ere happenstance." *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016), Pet. App. 77a. Accordingly, the court's conclusion, in contravention of long-standing U.S. foreign policy, resulted in Ali gaining safe haven from civil liability for his most serious crimes.

In *Kiobel*, Justice Breyer warned of this very danger, concurring in the Court's judgment but not its reasoning, and explaining 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) (emphasis added). This case is a precise manifestation of one of the threats to American interests that Justice Breyer contemplated.

Accordingly, this case starkly presents the "significant question" that Justice Kennedy noted the *Kiobel* majority was "careful to leave open." *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring). This Court should grant certiorari to resolve the issue. *First*, the decision below conflicts with previous decisions of this Court by barring ATS jurisdiction even where the claims implicate strong U.S. interests that deeply touch and concern the territory of the United States—such as where the individual defendant has made the United States his domicile and is not subject to the jurisdiction of any other court. *Second*, the lower courts are divided on what constitutes other relevant conduct to the touch and concern analysis where the tortious conduct occurs abroad, with some courts effectively imposing an extraterritorial bar and others engaging (or attempting to engage) in an analysis of the aggregate of operative facts, including attempts to find safe haven in the United States. *Third*, the Fourth Circuit's opinion conflicts with expressly stated foreign policy views of the Legislative and Executive Branches, and the question presented is an important and recurring one. Victims of common enemies of mankind will be left with inadequate remedies, or no remedy at all, if the ATS ceases to apply to claims where the enemy has chosen to flee the country of his conduct in an attempt to find safe haven in the United States.

A. Factual Background

Warfaa was brutalized at the hands of Ali in Somalia. In late 1987, Warfaa was a farmer living in a small village near Gebiley, Somalia. (First Am. Compl., *Warfaa v. Ali*, No. 1:05-cv-00701, ECF No. 89, ¶ 16 (E.D. Va. May 9, 2014).) At that time, Ali was a commander in the Somali National Army. (*Id.* at ¶ 15.) He commanded soldiers stationed near Gebiley. (*Id.*) In December 1987, without cause and on Ali's orders, Warfaa was abducted from his home at gunpoint. (*Id.* at ¶¶ 17-18.) He was taken to Ali's headquarters. (*Id.* at ¶ 19.) There, Warfaa was thrown in a cell, beaten until unconscious, and tortured on multiple occasions over the course of more than three months. (*Id.* at ¶¶ 20-24.) Ali was present on more than one occasion while Warfaa was physically tortured. (*Id.* at ¶ 25.)

In March 1988, Ali, in an attempt to kill Warfaa, fired five bullets at him. (*Id.* at ¶ 26.) Assuming Warfaa was dead, Ali ordered his guards to bury Warfaa's body. *Id.* But, remarkably, and unbeknownst to Ali, Warfaa survived the attack. (*Id.* at ¶ 27.) After discovering Warfaa was alive, the guards released him once Warfaa promised to pay them to let him go. (*Id.*) Ali also committed numerous other atrocities as part of a vicious counterinsurgency campaign directed at civilians and combatants alike. (*Id.* at ¶¶ 10, 13, 14, 15.)

In 1990, Ali fled Somalia for Canada. (*Id.* ¶ 7.) In 1992, he was deported from Canada for gross human rights violations in Somalia, and has been living in the United States since 1996 as a lawful permanent resident. (*Id.* ¶ 8.) Ali lives in Alexandria, Virginia. (*Id.* ¶ 5.)

B. Procedural Background

Relying on the *Filártiga* line of cases endorsed by this Court in *Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004), Warfaa originally brought suit against Ali in 2004 to vindicate his rights under the ATS, based on the atrocities Ali committed against him in Somalia in violation of the law of nations. (Compl., *Does v. Ali*, No. 1:04-cv-01361, ECF No. 1 (E.D. Va. Nov. 10, 2004).) Warfaa brought six causes of action against Ali: (1) attempted extrajudicial killing; (2) torture; (3) cruel, inhuman or degrading treatment or punishment; (4) arbitrary detention; (5) crimes against humanity; and (6) war crimes. He asserted claims under both the ATS and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

On April 6, 2012, Ali filed a consent motion to stay the proceedings "pending full judicial review by the Supreme Court" of the Second Circuit's ruling in *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010). Later that day, the district court granted the consent motion and stayed this action. (Order, *Warfaa*, ECF No. 57.) This Court issued its opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), on April 17, 2013.

On April 25, 2014, after the U.S. Department of State had advised the district court that it did not wish to express its views on the potential effect of the litigation on various foreign-relations matters, the district court lifted the stay and ordered Warfaa to file an amended complaint. (Order, *Warfaa*, ECF No. 87.) He did so on May 9, 2014. (First Am. Compl., *Warfaa*, ECF No. 89.) Ali filed his motion to dismiss on May 30, 2014, and his memorandum in support thereof the following day. (Def.'s Mot. to Dismiss and Mem. In Supp., *Warfaa*, ECF Nos. 90, 91.) The district court

dismissed Warfaa's ATS claims, holding that "the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the defendant." Pet. App. 31a.

