Docket No. 15-20225

In the

United States Court of Appeals

for the

Fifth Circuit

RAMCHANDRA ADHIKARI, et al.,

Plaintiffs-Appellants,

v.

KELLOGG BROWN & ROOT, INCORPORATED, et al,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of Texas (Houston), Case No. 4:09-CV-1237 · Honorable Keith P. Ellison

BRIEF OF AMICI CURIAE ABUKAR HASSAN AHMED, DR. JUAN ROMAGOZA ARCE, ZITA CABELLO, AZIZ MOHAMED DERIA, CARLOS MAURICIO, GLORIA REYES, OSCAR REYES, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ AND BASHE ABDI YOUSUF IN SUPPORT OF APPELLANTS

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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 Fifth Circuit Rule 28.2.1, Counsel for Amici Curiae certify that no Amicus represented by counsel is a corporation.

Further, pursuant to Fifth Circuit Rule 28.2.1, counsel for Amici Curiae hereby submit their Certificate of Interested Persons, incorporating the Certificate of Interested Persons filed by Plaintiffs-Appellants on September 24, 2015, and adding the following:

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief of Amici Curiae is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure in support of Plaintiffs-Appellants. Amici Abukar Hassan Ahmed, Dr. Juan Romagoza Arce, Zita Cabello, Aziz Mohamed Deria, Carlos Mauricio, Gloria Reyes, Oscar Reyes, 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 their individual abusers.[1]

This case will determine whether survivors such as Amici may 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 U.S. Supreme Court held that such claims are actionable so long as they touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritoriality. Having held their tormentors accountable in U.S. courts for torture, war crimes, crimes against humanity, and other violations of international

[1] No counsel for a party authored this brief in whole or in part and none of parties or 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. All parties to this appeal have consented to the filing of this amicus brief, pursuant to Federal Rule of Appellate Procedure 29(a).

law, Amici are uniquely qualified to speak to the importance of access to this remedy.

STATEMENT OF ISSUES

Amici present argument on the legal standards governing the evaluation of ATS claims involving foreign conduct, and when such claims sufficiently touch and concern the United States to displace *Kiobel*'s presumption against extraterritoriality, including when the defendant is a U.S. national or resident.

SUMMARY OF ARGUMENT

For over three decades, and in each case brought by Amici, federal courts have heard ATS claims against individual defendants for torture and other egregious human rights violations committed abroad. The Supreme Court did not overturn this long-standing precedent in *Kiobel*. It instead left open the question of what circumstances warrant ATS jurisdiction over claims arising in the territory of another sovereign and announced a displaceable presumption against the application of the ATS to such claims. The Court further held that this presumption may be *overcome* when claims "touch and concern" the territory of the United States with "sufficient force." *Kiobel*, 133 S. Ct. at 1669.

The district court below, however, dismissed all of the ATS claims in this case without conducting the analysis mandated by *Kiobel*. Instead of applying the displaceable presumption announced by the *Kiobel* majority, the district court

applied the "focus test" set forth in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and endorsed by only two justices in *Kiobel* in a concurring opinion.[2] According to these justices, the presumption against extraterritoriality is displaced only if the conduct in violation of international law occurs on U.S. territory. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

The district court's application of *Morrison*'s focus test was error. Were the district court's approach generalized, it would bar most ATS suits, including those through which Amici and hundreds of other victims of human rights abuses have sought and achieved justice against their abusers. The Supreme Court did not mandate such a result, and *Kiobel* did not overturn these precedents. It instead instructed courts to apply a multi-factor analysis to determine whether "claims," rather than the conduct, "touch and concern" the U.S. with sufficient force to displace the presumption against extraterritoriality. Amici accordingly urge that the decision of the district court below should be reversed.

