No. 13-1937(L), 13-2162

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SALAH HASAN NUSAIF AL-EJAILI, ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellants,

– v. –

CACI PREMIER TECHNOLOGY, INC., CACI INTERNATIONAL, INC.,
Defendants-Appellees,

– and –

TIMOTHY DUGAN, L-3 SERVICES, INC.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA (ALEXANDRIA)

BRIEF OF *AMICI CURIAE* DOLLY FILÁRTIGA, ABUKAR HASSAN AHMED, DANIEL ALVARADO, DR. JUAN ROMAGOZA ARCE, ALDO CABELLO, ZITA CABELLO, AZIZ MOHAMED DERIA, NERIS GONZALES, CARLOS MAURICIO, GLORIA REYES, OSCAR REYES, CECILIA SANTOS MORAN, ZENAIDA VELASQUEZ, AND BASHE ABDI YOUSUF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief of *Amici Curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Plaintiffs-Appellants.

Amici Dolly Filártiga, Abukar Hassan Ahmed, Daniel Alvarado, Dr. Juan Romagoza Arce, Aldo Cabello, Zita Cabello, Aziz Mohamed Deria, Neris Gonzales, Carlos Mauricio, Gloria Reyes, Oscar Reyes, Cecilia Santos Moran, Zenaida Velasquez, and Bashe Abdi Yousuf are survivors of gross human rights violations who have filed and won lawsuits under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS" or "section 1350"), and the Torture Victim Protection Act, Pub. L. 102–256, 106 Stat. 73 (1992) ("TVPA"), against the individuals responsible for perpetrating those abuses.

In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Supreme Court held that ATS claims must touch and concern the territory of the United States with sufficient force to displace the ATS's presumption against extraterritoriality. Courts' application of *Kiobel* will determine whether and under what circumstances survivors such as *Amici* may be allowed to pursue their claims. Having held their tormentors accountable in U.S. courts for torture, extrajudicial killing, war crimes, crimes against humanity, arbitrary detention, and cruel, inhuman, or degrading treatment or punishment, *Amici* are uniquely qualified to speak to the importance of access to the courts in such situations.

No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *Amici*, or *Amici*'s counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this appeal have consented to the filing of this *amicus* brief, pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

For over three decades, and in each case brought by *Amici*, federal courts have affirmed their power to exercise jurisdiction over individuals who come to the United States after committing egregious human rights abuses abroad. The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* is consistent with this line of authority. Rather than imposing a categorical bar on ATS claims that arise abroad, the Court's decision instructs the lower courts to perform a case-by-case analysis to determine whether ATS claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritoriality ("the *Kiobel* presumption").

Specifically, *Kiobel* requires a two-pronged analysis. *First*, the court must determine whether an ATS claim is based on extraterritorial conduct, as only such extraterritorial application will trigger the *Kiobel* presumption. *Second*, the court must decide whether the presumption—once triggered—is displaced under the "touch and concern" test, in which the Supreme Court looked to the nexus between

the parties and the events and the United States; the status and residence of the defendant; and whether adequate, alternative fora were available for redress.

Yet in the present case, the district court failed to complete the two-pronged analysis that *Kiobel* requires. Applying only the first prong, the district court refused to consider whether the *Kiobel* presumption, once triggered, was displaced. It did not examine the status and residence of the defendant, nor the availability of other fora. This truncated analysis short-circuits the Supreme Court's framework for the ATS. Were it generalized, it would have barred most ATS cases brought in the past 30 years. In contrast, *Kiobel*'s required analysis keeps the courthouse doors open to claims with a strong connection to the United States, such as cases against U.S. residents.