C. The Court of Appeals' Decision

Warfaa appealed the district court's decision to the Fourth Circuit, which affirmed. Focusing entirely on the fact that Ali's acts of torture occurred in Somalia, the Fourth Circuit barred Warfaa's claims asserting jurisdiction pursuant to the ATS. *Warfaa*, 811 F.3d at 660-61, Pet. App. 72a ("Ali inflicted all the injuries against Warfaa in Somalia. Warfaa's ultimate escape—thus ending the violation—occurred in Somalia, as well."). The majority opinion reasoned that "[t]he only purported 'touch' in this case is the happenstance of Ali's after-acquired residence in the United States long after the alleged events of abuse." *Id.* at 661 (citing *Kiobel*). Thus, the court concluded, "Warfaa has pled no claim which 'touches and concerns' the United States to support ATS jurisdiction." *Id.* (quoting *Kiobel*). The court reasoned that "[m]ere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context." *Id.*

Judge Gregory concurred in the separate portion of the majority opinion regarding immunity from suit, but wrote separately to dissent from the majority's determination that *Kiobel* foreclosed the possibility of relief for Warfaa under the ATS. *Id.* at 662 (Gregory, J., concurring in part and dissenting in part). Judge Gregory would have reversed the district court's application of *Kiobel* for three reasons. First, he noted that "Ali's status as a lawful permanent resident alone distinguishes this case from *Kiobel*, where the corporate defendant was merely 'present.'" *Id.* at 663

(quoting *Kiobel*, 133 S.Ct. at 1669). Second, Ali's "'after-acquired residence' in this country is not mere 'happenstance.'" *Id.* at 664 (quoting *id*. at 660). Rather, Ali fled Somalia when the Barre regime was about to fall, spent years opposing deportation proceedings related to his "gross human rights abuses" in Canada and the United States, and "has been living here as a lawful permanent resident, availing himself of the benefits and privileges of U.S. residency since 1996." *Id.* Third, according to a declaration Ali himself made to the district court, "when the alleged acts of torture took place, Ali was serving as a commander in the Somali National Army. In that same capacity, he received extensive military training, on numerous occasions, in the United States." *Id.*

Judge Gregory concluded his dissent by emphasizing the perils of enabling human rights abusers such as Ali to find safe haven within the borders of the United States, noting "[t]hese are 'circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator,' thereby 'seriously damag[ing] the credibility of our nation's commitment to the protection of human rights.'" *Id.* at 665 (quoting *Filártiga*). Moreover, Judge Gregory observed, "[s]uch concerns are precisely what led the United States, writing as amicus in *Kiobel*, to conclude that 'allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights.'" *Id.* (quoting Suppl. Br. for the U.S. in Partial Supp. of Affirmance, *Kiobel*, 2012 WL 2161290, at *4-5 (U.S. June 11, 2012)).

REASONS FOR GRANTING THE PETITION

This case tests the limits of the *Kiobel* holding, putting squarely before the Court the issue raised by Justice Breyer when he wrote of the "distinct [American] interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind." 133 S.Ct. at 1674 (Breyer, J., concurring). As Justice Kennedy wrote in his concurrence, "[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case." *Id.* at 1669 (Kennedy, J., concurring). The instant case presents this Court with just such a scenario and provides the Court with an opportunity to resolve an important jurisdictional question left open by *Kiobel*.

Kiobel did not answer this question because it was not before the Court. The defendant in *Kiobel* was a corporation and, therefore, the Court was able to dispose of the claims against it on the basis that "mere corporate presence" did not meet the "touch and concern" test. 133 S.Ct. at 1669. Here, in contrast, the defendant is Mr. Warfaa's individual abuser, directly responsible for the mass atrocities detailed in the complaint and to which Mr. Warfaa was subjected. Ali committed his crimes abroad, but he then spent more than 20 years seeking safe haven and ultimately settled in the United States. Unlike the corporation in *Kiobel*, whose "only presence in the United States consist[ed] of an office in New York City (actually owned by a separate but affiliated company)," *id* at 1677, Ali committed atrocities and then deliberately sought to occupy the United States, evading or opposing various deportation proceedings and ultimately establishing

lawful permanent residency here. Unlike corporations that "are often present in many countries," *id.* at 1669, an individual may be present in only one country and Ali is present in Alexandria, Virginia. The concerns raised in *Kiobel* regarding other sovereigns are minimal where the individual wrongdoer avails himself of this nation's laws and protections, even though the underlying tortious conduct occurred abroad.

As Judge Gregory correctly noted in his dissent below, "no circuit court has decided a post-*Kiobel* ATS case premised on principal liability brought against an individual defendant who has sought safe haven in the United States, a key difference the majority does not address." *Warfaa*, 811 F.3d at 662, Pet. App. 81a. Judge Gregory further observed, correctly, that "the analysis and relevant considerations may differ where the defendant is a natural person." *Id.* Nevertheless, the Fourth Circuit did not consider Ali's residence "relevant conduct," equated it to "mere corporate presence" under *Kiobel*, and thus held his residency insufficient to meet the "touch and concern" test. *Id.* at 661 (citing *Kiobel*).