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[2] *Compare Adhikari v. Daoud & Partners*, No. 4:09-CV-1237, 2015 U.S. Dist. LEXIS 37403, at *14 (S.D. Tex. Mar. 24, 2015) ("The Supreme Court . . . instructed lower courts to consider whether the alleged domestic conduct coincides with the 'focus of congressional concern.'") *with Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring) ("[W]hen the ATS was enacted, congressional concern was focused on the three principal offenses against the law of nations . . . . As a result, a putative ATS cause of action will . . . be barred—unless the domestic conduct is sufficient to violate an international law norm.") (internal quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED BECAUSE *KIOBEL* DOES NOT APPLY *MORRISON*'S FOCUS TEST TO ATS CLAIMS

The court below erred when it applied *Morrison*'s focus test to determine that the presumption against extraterritoriality had not been displaced. *See Adhikari v. Daoud & Partners*, No. 4:09-CV-1237, 2015 U.S. Dist. LEXIS 37403, at *14 (S.D. Tex. Mar. 24, 2015). Rather than apply *Kiobel*'s broader "touch and concern" test, the district court mistakenly focused solely on where Defendants' wrongful conduct took place. *Id*. *Kiobel*, however, requires a broader factual inquiry into whether the claims "touch and concern the territory of the United States, . . . with sufficient force to displace the presumption." 133 S. Ct. at 1669. Unlike *Morrison*, *Kiobel* aims a wide-angle lens at the "claim" as a whole, rather than a microscope at conduct alone. Erroneously applying the latter test would eliminate claims such as Amici's, a result unanticipated by *Kiobel's* majority opinion.

A. *Kiobel* Adopted a Two-Step Approach that Requires Examining the Claim as a Whole to Determine Whether the Presumption Against Extraterritoriality Has Been Displaced

In *Kiobel*, plaintiffs (originally from Nigeria) sued British and Dutch parent companies in New York for abuses allegedly committed by the companies' subsidiaries in Nigeria. 133 S. Ct. at 1662-63. Under these facts, the Court framed the question presented as "whether a claim [under the ATS] may reach conduct

occurring in the territory of a foreign sovereign." *Id*. at 1664. The Court answered the question presented in the affirmative, holding that the ATS permits claims for violations of international law that occur abroad, so long as the presumption against extraterritoriality has been "displaced." *See Id*. at 1669.

Kiobel therefore requires a two-step factual inquiry. The court must first determine whether "all the relevant conduct took place outside the United States," thereby triggering the presumption against extraterritoriality.[3] 133 S. Ct. at 1669. Second, if the presumption is triggered, then the court must assess whether "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Id.* at 1669. If the presumption has been displaced, then federal courts have jurisdiction over the extraterritorial ATS claims. *Id.* The district court erred by stopping at the first step. *See Adhikari*, 2015 U.S. Dist. LEXIS 37403, at *14 (concluding "that the conduct 'relevant' to the ATS claim occurred outside of the United States").

B. *Morrison's* Focus Test Does Not Apply to Common Law ATS Claims

Morrison is distinct from *Kiobel*. *Morrison*'s focus test applies to conduct-regulating statutes legislated by Congress, not to jurisdictional grants and not to

[3] Applying U.S. law to conduct within the United States raises no issue of extraterritoriality and does not trigger the presumption. *See Envtl. Def. Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

common law claims. *Morrison* addressed whether Congress intended § 10(b) of the Securities Exchange Act to regulate a foreign sale of securities listed on an Australian exchange. *Morrison*, 561 U.S. at 250-51. The Court invoked the presumption against the extraterritorial application of federal statutes—"a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate"—and held that Congress did not so intend. *Id.* at 255.

Morrison's approach depends on identifying the "focus of congressional concern." *Id.* at 249 (internal quotation marks omitted). Because Congress "ordinarily legislates with respect to domestic, not foreign matters," a conduct-regulating statute is presumed to focus on domestic matters and therefore to apply only to domestic conduct. *See id.* at 255, 266–67. In *Morrison*, the Court determined that the focus of the Exchange Act is "domestic exchanges," and, therefore, the Act did not apply to foreign sales of securities listed on foreign exchanges. *Id*. at 273.