The analysis of ATS claims against U.S. residents required by *Kiobel* is compatible with over 30 years of judicial precedents, and with the express foreign policy of the legislative and executive branches to prevent the United States from becoming a safe haven for human rights violators. Further, *Kiobel* allows ATS claims against U.S. residents accused of being human rights abusers who would otherwise escape liability because, as a practical matter, this country is often the only place they can be held accountable. Without the availability of remedial ATS claims, *Amici* would not have been able to seek and obtain justice against notorious human rights abusers in U.S. courts or anywhere else.

ARGUMENT

I. THE DISTRICT COURT ERRED BECAUSE *KIOBEL* DOES NOT IMPOSE A CATEGORICAL BAR ON ATS CLAIMS THAT ARISE ABROAD.

In dismissing Plaintiffs' claims under the Alien Tort Statute, the district court held that "the ATS cannot provide jurisdiction for alleged violations of the law of nations where the alleged conduct occurred outside the United States." *Al Shimari v. CACI Int'l, Inc.*, No. 1:08–cv–827, 2013 WL 3229720 at *7 (E.D.Va. June 25, 2013). In essence, the District Court's ruling presents a categorical bar to ATS claims relying exclusively on extraterritorial acts.

This Court should reject such a categorical bar on ATS claims arising abroad, and it need look no further than the plain language of *Kiobel* to do so. *Kiobel* fashioned a case-by-case presumption that cautions courts against recognizing extraterritorial ATS claims, with an important exception that the court below ignored: when a case-by-case analysis shows that those claims sufficiently "touch and concern" the United States. By refusing to apply *Kiobel*'s "touch and concern" test, the district court failed to complete the analysis the Supreme Court required in *Kiobel*. *Amici* urge this Court not to enshrine this error, and not to foreclose cases that embody the profound tie between the United States and many ATS claims or defendants.

A. The *Kiobel* Presumption is Displaced When ATS Claims Arising Abroad Sufficiently Touch and Concern the United States.

In *Kiobel*, 133 S. Ct. at 1669, the Supreme Court held that the "principles underlying" the presumption against extraterritoriality limit the circumstances in which courts should recognize common-law causes of action under the ATS. In applying a canon of statutory construction to federal-common-law claims, the Supreme Court fashioned a new *displaceable* presumption: where claims under the ATS "touch and concern the territory of the United States . . . with sufficient force" they "displace the presumption against extraterritorial application." *Id.*

In *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), the Supreme Court had previously explained that the jurisdictional grant of the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Sosa*, 542 U.S. at 724. The Court urged lower courts to proceed cautiously in exercising their power to recognize causes of action under the ATS, refraining from recognizing claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when § 1350 was enacted." *Id.* at 731-32.

The *Kiobel* decision gives the lower courts further guidance regarding when and how to recognize federal-common-law causes of action under the ATS. It

instructs that, in keeping with the cautionary words of *Sosa*, "the principles underlying" the presumption against extraterritoriality "constrain courts considering causes of action" under the jurisdiction of the ATS. *Kiobel*, 133 S. Ct at 1664. The Court further concludes that the *Kiobel* presumption can be displaced where claims under the ATS "touch and concern the territory of the United States . . . with sufficient force." *Id.* at 1669.

Whether the *Kiobel* presumption is dislodged requires a case-specific factual inquiry. The facts alleged in *Kiobel* itself were insufficient to displace it. *See Kiobel*, 133 S. Ct. at 1669 (evaluating the presumption "[o]n these facts"). There, Nigerian plaintiffs sued U.K. and Dutch parent companies in New York for allegedly abetting Nigerian military abuses in Nigeria. *Id.* at 1662-63. *Kiobel* held that the "mere corporate presence" in the United States of a foreign multinational, presumably amenable to suit in other countries, does not sufficiently "touch and concern" the United States. *Id.* As Justice Kennedy's concurrence observed, the majority was "careful to leave open a number of significant questions." *Id.* at 1669 (Kennedy, J., concurring) (noting that "other cases may arise" that are not covered "by [*Kiobel*'s] reasoning and holding").