The majority thus improperly conflated the "mere corporate presence" found insufficient to establish jurisdiction in *Kiobel* with the presence of an *individual* who came to this country after committing atrocities abroad. *See id.* (discounting "happenstance of Ali's after-acquired residence in the United States" on premise that it "is not a cognizable consideration in the ATS context"). But Ali, a natural person who purposefully relocated to the United States after attempting unsuccessfully to move to Canada, is not here by happenstance, nor does *Kiobel* in any way make such residency non-cognizable for ATS purposes. Rather, this is precisely the type of case Justice Kennedy likely

envisioned when he predicted that other cases may arise to which the particular *Kiobel* reasoning may not apply. 133 S.Ct. at 1669 (Kennedy, J., concurring).

Moreover, the Fourth Circuit's decision below conflicts with this Court's decisions, deepens a split among the circuits regarding whether *Kiobel* allows for consideration of conduct other than that underlying the tortious conduct abroad (like establishing residency), and presents an important question of federal law. This question meets the criteria for certiorari and, if the Court grants Ali's petition for certiorari, it should grant certiorari here.

I. The Fourth Circuit's Decision Conflicts with the Decisions of This Court.

The Fourth Circuit's decision conflicts with Supreme Court precedent. The Fourth Circuit purported to apply *Kiobel* to bar jurisdiction here, but failed to consider the residence of the individual torturer in Alexandria, Virginia, U.S.A., as a factor that was relevant to whether the *Kiobel* presumption had been displaced. In dismissing Warfaa's claims against Ali solely on the basis of where Ali committed his mass-atrocity crimes, the court of appeals discounted entirely the fact that Ali, currently a lawful permanent resident of the United States, fled Somalia and then spent the next 20 years seeking safe haven to avoid accountability, ultimately settling in the United States. The Fourth Circuit's disregard of the overall aggregate of facts connecting Warfaa's claims to the United States, and undermining any minimal foreign-policy concerns, directly conflicts with *Kiobel*. 133 S.Ct. at 1669.

The Fourth Circuit's decision also is in tension with *Sosa*. In *Sosa*, this Court rejected a plaintiff's claim for

"arbitrary arrest and detention" on the basis that the plaintiff had failed to state a violation of the law of nations with the requisite "definite content and acceptance among civilized nations." 542 U.S. at 699, 732. The Court reiterated, however, "the First Congress understood that the district courts *would* recognize private causes of action for *certain* torts in violation of the law of nations." *Id.* at 724-25 (emphases added). Among the "certain torts" this Court identified as cognizable are those of the type district courts have heard following "the birth of the modern line of cases beginning with [*Filártiga*]." *Id.*; *see also id.* at 731 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided [*Filártiga*]."); *id.* at 732 (characterizing Court's position as "consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court") (citing *Filártiga* and *Marcos*). This Court's stated rationale, adopted from *Filártiga*, was that the ATS embraces causes of action falling within "the historical paradigms familiar when [the ATS] was enacted"—*e.g.*, claims akin to those that would have been brought against pirates or slave traders in the eighteenth century, which includes claims against torturers. *Id.* ("[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 *Filártiga*) (internal quotation marks omitted) (alteration in original).

In *Filártiga*, the Second Circuit held that federal jurisdiction existed under the ATS for a claim by an alien against an individual torturer who subsequently fled to the United States. 630 F.2d at 885-89. *Filártiga* launched a line of human rights cases in which federal

courts heard claims alleging torture or other human rights abuses committed overseas where the perpetrators later sought safe haven in the United States. *See, e.g.*, *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992) (upholding ATS claims against deposed head of state who fled to United States for torture committed in the Philippines); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (upholding ATS claims against Bosnian Serb leader found in New York for war crimes in Bosnia).

At oral argument in *Kiobel*, 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). And, as Justice Breyer noted in his concurrence in *Kiobel*, *Sosa* "referred to [*Filártiga* and *Marcos*] with approval, suggesting that the ATS allowed a claim for relief in such circumstances." *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring) (citing *Sosa*, 542 U.S. at 732); *see Sosa*, 542 U.S. at 731-33. Indeed, Justice Breyer, joined by three other justices, made express reference to *Filártiga* and *Marcos* as cases presenting facts that should establish ATS jurisdiction, despite the extraterritoriality of the tortious conduct, because the defendants in those cases resided in the United States. *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring). 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 harbor to a "common enemy of mankind." *Id*. at 1674, 1678 (Breyer, J., concurring). Significantly, in discussing the continuing validity of ATS claims brought in circumstances like those of *Filártiga* and *Marcos*, Justice Breyer expressly contemplated the very scenario before the Court in this Cross-Petition, stating, in relevant part:

> I would find jurisdiction under this statute 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.***

Id. at 1671 (Breyer, J., concurring) (emphases added).

Warfaa's claims present this scenario, and the United States has a distinct interest in preventing this nation from becoming Ali's safe haven, shielding him from liability for his most serious crimes. Warfaa's claims are like the ATS claims allowed by the Second and Ninth Circuits, in *Filártiga* and *Marcos*. While Ali committed his heinous acts of torture on Warfaa abroad, for more than two decades Ali has voluntarily sought safe haven in the United States to escape the consequences of his actions in Somalia.