The ATS, in contrast, is not a conduct regulating statute. It instead confers jurisdiction on federal courts to hear common law claims based on customary international law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (The ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations."). Accordingly, the ATS—like the federal question statute, 28 U.S.C. § 1331, and the diversity statute, 28 U.S.C. § 1332—has but one focus: the power of

a federal court to adjudicate a dispute. Thus, as the D.C. Circuit noted, "a jurisdictional statute . . . would apply extraterritorially only if Congress were to establish U.S. district courts in foreign countries." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 23 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

The *Kiobel* majority recognized the incongruity of applying *Morrison* to the ATS: "We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad . . . . The ATS, on the other hand, is 'strictly jurisdictional.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Sosa*, 542 U.S. at 724); *see also Al Shimari v. CACI Premier Techs., Inc.,* 758 F.3d 516, 530 (4th Cir. 2014) ("[P]laintiffs seek to enforce the customary law of nations through a jurisdictional vehicle provided under United States law, the ATS, rather than a federal statute that itself details conduct to be regulated or enforced.").[4] *Morrison* simply does not square with common law claims: "[S]ince the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms." *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014). There is no congressional "focus" to be discerned.

[4] *See also Al Shimari v. CACI Premier Techs., Inc.,* 758 F.3d 516, 530 (4th Cir. 2014) ("Thus, any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable.").

Only Justice Alito, joined by Justice Thomas, urged the application of *Morrison*'s focus test to ATS claims. *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). Justice Alito explained his view that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations." *Id*. Accordingly, he reasoned, the statute has no extraterritorial application. This view has been soundly rejected. *See id*. at 1669 (presumption can be displaced); *id*. (Kennedy, J., concurring); *id*. at 1670 (Breyer, J., concurring); *see also Nestle USA*, 766 F.3d at 1028 ("[T]he assertion that *Kiobel II* meant to direct lower courts to apply the familiar *Morrison* focus test is belied by the concurring opinions, which note that the standard in *Kiobel II* leaves 'much unanswered.'").

The *Kiobel* majority's analysis was instead more subtle. *Kiobel* relied on *Morrison* to determine *when* the presumption against extraterritoriality applies—the first prong of the analysis—not when it is *displaced*. 133 S. Ct. at 1668 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."). The focus test plays no part in addressing whether ATS claims sufficiently touch and concern the U.S. to displace the presumption.

Rather, it is the "principles underlying" the presumption against extraterritoriality that determine when the presumption has been displaced. *Kiobel*, 133 S. Ct. at 1664. These principles include avoiding "foreign policy consequences not clearly intended by the political branches," *id*., while, at the same time, heeding the Court's instruction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). These are the principles that properly constrain courts entertaining ATS suits for human rights abuses committed abroad and effectively assist courts in determining when ATS jurisdiction is proper.

C. *Kiobel's* Touch and Concern Test Applies to Claims as a Whole to Ascertain Whether the Presumption Against Extraterritoriality Has Been Displaced

The *Kiobel* majority formulated a legal standard—the "touch and concern" test—that differs materially from the *Morrison* test. *Kiobel* altered the *Morrison* test by deploying the phrase "touch and concern" rather than "focus," the term "claim" rather than "conduct," and the term "displace" rather than "rebut." *Kiobel*, 133 S. Ct. at 1664; *see Nestle USA*, 766 F.3d at 1028 ("[T]he opinion in *Kiobel II* did not incorporate *Morrison*'s focus test . . . and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt.").

Altering these terms has legal effect. The use of "touch and concern," "claim," and "displace" indicates that if the presumption against extraterritoriality has been

triggered by extraterritorial conduct, courts must look beyond this conduct to the claim as a whole to evaluate whether the presumption has been displaced. Specifically, by instructing courts to analyze "claims," *Kiobel* requires courts to inquire into "the aggregate of operative facts giving rise to a right enforceable by a court." *See Black's Law Dictionary* 204 (abridged 8th ed. 2005) (defining "claim" as such).

The Fourth Circuit adopted the correct approach in *Al Shimari*. It reasoned as follows:

> [T]he [*Kiobel*] Court broadly stated that the "claims," rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force to displace the presumption against extraterritoriality, suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action.