Although the Court did not delineate all factors relevant to displacing the *Kiobel* presumption, it did offer guideposts. For instance, the analysis should be guided by the same foreign-relations principles that animate the presumption

against extraterritoriality. *Kiobel*, 133 S. Ct. at 1664 ("The presumption against extraterritorial application 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."). As the United States explained in its Supplemental Brief as *Amicus Curiae* in *Kiobel*, 2012 WL 2161290 at *3, *16-19 (hereinafter "U.S. Supp. Br."), 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; *see also Kiobel*, 133 S. Ct. at 1665 (stating that courts should avoid conflicts with foreign laws that stoke "international discord"). The *Kiobel* majority did not expressly rule out the possibility that in some circumstances, these policies favor recognizing an ATS claim based on extraterritorial violations of international law, such as when the defendant resides on U.S. soil and is subject to our country's laws.

In addition to the nationality and residency of the defendant, the Court also considered the availability of other fora. Multinational corporations might be amenable to suit in many jurisdictions, while an individual is likely suable in just one. *See Kiobel*, 133 S. Ct. at 1669 (noting that defendants were multinationals); *accord* Supp. Br. of the United States at *19 (arguing that the exclusive presence of an individual foreign perpetrator in the United States warrants an ATS claim).

Additional principles underlying the presumption against extraterritoriality include familiar choice of law notions: the need for contacts with the forum, sovereign interests arising from those contacts, and notice to the defendant such that he or she could reasonably anticipate being made subject to the forum's law. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (analyzing extraterritorial application of State law under the Constitution's Due Process and Full Faith and Credit clauses).[1]

Indeed, following the guidelines laid down by the *Kiobel* Court, several ATS claims based on extraterritorial conduct have been found to touch and concern U.S. territory with sufficient force to displace the *Kiobel* presumption. One court observed that a U.S. national, living near a U.S. courthouse, was on fair notice that he could be subject to ATS claims for conspiring to commit persecution in Uganda. *Sexual Minorities Uganda v. Lively*, No. 12-CV-30051-MAP, 2013 WL 4130756 at *14 (D. Mass. Aug. 14, 2013) ("This is not a case where a foreign national is

[1] Indeed, in 1909, Justice Holmes based the presumption against extraterritoriality on the prevailing conflicts theory of the 19th century: the strict territorialism of "vested rights," which focused solely on the location of the conduct. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). But modern conflicts rules generally reject a pure *lex loci delicti* approach and instead apply the law of the forum with the most "significant relationship" to the parties and the transaction, using a comparative analysis of contacts and governmental interests. *See, e.g.*, *Restatement (Second) of Conflict of Laws* § 145 (1971). This balancing approach to extraterritoriality was embraced by the *Restatement of the Law (Third), The Foreign Relations Law of the United States* § 403 (1987). And it guides application of *Kiobel*'s "touch and concern" standard, just as 19th century conflicts guided *American Banana*.

being haled into an unfamiliar court to defend himself. Defendant is an American citizen located in the same city as this court."). Another court observed that although a terrorist attack on a U.S. Embassy in Kenya was not committed on U.S. soil, it "touched and concerned" the United States, since it directly targeted U.S. interests. *Mwani v. bin Laden*, No. CIV. A99-125 JMF, 2013 WL 2325166 at *4 (D.D.C. May 29, 2013); *see also Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 at *2 (S.D. Ohio Aug. 20, 2013) (finding that the presumption "has been overcome in this case" since the defendant was "a permanent resident of the United States"). Like the *Lively*, *Mwani*, and *Magan* courts, this Court should look to *Kiobel*'s guidance in applying the principles of foreign relations law and conflicts of law that underlie the presumption against extraterritoriality, and should undertake an analysis of case-specific facts to explore the extent to which Plaintiffs' ATS claims touch and concern the United States.

B. The District Court Failed to Complete the Two-Pronged Analysis Required by *Kiobel*.

In light of these principles and factors, the flaws of the decision below are apparent. *Kiobel* requires a two-pronged analysis, and the district court stopped short at the first prong.