The facts of *Filártiga* were similar. There, plaintiff 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. 630 F.2d at 878-79. None of the conduct relating to Joelito's torture or death occurred in the United States. *Id.* Yet, upon discovering that her brother's torturer was residing in the United States, Dolly Filártiga and her father filed suit under the ATS in an attempt to hold Joelito's murderer responsible. *Id.* The Second Circuit recognized the Filártiga family's claims under the ATS. *Id.* at 878-885.

Likewise, in *Marcos*, Archimedes Trajano, a university student in the Philippines, attended an open-forum discussion at which a government official from the administration of Ferdinand Marcos was speaking. 978 F.2d at 495. After Trajano asked the official a question about an appointment she had received, Trajano was kidnapped, tortured, and killed by military intelligence personnel. *Id.* at 496. Subsequently, Marcos and his family fled to Hawaii. *Id.* at 495. Trajano's family then sued Marcos and others in federal court under the ATS. *Id.* at 496. The Ninth Circuit recognized the claims, holding that "Trajano's suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture prohibited by the law of nations, is within the jurisdictional grant of [the ATS]." *Id.* at 499.

Ali's residency should likewise have been considered a significant touch upon this nation, resulting in the displacement of the *Kiobel* presumption. But, instead, the Fourth Circuit treated it as irrelevant to the analysis and called it "[m]ere happenstance." *Warfaa*, 811 F.3d at 661, Pet. App. 77a. That reasoning is in conflict with *Kiobel* and in tension with *Sosa*'s reasoning. Accordingly, this Court should grant certiorari.

II. The Circuits Are Split Regarding Whether Conduct Other Than the Defendant's Underlying Tortious Conduct Is Relevant to an ATS Jurisdiction Analysis.

The circuits are in disarray as to whether, when the entirety of the alleged tortious conduct occurs abroad, *Kiobel*'s "touch and concern" analysis should consider other conduct apart from a defendant's tortious acts that implicates an important U.S. interest. The Fourth

and Second Circuits will not consider such conduct, whereas the Ninth and Eleventh Circuits have indicated such conduct appropriately should be considered. *See Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014); *Doe v. Drummond Co.*, 782 F.3d 576, 596 (11th Cir. 2015). As a result, in cases involving the same operative facts, an ATS claim that may be allowed to proceed in some circuits would be dismissed for lack of subject-matter jurisdiction in others. The divergent reasoning and conclusions of these cases demonstrates that *Kiobel*'s "touch and concern" test must be clarified and certiorari should be granted here.

This case presents perhaps the most patent and extreme example of conduct other than the underlying tortious conduct implicating an interest of the United States—it is exactly what Justice Breyer contemplated when he wrote of our nation's "distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind." *Kiobel*, 133 S.Ct. at 1674 (Breyer, J., concurring). Nevertheless, the Fourth Circuit below (purportedly in reliance on *Kiobel*) refused to consider Ali's later-acquired lawful permanent U.S. residency, and focused exclusively on the extraterritorial nature of the underlying tortious conduct itself in finding that Warfaa's ATS claims were barred. *Warfaa*, 811 F.3d at 661, Pet. App. 76a ("Warfaa's claims fall squarely within the ambit of *Kiobel's* broad presumption against extraterritorial application of the ATS." (citing *Kiobel*, 133 S.Ct. at 1669)).[2] Specifically, the

[2] In 2014, the Fourth Circuit itself had expressed a different view, recognizing this Court's articulation of the "touch and concern" test as one focused on "claims" (rather than simply "the

court reasoned that the defendant's "residency" was "not a cognizable consideration in the ATS context." *Id.* at 661 (citing *Kiobel*). Seizing on the phrase "mere corporate presence" as used by this Court in *Kiobel*—but eliding the word "corporate"—the Fourth Circuit characterized *Kiobel* as holding that "'mere . . . presence' in the United States does not afford jurisdiction" and found that, because Warfaa's lawful permanent U.S. residency was "after-acquired," it was "[m]ere happenstance . . . lacking any connection to the relevant conduct." *Id.*

The Second Circuit has engaged in a similar analysis, finding that extraterritoriality bars any ATS claim, irrespective of whether the defendant's other conduct implicates the interest of the United States in not providing safe haven to war criminals. *See Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013). In *Balintulo*, the Second Circuit, attempting to apply the *Kiobel* "touch and concern" test to a corporate defendant, held that because the alleged tortious conduct occurred outside the United States there was no ATS jurisdiction—without regard to whether the defendant engaged in other conduct that implicated U.S. interests—*i.e.*, by residing or obtaining residence status here. 727 F.3d at 190. The Second Circuit stated flatly that, "if all the relevant conduct occurred abroad, that is simply the end of the matter

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alleged tortious conduct") in describing the circumstances in which the *Kiobel* presumption may be displaced "suggest[s] that courts must consider all the facts that give rise to ATS claims[.]" *Al Shimari v. Caci Premier Technology, Inc.*, 758 F.3d 516, 527 (4th Cir. 2014). *Al Shimari* recognized that a claim may involve far more than the underlying tortious conduct; rather, it is the "aggregate of operative facts giving rise to a right enforceable by a court." Black's Law Dictionary 281 (9th ed. 2009) (quoted in *Al Shimari*, 758 F.3d at 527).