758 F.3d at 527. Applying *Morrison*'s focus test to ATS claims thus fundamentally misunderstands the *Kiobel* test and misses key factors necessary to determine whether the presumption is displaced.

D. The Decision Below Bars Claims Like Those of Amici, a Consequence Not Contemplated by *Kiobel*

The lower court's misapplication of *Kiobel* would have unintended consequences if affirmed. To misread *Kiobel* as categorically barring all ATS claims based upon extraterritorial conduct would prematurely exclude cases that the majority did not address. *See Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring) (noting that the majority "leaves for another day . . . just when the presumption . . .

might be 'overcome'" and that "[o]ther cases may arise" that are not covered by *Kiobel*'s "reasoning and holding.").

The lower court's decision would also overturn the line of authority that started with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)—a line of authority that was endorsed by the Supreme Court in *Sosa* and *Kiobel.* In addition to *Filártiga*, which concerned the torture of a Paraguayan citizen in Paraguay, *Sosa* explicitly cited two cases, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) and *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), both of which held that the ATS permitted Courts to hear claims for conduct occurring abroad. By favorably citing these precedents, *Sosa* "suggest[ed] 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).

Kiobel did not undo these longstanding precedents. 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 v. Royal Dutch Petroleum Co.* (No. 10-1491) (Feb 28, 2012). And the *Kiobel* majority drew extensively from *Sosa*'s underpinnings in *Filártiga*. *See* 133 S. Ct. at 1673. The *Kiobel* majority simply found the facts before it distinguishable from *Sosa*. *Id.*

The district court's misapplication of *Morrison* ignores these subtleties and forecloses ATS claims, like those in *Filártiga*, against U.S. citizens and residents

who commit genocide, war crimes, and crimes against humanity abroad. Such a result would deprive many survivors, such as Amici, of any remedy against foreign perpetrators taking refuge in the United States. The number of atrocity survivors who would now be denied a day in court is startling. *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305 (2010); *Ochoa Lizarbe v. Rondon*, 402 F. App'x 834 (4th Cir. 2010); *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009); *Chavez v. Carranza*, 559 F.3d 486 (6th 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); *Ahmed v. Magan*, No. 2:10-cv-342, 2013 U.S. Dist. LEXIS 117963 (S.D. Ohio Aug. 20, 2013); *Jara v. Barrientos*, No. 6:13-cv-01426 (M.D. Fla. 2013); *Lizarbe v. Hurtado*, No. 07-cv-21783, 2008 U.S. Dist. LEXIS 109517 (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-cv-22046- Lenard/Klein (S.D. Fla 2002).

Amicus Dr. Juan Romagoza Arce exemplifies these cases. Dr. Romagoza was among the many innocent civilians tortured by Salvadoran officials during the civil war of the 1970s and 1980s. A medical doctor, Romagoza was shot and detained in a military raid on a church clinic, and tortured for 22 days in the National Guard headquarters. The Guardsmen applied electric shocks to his tongue, testicles, anus, and the edges of his wounds. Revived by beatings and cigarette burns, he was

raped and asphyxiated with a hood containing calcium oxide. His torturers shot him in his left hand and taunted him that he would never perform surgery again.

Dr. Romagoza survived and received asylum in the United States in 1983. But his nightmare followed him into U.S. territory: The Generals who had commanded his torturers were living in comfortable retirement in southern Florida. Dr. Romagoza and other victims filed ATS and TVPA claims against General Carlos Eugenio Vides Casanova, Director General of the National Guard, and General José Guillermo García, Salvadoran Minister of Defense from 1979 to 1983. In 2002, a jury found both Generals liable. *See generally Arce*, 434 F.3d at 1259.

The United States was the sole judicial forum open to Dr. Romagoza, as holding the Generals accountable in El Salvador would have been impossible. *See Id*. at 1263. But the public—and several members of Congress—were shocked to learn that the United States had been a safe haven for Dr. Romagoza's tormentors.