First, courts must determine whether an ATS claim is being applied to domestic or extraterritorial conduct, as only an extraterritorial application will trigger the presumption. *See Kiobel*, 133 S. Ct. at 1669 (addressing first where the

relevant conduct occurred); *see also Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (stating that the presumption is not triggered in the first place if U.S. law is being applied to domestic conduct). *Second*, courts must then determine—under a broader factual inquiry guided by the principles outlined above—whether the *Kiobel* presumption is displaced under the touch and concern test. *See* 133 S. Ct. at 1669 (addressing the status and presence of the defendants after establishing that the presumption is triggered).

By applying only *Kiobel*'s first prong, the district court erroneously adopted the strict territorial approach proposed by Justice Alito but rejected by seven justices. *See Kiobel* 133 S. Ct. at 1669-70 (Alito, J., concurring, setting out a "broader standard" than that adopted by the majority); *Al Shimari*, 2013 WL 3229720 at *7-8. The district court ruled that the *Kiobel* presumption is rebuttable only by "legislative act," not by judicial inquiry into the facts. *Al Shimari, 2013 WL 3229720* at *8.[2] Thus, under the district court's reading, the ATS claims in the instant case are automatically barred from adjudication for the sole reason that the "conduct giving rise to their claims occurred exclusively on foreign soil." *Id.* at

[2] A panel of the Second Circuit made the same error in *Balintulo v. Daimler AG*, No. 09-2778-CV L, 2013 WL 4437057 at *7 (2d Cir. Aug. 21, 2013). Like the decision below in this case, *Balintulo* followed Justice Alito and collapsed *Kiobel*'s two-pronged analysis into one: "if all the relevant conduct occurred abroad, that is simply the end of the matter . . . ." *Id.* *Balintulo* is unpersuasive for the same reasons: (1) it asks only if the presumption is applicable, not if it is displaced; (2) it ignores the text and holding of *Kiobel*, and (3) it disregards the views of the United States, on which the *Kiobel* majority relied.

*7-8. As a result, the court did not consider the status or residence of the defendant; whether adequate, alternative fora were available; or, most importantly, whether the principles underlying the *Kiobel* presumption would favor recognition of claims under the ATS or not. *See id.* Thus, the court below failed to perform the analysis required by *Kiobel*.

C. The Decision Below Would Bar Claims Like Those of *Amicus* Dr. Juan Romagoza, a Consequence not Endorsed by *Kiobel*.

The lower court's misapplication of *Kiobel* would have unintended but far-reaching consequences if affirmed. To misread *Kiobel* as categorically barring all ATS claims based upon extraterritorial conduct would prematurely exclude cases that the Court did not address. *See Kiobel*, 133 S. Ct 1669, 1673 (Breyer, J., concurring) (noting that the Court "leaves for another day . . . just when the presumption . . . might be 'overcome'" and that other cases may arise" that are not covered by its "reasoning and holding"). One of the circumstances not addressed by *Kiobel* was an ATS claim against a U.S. resident for conduct abroad. However, the district court's position is clear: it would exclude *all* ATS claims based on conduct abroad regardless of circumstance, even when the wrong the plaintiffs are seeking to redress was committed by an American citizen. This would deprive victims of mass atrocities similar to *Amici* 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 v. Yousuf*, 130 S. Ct. 2278 (2010); *Ochoa Lizarbe v. Rondon*, 402 F. App'x 834 (4th Cir. 2010); *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009); *Doe v. Constant*, 354 F. App'x 543 (2d Cir. 2009); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In re Estate of Marcos, Human Rights Litigation,* 25 F.3d 1467 (9th Cir. 1994); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013); *Jara v. Barrientos,* No. 6:13-cv-01426-RBD-GJK, 2013 WL 4771739 (M.D. Fla. 2013); *Ochoa Lizarbe v. Hurtado*, No. 07-21783-Civ-Jordan, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. Mar. 4, 2008); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 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. 09-1048, 2009 WL 8726450 (E.D. Va., Oct. 22, 2009) (case settled).