under *Kiobel*." *Id.* In another decision, the Second Circuit similarly applied the "touch and concern" test to corporate defendants and held that "neither the U.S. citizenship of defendants, nor their presence in the United States, is of relevance for jurisdictional purposes." *Mastafa v. Chevron Corp.*, 770 F.3d 170, 188 (2d Cir. 2014). The Second Circuit recently reaffirmed its restrictive reading of *Kiobel*, denying—solely on the basis of extraterritoriality, and without considering any conduct of the defendant other than the underlying tortious conduct—a request for *en banc* rehearing on the issue whether a U.S. corporate defendant was subject to claims under the ATS for its alleged role in facilitating terrorism abroad. *In re Arab Bank, PLC Alien Tort Statute Litigation*, --- F.3d ----, 2016 WL 2620283, at *1-4 (2d Cir. May 9, 2016). The *Arab Bank* court held, over a vigorous three-judge dissent, that the extraterritoriality of the tortious conduct (coupled with the defendant's "mere corporate presence" in the United States) foreclosed the plaintiffs' claims and, therefore, no sufficient basis existed for examining *en banc* whether the ATS provided for corporate liability. *Id.* at *1-2.

In contrast, the Ninth and Eleventh Circuits have indicated that other conduct surrounding a claim—such as the subsequent U.S. residence or citizenship of a defendant—is relevant to an ATS jurisdictional inquiry under *Kiobel*, even when all of the tortious conduct happened abroad. In *Mujica v. AirScan Inc.*, the Ninth Circuit considered the fact that the corporate defendants were both U.S. corporations in its ATS "touch and concern" inquiry and noted, "It may well be . . . that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United

States to satisfy *Kiobel*." 771 F.3d at 594 (holding corporate citizenship alone was not enough for ATS jurisdiction). Similarly, the Eleventh Circuit reasoned in *Doe v. Drummond Co.* (as to a corporate defendant), that U.S. citizenship was relevant to the "touch and concern" inquiry. 82 F.3d at 596 (holding corporate citizenship alone was not enough for ATS jurisdiction). The *Drummond* court was clear that "it would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct." *Id.* at 593 n.24 (emphasis in original) (citing *Al Shimari*). These decisions demonstrate that the circuits are split on whether the defendant's other conduct, including acquiring U.S. residency, is a relevant "touch and concern" factor. *See Arab Bank*, 2016 WL 2620283, at *9 ("The Court's 'touch and concern' test is cryptic and has understandably divided the circuits.").

This division among circuits and the general absence of clear guidance regarding whether other relevant conduct of the defendant, including attempts by the defendant to find safe haven in the United States, can satisfy the "touch and concern" test has likewise led to confusion and inconsistent results in the lower courts. *See Tymoshenko v. Firtash*, No. 11-CV-2794(KMW), 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) ("Although the Supreme Court did note that there may be situations in which a tort committed outside the U.S. is nonetheless actionable . . . the Court failed to provide guidance regarding what is necessary to satisfy the 'touch and concern' standard."). Subsequent cases have attempted to fashion *ad hoc* standards for what meets the *Kiobel* test, sometimes imposing an extraterritorial bar and other times allowing claims arising from extraterritorial conduct to proceed based on other factors implicating apparent

U.S. interests. *Compare, e.g.*, *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2014 WL 4898210, at *7 (S.D. Fla. Sept. 30, 2014) ("[T]he *Kiobel* presumption against extraterritoriality remains intact when all relevant conduct transpired on foreign soil by foreign actors.") *with Mwani v. Bin Laden*, No. 99–125(JMF), 2013 WL 2325166, at *4 (D.D.C. May 29, 2013) (upholding claims by foreign nationals against Al Qaeda because "[i]t is obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here"). One district court unequivocally stated that the *Kiobel* presumption was overcome by the defendant's residency in the United States. *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013); *see also Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 310-11 (D. Mass. 2013) (recognizing defendant's U.S. citizenship as relevant factor in the jurisdictional analysis under *Kiobel*). And, in yet another variation on the *Kiobel* test, the D.C. District Court has attempted to harmonize the two competing approaches by considering the defendant's U.S. presence but giving greater weight to the location of the conduct. *Doe v. Exxon Mobil Corp.*, No. 01–1357(RCL), 2015 WL 5042118, at *7 (D.D.C. July 6, 2015). The *Exxon* court held, "[i]n accord with the Eleventh and Fourth Circuits, . . . that a defendant's U.S. citizenship or corporate status is a relevant consideration in applying the touch and concern test." *Id.* (citing *Drummond* and *Al Shimari*). But the court "agree[d] with the Second Circuit that given the Supreme Court's conduct-focused reasoning in *Kiobel* . . . the location of the relevant conduct is the fundamental criterion in conducting this analysis." *Id.*

The post-*Kiobel* decisions refusing to recognize other relevant conduct further conflict with *Filártiga* and *Marcos*, discussed *supra*. Neither case has been overruled (even though later decisions of the Second Circuit arguably call *Filártiga* into question and the Fourth Circuit below suggested that *Kiobel* had overruled them). In *Filártiga* and *Marcos*, the courts upheld claims against individual wrongdoers, even though the wrongdoing occurred abroad. *Filártiga*, 630 F.2d at 878-885; *Marcos*, 978 F.2d at 499. The subsequent presence of the defendants in the United States was a factor that bore on ATS jurisdiction in those cases, and *Kiobel* did not in any way preclude courts from continuing to consider it in future cases.