In 2007, Dr. Romagoza testified before the Senate Judiciary Subcommittee on Human Rights and the Law. Moved by his story, the subcommittee members recognized that his case belonged in U.S. court. Senator Richard Durbin remarked as follows

> "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.

And the Executive Branch agreed: In 2012, Dr. Romagoza testified in the immigration removal proceedings against General Vides Casanova, which resulted in a finding of removability.

Although Dr. Romagoza was tortured in El Salvador, his claims against the Generals so "touched and concerned" the United States that Congress and the Executive spoke with one voice: War criminals and génocidaires should not be free to 'go about their business' under the law's protection, without having to bear the law's burden. Barring all ATS claims based on foreign conduct, as the lower court did, would close the courts of this Circuit to atrocity survivors such as Amici, even when, as in Dr. Romagoza's case, their abusers are resident in the United States and unreachable in any other forum.

II. *KIOBEL*'S "TOUCH AND CONCERN" TEST REQUIRES A MULTI-FACTOR ANALYSIS

The Fourth, Ninth, and Eleventh Circuits have correctly recognized that *Kiobel*'s "'touch and concern' language" instructs "courts [to] apply a fact-based analysis to determine whether particular ATS claims displace the [*Kiobel*] presumption." *Al Shimari*, 758 F.3d at 527; *see also Doe v. Drummond Co.*, 782 F.3d 576, 594-601 (11th Cir. 2015) (considering multiple factors beyond conduct); *Mujica v. AirScan Inc.*, 771 F.3d 580, 594-95 & n.9 (9th Cir. 2014) (same). To be sure, the *Kiobel* Court did not enumerate all of factors relevant to the "touch and concern" test. *See* 133 S. Ct. at 1669 (Kennedy, J., concurring) ("The opinion for

the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."). Nonetheless, the majority opinion, its concurrences, and its progeny provide important guideposts.

Specifically, *Kiobel* and subsequent courts have considered: (1) whether the defendant has U.S. residence, nationality, or presence; (2) whether international comity concerns are triggered by competing foreign jurisdictions; and (3) whether the claim impacts U.S. national interests, including the national security interest in denying safe harbor to fugitive human rights abusers.[5] These factors should guide this Court's analysis.

A. The Presumption May Be Displaced by the Defendant's Nationality, Residence, and Physical Presence

Kiobel considered the defendants' nationality and the nature and extent of their presence in the United States to be significant indicators of whether a claim

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[5] *Kiobel*'s fact-based analysis involves a familiar judicial exercise: Courts regularly conduct multi-factor, reasonableness inquiries to determine personal jurisdiction and resolve conflicts of law. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (conducting multifactor "minimum contacts" analysis to find personal jurisdiction); *United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that application would not be arbitrary or fundamentally unfair."); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (after considering factors similar to those in *Kiobel*, finding that "Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair").

sufficiently "touch[es] and concern[s]" the territory of the United States. *See* 133 S. Ct. at 1662, 1669. The Court noted that the defendants were foreign ("Dutch, British, and Nigerian") and "present in many countries." *Id.* Under these facts, the Court held that "it would reach too far to say that mere corporate presence suffices." *Id*. at 1669. The Court had no occasion to consider the outcome where the defendants are U.S. nationals or are present only in the United States. This was one of the "significant questions" that *Kiobel* "le[ft] open." *Id.* (Kennedy, J., concurring). But the importance of nationality and presence was reiterated in Breyer's concurrence, which "would find jurisdiction under [the ATS] where . . . the defendant is an American national." *Id.* at 1671 (Breyer, J., concurring).

Other circuits have accordingly looked to the nationality and presence of the defendant to determine whether a claim displaces *Kiobel*'s presumption. For example, in *Al Shimari*, the Fourth Circuit held that the plaintiffs' claims sufficiently touched and concerned the territory of the United States. The court reasoned as follows:

> When a claim's substantial ties to United States territory include the performance of a contract executed by a *United States corporation* with the United States government, a more nuanced analysis is required to determine whether the presumption has been displaced. In such cases, it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory.