Amicus Dr. Juan Romagoza embodies these cases and their deep tie to the United States. 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 was 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 out a 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 Salvadoran National Guard, and General José Guillermo García, Minister of Defense from 1979 to 1983. In 2002, a jury found both defendants liable. *See generally Arce v. Garcia*, Second Am. Compl., ¶¶ 12-24 (S.D. Fla. 2000) (No. 99-8364); *Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006).

Holding the Generals accountable in Salvadoran courts would have been impossible: the Eleventh Circuit found that the military regime would have suppressed evidence, thwarted any attempt to bring suit, and retaliated against Romagoza's family and friends. *Arce*, 434 F.3d at 1263. The United States was the sole judicial forum open to Dr. Romagoza.

But the public—and several members of Congress—were shocked that this country had provided a safe haven to his tormentors in the first place. In 2007, Dr. Romagoza testified before the Senate Judiciary Subcommittee on Human Rights and the Law. Moved by his 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."[3] The Executive branch agreed: in 2012, Dr. Romagoza testified in immigration removal proceedings against General Vides Casanova, which resulted in a finding of removability.[4]

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 who come to the

[3] *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).

[4] *See* Julia Preston, *Salvadoran May Face Deportation for Murders*, N.Y. Times, Feb. 24, 2012, at A17.

United States should not be free to "[go] about their business"[5] under the law's protection, without having to bear the law's burden.

II. ATS CLAIMS AGAINST U.S. RESIDENTS DEEPLY TOUCH AND CONCERN THE UNITED STATES.

The *Kiobel* Court instructs lower courts to conduct a fact-based analysis to determine whether an extraterritorial ATS claim "touches and concerns" the United States with "sufficient force" to displace the presumption against extraterritoriality. *Kiobel* at 1669. Claims against U.S. residents, like those brought by *Amici*, deeply touch and concern the United States, especially where the principles that underlie the *Kiobel* presumption favor adjudication and where there are no adequate alternative fora. *See id.*

A. *Kiobel* Analysis Favors ATS Claims that Accord with the Foreign Policy of Preventing the United States from Becoming a Safe Haven for Human Rights Abusers.

Kiobel requires an analysis of the principles underlying the presumption against extraterritoriality, including avoiding conflicts with foreign laws that may stoke "international discord." *Kiobel*, 133 S. Ct. at 1665. All three branches of the U.S. government are unified in their support for a policy of permitting ATS claims against individual perpetrators of severe human rights abuses who have sought safe haven in the United States. Yet the district court's categorical bar to ATS claims based on conduct committed abroad is in conflict with this policy.

[5] *See* S. Hrg. 110-548, *supra* note 3, at 26.

Keeping federal courts open to suits against U.S.-resident human rights abusers for harms committed abroad advances the policy of denying safe haven. For more than 30 years, the ATS has served a vital role in holding human rights abusers accountable and in providing redress to victims. The Supreme Court has affirmed this role.

The landmark case of *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), underscores the importance of this forum and the U.S. interests in denying safe haven to torturers. In 1976, *Amica* Dolly Filártiga's brother Joelito was kidnapped and tortured to death in Paraguay by Américo Norberto Peña-Irala, the Inspector General of Police of Asunción, in retaliation for his father's outspoken criticism of Paraguay's dictator, General Alfredo Stroessner. *Filártiga,* 630 F.2d at 878-79. The Filártigas tried to seek justice in Paraguay, but were harassed and put in jeopardy as a result.[6] Upon discovering that her brother's torturer was residing in the United States, Dolly Filártiga and her father filed a suit under the ATS and became the first victims to use the statute successfully to seek justice for human rights violations. In a landmark decision, the Second Circuit recognized the Filártiga family's claims under the ATS. *Filártiga,* 630 F.2d at 878 (2d Cir. 1980). Twenty-five years later, Ms. Filártiga wrote:

[6] *See* Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004, at A21.