For these reasons, this Court should grant certiorari to provide "further elaboration and explanation" concerning what is necessary to meet *Kiobel*'s "touch and concern test"; specifically, whether conduct of the defendant other than that underlying the tortious conduct abroad is a cognizable consideration. 133 S.Ct. at 1669 (Kennedy, J., concurring). As anticipated by Justices Breyer and Kennedy, the time has now come for the Court to speak definitively on whether courts should consider such conduct, including the defendant's efforts to find safe haven in the United States, in evaluating ATS claims based on tortious conduct committed abroad by an individual.

III. The Fourth Circuit's Decision Refusing to Consider Ali's U.S. Residency Conflicts with the Views of Both Political Branches and Undermines U.S. Foreign Policy.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—Departments of the

government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Here, both political branches have stated that jurisdiction should lie under the ATS in these circumstances, and any conflicting interpretation undermines the foreign-policy commitment of the United States to preventing human rights abusers from finding safe haven here.

A. The Fourth Circuit's Decision Conflicts With the Views of Both Political Branches of the Federal Government.

Both the legislative and executive branches of the federal government have agreed that jurisdiction in the United States is proper under the circumstances presented here. The Fourth Circuit's opinion that an individual's residence in the United States is not a cognizable factor for ATS claims based on atrocities perpetrated abroad is in conflict with this policy commitment to deny human rights abusers safe haven.

1. The Fourth Circuit's Decision Conflicts With the Views of the Executive Branch That Jurisdiction Under these Circumstances is Consistent with the Interests of the United States.

The Executive Branch has unequivocally stated that "recognizing a cause of action in the circumstances of *Filártiga* [viz., foreign plaintiffs, foreign conduct, defendant residing in the U.S.] is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." Suppl. Br. for the U.S., *Kiobel*, 2012 WL 2161290, at

*13. In fact, in *Kiobel*, the Solicitor General urged the Court to issue a narrow ruling that left open the possibility of adjudicating ATS cases involving foreign conduct, such as those in *Filártiga*, taking the position that a bar to ATS claims against an individual torturer found on U.S. soil, like Peña-Irala, could risk international discord and "give rise to the prospect that this country would be perceived as harboring the perpetrator." *Id.* at *4.

That same commitment to denying safe haven has been reaffirmed in the various briefs and Statements of Interest submitted by the U.S. Government in ATS cases. In its brief in *Filártiga*, for example, the Government stated that "there is little danger that judicial enforcement [of ATS claims] will impair our foreign policy efforts," despite the fact that *Filártiga* involved torture committed overseas. Br. for the U.S. as Amicus Curiae, *Filártiga*, 1980 WL 340146 at *22-23 (2d Cir. June 6, 1980). In fact, the Executive Branch took the same position in *Filártiga* as it did three decades later in *Kiobel*: "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.* Thus, the United States has been adamant that barring such claims could harm U.S. interests.

Similarly, the Government filed Statements of Interest in support of claims based on extraterritorial conduct in cases with circumstances similar to the claims here. When this Court was considering the immunity of a foreign official residing in the United States for ATS claims involving overseas conduct in Somalia in *Yousuf v. Samantar*, the United States filed a brief urging this Court to hold General Samantar liable for his egregious breaches of international law.

See Br. for the U.S. as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2010 WL 342031 (U.S. 2010). The Executive Branch voiced its "strong foreign policy interest in promoting the protection of human rights." *Id.* at *1.

After this Court denied the defendant immunity under the Foreign Sovereign Immunities Act, the case was remanded to the district court, where the Government filed a Statement of Interest to express the view that the defendant should be denied any official immunity. Statement of Interest of the United States, ¶ 9, *Yousuf v. Samantar*, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011). In making its recommendation, the State Department declared, "U.S residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts." *Id.* The Government has expressed similar views in other cases. *See, e.g.*, Statement of Interest of the United States, ¶ 9, *Ahmed v. Magan*, No. 2:10-CV-342 (S.D. Ohio Mar. 15, 2011) (endorsing court's power to proceed on ATS claims as important for strengthening U.S. foreign-policy interest in protecting human rights).

President Obama 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."[3] The Order calls for government agencies to "promote accountability of and deny impunity for perpetrators of mass atrocities, including by denying

[3] https://www.whitehouse.gov/the-press-office/2016/05/18/executive-order-comprehensive-approach-atrocity-prevention-and-response.

safe haven for perpetrators found in the United States." The Executive Branch has also stated separately, at Congressional hearings, its support for ATS claims based on extraterritorial conduct, declaring a commitment to "ensuring that no human rights violator or war criminal ever again finds safe haven in the United States" and to "marshal[ing]' our resources to guarantee that no stone is left unturned in pursuing that goal." *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 10 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.).

The Fourth Circuit's opinion undermines the stated foreign policy interest of the United States in "promoting the protection of human rights" and "condemn[ing] grave human rights abuses." *See* Brief for the United States of America as Amicus Curiae Supporting Affirmance, *Samantar*, 2010 WL 342031, at *1. This judicial override of foreign policy is all the more perverse when done in the name of avoiding "unwarranted judicial interference in the conduct of foreign policy." *Kiobel*, 133 S. Ct. at 1661.