758 F.3d at 528 (first emphasis added). *Al Shimari*'s analysis is sound: In conjunction with other factors, a defendant's U.S. nationality or presence can

displace the presumption. *Cf. Drummond Co.*, 782 F.3d at 596 ("Although the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own.").

Likewise, multiple courts have held that an individual defendant's presence or residency in the United States is sufficient to displace the presumption. For example, in Amicus Abukar Hassan Ahmed's case, *Ahmed v. Magan*, the U.S. District Court for the Southern District of Ohio held that the *Kiobel* presumption was overcome, even though the abuses at issue took place in Somalia, because the defendant was a resident of the United States. 2013 U.S. Dist. LEXIS 117963, at *4. Similarly, the U.S. District Court for the District of Massachusetts held 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*, 960 F. Supp. 2d 304, 322 (D. Mass. 2013). These analyses reflect a straightforward application of *Kiobel*'s displacement principle: Where the defendant is resident in the forum, there is less likelihood of friction in foreign affairs, and the presumption is likely to be displaced.

The Court's subsequent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), confirms this understanding. The *Daimler* Court explained that "the risks to international comity," compelled a more restrained view of personal jurisdiction with respect to foreign corporations. 134 S. Ct. at 763. Nonetheless, the Court

implied that such concerns would be reduced, if not eliminated entirely, if the corporation were "domiciled" in the forum. *See id.* ("In the European Union, for example, a corporation may generally be sued in the nation in which it is 'domiciled' . . . ."). Thus, the defendant's nationality and presence—whether as a natural person found on U.S. soil or as a corporation domiciled in U.S. territory—is a key factor to be considered under *Kiobel*.

B. The Presumption May Be Displaced If Comity Concerns Are Not Triggered by Competing Foreign Jurisdictions

Kiobel expressly stated that the comity concerns underlying the presumption against extraterritoriality subside when the plaintiffs' claims do not touch and concern the territory of another sovereign. *See* 133 S. Ct. at 1667. This reasoning includes claims for which there are no alternative fora. In such cases, *Kiobel*'s presumption is likely to be displaced.

Kiobel's animating principle is the avoidance of unwarranted judicial intrusion into foreign policy. *See id.* at 1664. Accordingly, its presumption is displaced when ATS claims do not affect the sovereignty of a foreign state. The paradigmatic example of such a claim is piracy. *Kiobel* recognized that an ATS cause of action for piracy on the high seas was a permissible, extraterritorial application of U.S. law. This application, the Court explained, did not raise the same concerns of intrusion onto another sovereign's territory because

> [a]pplying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences.

Id. at 1667. *Kiobel* thus suggests where the sovereignty of another nation is not implicated, the presumption against extraterritorial application of ATS claims may be displaced.[6]

By the same principle, *Kiobel* also indicates that where the plaintiff has no other available forum, ATS jurisdiction should lie in the United States. *Cf. id.* at 1669; *see also* Restatement (Second) of Conflict of Laws, § 85, cmt. b ("A court will

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[6] *Boumediene v. Bush*, 553 U.S. 723 (2008), and *Rasul v. Bush*, 542 U.S. 466 (2004), are instructive in this regard. In these cases, the Court considered whether the civil writ of habeas corpus extends to prisoners held by the United States Military at Guantanamo Bay, Cuba. The Court held that it does. In *Rasul*, the Court explained that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the territorial jurisdiction of the United States." *Id.*at 480 (internal quotation marks omitted). And in *Boumediene*, the Court further explained that the extension of habeas to Cuban sovereign territory at Guantanamo "would [not] cause friction with the host government . . . . [because n]o Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there." 553 U.S. at 770.