> [S]urvivors or victims' relatives have used this law to obtain a measure of justice. . . . [Without the ATS] torturers like Américo Peña-Irala would be able to travel freely in the United States. Deposed dictators like Ferdinand Marcos and brutal generals like Carlos Vides Casanova, who presided over human rights abuses in El Salvador in the 1980's, could come here and enjoy safe haven.[7]

The decision paved the way for future survivors of egregious human rights abuses to seek accountability in U.S. courts against perpetrators for harms they committed abroad. *Filártiga* opened the courthouse door to claims such as *Amici*'s.

The *Filártiga* case and its progeny drew the attention of the political branches and, in 1992, 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. *See* S. Rep. No. 102-249, at 4 (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)"). The legislative history expressed strong 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 Congress's 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).

[7] *Id.*

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").

In discussing the interplay between the TVPA and the ATS, the Supreme Court has recognized that Congress "not only expressed no disagreement with our view of the proper exercise of the judicial power [in the *Filártiga* line of cases] but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail." *Sosa v. Alvarez Machain*, 542 U.S. 692, 731 (2004). As Justice Breyer noted in his concurrence in *Kiobel*, the *Sosa* Court cited two ATS cases with approval, *In re Estate of Marcos, Human Rights Litigation,* 25 F.3d 1467 (9th Cir. 1994), and *Filártiga*; both apply the ATS to conduct committed overseas, "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). An absolute bar against all ATS claims based on extraterritorial conduct would run counter to this line of authority.

Congress has also repeatedly declared an interest in denying human rights abusers safe haven. The TVPA is but one example of this congressional commitment. 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 U.S. for extraterritorial human rights violations. These include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[8] the Convention on the

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), art. 5.

Prevention and Punishment of the Crime of Genocide,[9] and the Geneva Conventions.[10] *See* U.S. Dep't of State, Treaties in Force (January 1, 2011), at 379-80, 448-49, 472 (2011). All of these statutes and treaties reflect the political branches' consistent stance that the United States must not become a safe haven for perpetrators of human rights crimes committed overseas.[11]

The Executive Branch has similarly declared its 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

[9] Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, G.A. Res. 260 (III), 78 U.N.T.S. 277, U.N. Doc. A/RES/260 (III) (Dec. 9, 1948), art. 7.

[10] Geneva Convention (First) for the Amelioration of the Condition of the Wounded and the Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31, art. 50.

[11] 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. *See* (1) *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*, 110th Cong. (2007), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg43914/pdf/CHRG-110shrg43914.pdf; (2) *No Safe Haven: Accountability for Human Rights Violators, Part II, Hearing before the Subcommittee on Human Rights and the Law of the Senate Judiciary Committee*, 111th Cong. (2009), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg71853/pdf/CHRG-111shrg71853.pdf; and (3) *No Safe Haven: Law enforcement Operations Against Human Rights Violators in The US., House Committee on Foreign Affairs, Tom Lantos Human Rights Commission*, 112th Cong. (2011), *available at* http://tlhrc.house.gov/hearing_notice.asp?id=1217.

left unturned in pursuing that goal."[12] That same commitment to deny 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. Brief of the United States as Amicus Curiae, *Filártiga*, 1980 WL 340146 at *22 (2d Cir. 1980). In fact, the Executive Branch took the position that categorically barring such claims could harm U.S. interests: "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *Id*. at *22.

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*, although the Government argued against recognizing a federal cause of action for the *Kiobel* plaintiffs' specific claims, given their weak nexus to the United States. The Government explained that a categorical bar on ATS claims against an individual torturer found on U.S. soil, like Peña-Irala, might "give rise to the prospect that this country would be perceived as harboring the

[12] *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.).

perpetrator." Supp. Br. of the United States, *at* 4. "Allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga*," argued the Government, "is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." *Id.* at 4-5.