2. The Fourth Circuit's Decision Conflicts With the Views of Congress, Which Expressly Endorsed the *Filártiga* Line of Cases.

Congress also expressly endorsed the *Filártiga* line of cases when it extended the right to U.S. citizens, not simply aliens, to bring similar claims under the TVPA, 28 U.S.C. § 1350 note, demonstrating 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 in the judgment); *see also* 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)[.]").

As the legislative history indicates, Congress passed the TVPA to *endorse* ATS actions as an important tool to bring to justice perpetrators of human rights violations overseas when they are found within the reach of U.S. courts. Congress expressed support for the *Filártiga* decision, H.R. Rep. No. 102-367, at 4 (1991) (stating that the "Filártiga case met with general approval"), and indicated its intent in passing the TVPA to "mak[e] sure the torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 102-249, at 3 (1991).

Congress expressed that 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." H.R. Rep. No. 102-367, at 4. As the ATS limits jurisdiction to civil actions by 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 (emphasis added); *see also* H.R. Rep. No. 102-367, at 3 (noting that U.S. treaty obligations require this country "to adopt measures to ensure that torturers are held legally accountable for their acts," including through the provision of "means of civil redress to victims of torture").

The TVPA is but one example of this congressional commitment to denying safe haven in the United States to perpetrators of human rights crimes committed overseas. The Human Rights Enforcement Act (2009) established a section within the Criminal Division of the Department of Justice with a specific

mandate to enforce human rights laws. *See* Human Rights Enforcement Act, Pub. L. No. 111-122, § 2(b), 123 Stat. 3480 (2009) (codified at 28 U.S.C. § 509B). Its work includes prosecution for extraterritorial crimes under the Genocide Accountability Act, Pub. L. No. 110-151, § 2, 121 Stat. 1821 (2007) (codified at 18 U.S.C. § 1091), and the Child Soldiers Accountability Act, Pub. L. No. 110-340, § 2(c), 122 Stat. 3735 (2008) (codified at 8 U.S.C. § 1227(a)(4)(F)). Congress has also ratified several treaties that commit the United States to either extradite or prosecute individuals found in the United States for extraterritorial human rights violations. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Prevention and Punishment of the Crime of Genocide; and the Geneva Conventions. *See* U.S. Dep't of State, Treaties in Force (Jan. 1, 2013), at 394-95, 488.

Moreover, just since 2007, 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. In 2007, the Senate Judiciary Subcommittee on Human Rights and the Law heard testimony from Dr. Juan Romagoza Arce, a medical doctor from El Salvador who was detained in a raid on his church clinic, and tortured for 22 days in National Guard headquarters. 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*, 434 F.3d 1254, 1259 (11th Cir. 2006).

Moved by Dr. Romagoza's story, the Subcommittee members agreed that his case belonged in a U.S. court. As Senator Richard Durbin remarked, "I could not help but think . . . of how this morning might have started for these two generals . . . in the soft breezes of South Florida, drinking coffee and reading the paper and going about their business under the protection of the United States of America. If this Judiciary Committee is about justice, that is wrong."[4] Like the Executive Branch, the Legislative Branch has made its position clear: war criminals and génocidaires who come to the United States should not be free to "[go] about their business" under the law's protection, without having to bear the law's burden. *See* S. Hrg. 110-548, *supra*, at 26.

While the Fourth and Second Circuits would not consider the fact that some defendants at this very moment go about their business under the protection of the laws of the United States in determining ATS jurisdiction based on tortious conduct committed abroad, the political branches of the U.S. government are unified in their support for a policy of permitting ATS claims against individual perpetrators of severe

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[4] 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, S. Hrg. 110-548, at 26, 110th Cong. (2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg43914/pdf/CHRG-110shrg43914.pdf (statement of Sen. Durbin).

human rights abuses who have sought safe haven in the United States.

3. Depriving the Federal Courts of Jurisdiction Over *Filártiga* Claims Undermines Our Nation's Commitment to Denying Human Rights Abusers Safe Haven, Stoking Diplomatic Friction and Foreign Policy Consequences Unintended by the Political Branches.

In *Kiobel*, this Court indicated that applying a presumption against extraterritorial application to ATS claims "helps ensure that the judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664; *see also id.* at 1665 (stating that courts should avoid conflicts with foreign laws that stoke "international discord"). As the United States explained in its Supplemental Brief as Amicus Curiae in *Kiobel*, 2012 WL 2161290 at *3, *16-19, those foreign policy concerns include preventing diplomatic "friction," *id.* at *17-18, upholding "the credibility of our nation's commitment" to human rights, and avoiding being seen as a safe harbor for international criminals, *id*. at *19-20. The government brief articulated plainly that foreign-policy consequences *will follow* from denying a human rights-abuse victim a remedy when the perpetrator has found safe haven in the United States and, as a result, urged that "the Court should not articulate a categorical rule foreclosing any such application of the ATS." *Id.* at *4. The risk of being perceived as harboring an enemy of mankind and causing international friction increases "[w]hen an individual foreign perpetrator is found residing in the

United States" because "the perpetrator's ties to the U.S. are stronger and often more lasting," thus the choice of forum and invocation of U.S. law by a victim-plaintiff "may be entitled to more weight." *Id.* at *19-20.