Read in tandem, *Kiobel*, *Boumediene*, and *Rasul* imply, first, that the concerns about intrusion in the territory of another sovereign identified by *Kiobel* are of substantially lesser magnitude when the territory in which the relevant acts took place is not that of another sovereign. Second, for purposes of assessing whether another sovereign asserts jurisdiction, the relevant inquiry is whether, in practice, another sovereign exercises jurisdiction. Third, in such contexts where another sovereign has not purported to assert jurisdiction over such territory in the past, the concerns of international "friction" subside and militate in favor of the exercise of jurisdiction by American courts.

be reluctant to dismiss the action if there is no other convenient state in which the plaintiff could obtain more appropriate relief."). The exercise of ATS jurisdiction in such cases is unlikely to implicate international comity concerns. *Cf. 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."). As the experience of Amici demonstrates, often in ATS litigation, the local judicial system may be inadequate, or the defendant may be physically present in the United States and thus beyond the reach of any other jurisdiction. In such cases, "where there is no other forum and no later exercise of jurisdiction . . . relinquishing jurisdiction is not abstention; it's abdication." *One2One Commc'ns., LLC v. Quad/Graphics, Inc*., No. 13-3410, 2015 U.S. App. LEXIS 12544 (3d Cir. July 21, 2015) (Krause, J., concurring).

The case of Amica Cecilia Santos exemplifies the importance of this principle. 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 as much 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 *Carranza* in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), 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 id.* at 1709.

C. The Presumption May Be Displaced If the Claim Impacts Important National Interests

Kiobel also instructs that when the United States government has stated policies favoring adjudication of the claim, the presumption against extraterritoriality is displaced. *See* 133 S. Ct. at 1669 (The presumption against extraterritorially applies to guard "against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."). The Fourth Circuit thus considered, as one *Kiobel* factor, "the expressed intent of Congress, through enacting the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Al Shimari,* 758 F.3d at

531. Such express policies are not limited to remedying and deterring torture: The United States has repeatedly voiced a national security interest in "not becoming a safe harbor for violators of the most fundamental international norms." *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

Claims like those alleged in the groundbreaking case of *Filártiga v. Peña-Irala*, discussed above, displace the presumption against extraterritoriality precisely because they comport with stated policies of the United States favoring adjudication of claims brought against human rights violators found within our borders. As the Second Circuit explained, "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." *Filártiga*, 630 F.2d at 876. According to the court, denying *Peña-Irala* safe haven in the United States was "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Id.*

Both Congress and the Executive subsequently endorsed the *Filártiga* paradigm. Congress first lent support when it extended the right to U.S. Citizens to bring similar cases under the TVPA, signed into law by President George H.W. Bush in 1992.[7] Like the ATS, the TVPA permits courts to entertain suits against foreign

[7] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) ("Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.").

citizens who are present in the United States. *See Mohamad*, 132 S. Ct. at 1709; *Samantar,* 560 U.S. at 325 (holding that the Foreign Sovereign Immunities Act did not bar ATS and TVPA claims against a U.S. resident who had committed abuses in Somalia). In so doing, Congress specifically noted that the TVPA was meant to reinforce that torturers have no safe haven in the United States, and to reaffirm that the ATS had been serving this laudable function for non-citizen plaintiffs. *See* H.R. Rep. No. 102-367, at 4 (1991).[8]

The Executive Branch has likewise unequivocally stated that "recognizing a cause of action in the circumstances of *Filártiga* [*i.e.*, 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, *Kiobel v. Royal Dutch Petroleum Co.*, 2012 U.S. S. Ct. Briefs LEXIS 2636, at *22-23. As the Solicitor General explained to the *Kiobel* Court, denying a cause of action against perpetrators found in the United States could risk "international discord," and "give rise to the prospect that this country would be perceived as harboring the perpetrator." *Id.* at *9, *27 (internal quotation marks omitted).

[8] Congress has since repeatedly declared an interest in denying safe haven to perpetrators of other human rights abuses, including genocide, war crimes, crimes against humanity, and human trafficking. *See, e.g.*, Human Rights Enforcement Act, Pub. L. No. 111-122, § 2(b), 123 Stat. 3480 (2009) (codified at 28 U.S.C. § 509B) (establishing a section with the Department of Justice for the prosecution of extraterritorial human rights crimes).

The Executive Branch again voiced national security interests in adjudicating ATS claims in the case of Amici Bashe Yousuf and Aziz Deria against an alleged war criminal who had sought safe haven in the United States. Yousuf and Deria sued Mohamed Samantar—a resident of Fairfax, Virginia since 1997—for torture, extrajudicial killing, war crimes, and crimes against humanity committed in Somalia. When Samantar's claim of statutory immunity reached the Supreme Court, the Executive Branch voiced its strong foreign policy interest in promoting the protection of human rights. Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2010 U.S. S. Ct. Briefs LEXIS 78. On remand, the Executive Branch again urged that Samantar be denied common law immunity from ATS claims, declaring that U.S. residents such as Samantar, who enjoy the protections of U.S. law, should be subject to the jurisdiction of our courts. Statement of the United States, ¶ 9, *Yousuf v. Samantar,* Dkt. 147, No. 1:04 CV 1360 (E.D. Va. Feb. 14, 2011). Accordingly, when the political branches have announced a national interest in favor of adjudicating cases alleging human rights violations, *Kiobel* guides courts to defer to such policy and exercise ATS jurisdiction.

Other courts have similarly held that when violations of international law committed abroad are directed at and threaten U.S. national interests, the presumption against extraterritoriality is displaced. In *Mwani v. Bin Laden,* 947 F. Supp. 2d 1 (D.D.C. 2013), the U.S. District Court for the District of Columbia held

that it had jurisdiction over ATS claims arising from a terrorist attack on the U.S. Embassy in Nairobi, Kenya. The court found it "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." *Id*. at 5. According to the court, because the events at issue were "plotted in part within the United States, and [were] directed at a United States Embassy and its employees," the presumption had undoubtedly been displaced. *Id*.; *see also Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) (finding jurisdiction under the ATS when important American national interests are at stake).

Relatedly, national interests are implicated where ATS claims are inextricably intertwined with other viable claims arising on foreign soil. Often, as in the cases of Amici as well as Plaintiffs below, ATS claims will be intertwined with viable claims arising on foreign soil. In such circumstances, severing ATS claims would have no discernible effect on international comity. For example, dismissing the ATS claims from the case of Amica Zita Cabello would have served no comity concern, because, as the Eleventh Circuit 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*, 402 F.3d at 1161.[9]

III. CONCLUSION

Justice Kennedy's concurring opinion in *Kiobel* emphasized that the Court did not foreclose ATS claims for "human rights abuses committed abroad" in cases not covered by the reasoning and holding of *Kiobel*. 133 S. Ct. at 1669 (Kennedy, J., concurring). In such cases, the *Kiobel* presumption "will require some further elaboration and explanation." *Id*. Amici submit that this is such a case.

Allowing the decision below to stand would deny survivors like Amici their right to bring claims against individual abusers found on U.S. soil. Neither *Kiobel*, nor Congress, nor the Executive has sanctioned such an outcome. If the *Kiobel* Court had intended to limit the ATS to violations of international law committed on U.S. soil, the majority opinion would have stated so. In such an alternate holding, nine justices—not two—would have adopted Justice Alito's version of *Morrison*'s focus

[9] 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. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005). Cabello's surviving relatives brought suit against Armando Fernando Larios, a death squad member residing in Florida, 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 the 11th Circuit affirmed. *Id.* at 1161 (noting that evidence of the widespread and systematic nature of the atrocities was relevant to both ATS and TVPA claims).

test. Instead, *Kiobel*, its predecessors, and its progeny demonstrate that the "touch and concern" test requires a multi-factor analysis that requires courts to consider a range of possible links to the United States. Because the district court failed to conduct such an analysis, Amici urge the Court to reverse the decision below, and provide the lower courts with guidance as to the proper application of *Kiobel*'s multi-factor analysis.

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CERTIFICATE OF SERVICE

I certify that on October 1, 2015, a true and correct copy of the foregoing was served on all counsel of record via the CM/ECF system, as indicated below:

Counsel also certifies that on October 1, 2015, the foregoing instrument was transmitted to the Clerk of the Court, United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System.

Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Vipre, and is free of viruses.

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