Nonetheless, the Fourth Circuit determined that Ali's residency was not a cognizable consideration in the *Kiobel* inquiry. That view is in conflict with the political branches that have signed treaties, engaged in congressional hearings, and enacted legislation in line with the policy of denying safe haven to human rights abusers. This Court should grant certiorari on this important federal question.

B. Depriving the Federal Courts of Subject-Matter Jurisdiction Over Claims Against War Criminals Residing in the United States Would Create a Safe Haven for Perpetrators, in Open Contradiction With Our Nation's Commitment to Human Rights.

The ATS has long served as the principal—and, indeed, often the only realistic—means of holding individuals accountable for violations of human rights in other countries. Neither the TVPA nor state tort law provides an adequate substitute. And in cases against individual defendants here in the United States, the United States is often the only available forum for accountability.

1. The Decision Below Leaves Atrocity Victims With No Adequate Remedy and Empowers War Criminals and Other Common Enemies of Mankind to Seek Safe Haven in the United States.

The position espoused by the court of appeals below would effectively deprive victims of mass atrocities of any remedy against foreign perpetrators taking refuge in the United States. The number of atrocity survivors who would, as a result, be denied a day in court is startling. *See, e.g.*, *Samantar*; *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*; *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005); *Kadic*; *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Marcos*; *Ahmed*; *Jara v. Barrientos Núñez*, No. 6:13-cv-01426-RBD-GJK, 2013 WL 4771739 (M.D. Fla. 2013); *Ochoa Lizarbe v. Hurtado*, No. 07-21783-Civ-Jordan, 2008 WL 941851 (S.D. Fla. Mar. 4, 2008); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 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). *See also Al–Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010), *aff'd*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Estate of Husein v. Prince*, No. 1:09cv1048, 2009 WL 8726450 (E.D. Va. Oct. 22, 2009) (case settled).

Equally startling is the volume of human rights violators seeking safe haven in the United States, whom the Fourth Circuit's decision would effectively

insulate from suit. U.S. Immigration and Customs Enforcement ("ICE") estimates that approximately 1,900 individuals present in the United States are suspected to have engaged in human rights crimes committed overseas. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, The Human Rights Violators and War Crimes Unit, https://www.ice.gov/human-rights-violators-war-crimes-unit#wcm-survey-target-id. A bar to claims like those here and in the *Filártiga* line of cases would end the opportunity for victims of serious violations of international law to seek remedies against these individuals and hold them civilly accountable when they are found on U.S. soil.

2. The TVPA Is Not an Adequate Substitute to Ensure the Denial of Safe Haven to Human Rights Abusers.

Because the TVPA was explicitly designed as a supplement to the broader extraterritorial reach of the ATS, it does not in itself adequately deny safe haven to human rights abusers. First, the TVPA extends only to extrajudicial killing and torture. *See* 28 U.S.C. § 1350 note. By contrast, the ATS encompasses a broader spectrum of heinous conduct, including genocide, war crimes, piracy, slavery, and crimes against humanity, among others. Congress expressed that 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." H.R. Rep. No. 102-367, at 4.

The impact of this distinction is illustrated by contemporary events in eastern Africa. Led by Joseph Kony, a rebel group called the Lord's Resistance Army

("LRA") has terrorized Ugandans for decades, engaging in the systematic cruel and inhuman treatment of innocent civilians. If Kony or any of his henchmen were to move to the United States, they could face liability under the ATS for the full range of their crimes, but not under the ruling in the Fourth Circuit below. Nor could their victims bring suit under the TVPA, because many of their actions—including forcing up to two million people into refugee camps and using children as soldiers—do not necessarily fall within the scope of the TVPA. For similar reasons, in many *Filártiga*-type cases, a number of the claims involving serious violations of international law are cognizable under the ATS, but not the TVPA.

Second, the TVPA "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 102-367, at 5. Instead, the statute reaches only torture or extrajudicial killings committed "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. By contrast, the ATS permits liability for individuals acting outside state authority. *See Kadic v. Karadzic*, 70 F.3d 232, 242-44 (2d Cir. 1995) (holding that plaintiffs in ATS suit needed not satisfy state action requirement regarding claims of genocide and war crimes). Once again, the impact of this distinction is illustrated by contemporary events in Uganda. Kony's rebel group the LRA has terrorized the region for decades, continuing to "kill, torture, maim, rape, and abduct large numbers of civilians, virtually enslaving numerous children"[5] seemingly without acting under the

[5] The Lord's Resistance Army (LRA), GlobalSecurity.org, http://www.globalsecurity.org/military/world/para/lra.htm (last visited June 2, 2016).

authority of any official government. The ATS undoubtedly covers Kony's and the LRA's conduct. The TVPA would not provide jurisdiction for any claims unless victims could show that Kony or the LRA was acting under the color of law of a foreign nation.

CONCLUSION

If the Court grants Ali's petition, Farhan Mohamoud Tani Warfaa's conditional cross-petition for a writ of certiorari should be granted.

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