Similarly, the Government filed Statements of Interest in support of claims based on extraterritorial conduct in the cases of *Amici* Bashe Yousuf and Aziz Deria, as well as Abukar Ahmed. *Amici* Bashe Yousuf and Aziz Deria brought suit against Mohamed Samantar—a resident of Fairfax, Virginia since 1997—for torture, extrajudicial killing, war crimes, and crimes against humanity. When Samantar's claim of immunity reached the U.S. Supreme Court, the United States and members of Congress filed briefs urging the Court to hold Samantar liable for his egregious breaches of international law. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2010 WL 342031 (U.S. 2010); Brief of Senators Arlen Specter and Russell D. Feingold and Representative Sheila Jackson Lee as *Amici Curiae* in Support of Respondents, *Samantar v. Yousuf*, 2010 WL 342039 (U.S. 2010). 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*, 2010 WL 342031 (U.S. 2010) at *1.

On remand, the Government again urged that Samantar be denied immunity

from claims under the ATS and TVPA. Statement 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 expressed similar views in *Amicus* Abukar Ahmed's case, recommending that immunity be denied to defendant Colonel Magan (accused of torture and cruel, inhuman, or degrading treatment or punishment) on the same grounds. *See* Statement of Interest of the United States, ¶ 9, *Ahmed v. Magan*, No. 2:10-CV-342 (S.D. Ohio Mar. 15, 2011).

Were it affirmed, the district court's absolute bar on ATS claims concerning extraterritorial conduct would thus undermine the stated foreign policy interest of the United States in "promoting the protection of human rights" and "condemn[ing] human rights abuses." *See* Brief for the United States of America as *Amicus Curiae* Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (no. 08-1555), 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.

Carrying out *Kiobel*'s case-by-case analysis, however, offers a path to avoid such conflict. Not every case touching foreign relations lies beyond judicial cognizance. *Baker v. Carr*, 369 U.S. 186, 211 (1962). And where the political

branches speak with one voice to deny legal safe harbor to human rights violators, courts should exercise the jurisdiction vested in them by the ATS. They should permit suits against those defendants who enjoy the protection of the United States legal system, and whose behavior is therefore a matter of legitimate U.S. concern.

B. ATS Claims Should Proceed Where There is No Adequate Alternative Forum.

The *Kiobel* Court reasoned that foreign multinationals are "present in many countries," *Kiobel*, 133 S. Ct. at 1669, implying that courts should not generally hear claims against defendants with no meaningful connection to the United States, where other fora are available. The *Kiobel* plaintiffs conceded that their claims could have been brought in the defendants' home countries. Tr. of Oct. 1, 2013 Oral Argument in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 at 14:19-25. Indeed, the sole connection between *Kiobel's* foreign multinational defendants and U.S. territory was their presence in one New York office, which was owned by another company and used to advise potential investors. *Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring). To the Court, the *Kiobel* plaintiffs' claims did not touch U.S. territory to the same degree that they touched and concerned the territories of the U.K. and the Netherlands, both of which provided adequate and available fora to the plaintiffs.

The *Kiobel* Court did *not* consider cases such as those of *Amici*, and other victims of human rights abuse, who typically have no other possible place to

pursue justice. Such cases fall within that class Justice Kennedy identified as "covered neither by the TVPA nor by the reasoning and holding of today's case." *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

Kiobel does not bar such cases because, among other reasons, the risk of international discord is minimal. When no other adequate forum is available, it is consistent with U.S. international commitments to hear ATS claims against U.S. residents or individuals present on U.S. soil. Indeed, the Senate Report accompanying the Torture Victim Protection Act referred to U.S. commitments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and noted the U.S. "obligation . . . to provide means of civil redress to victims of torture." S. Rep. No. 102-249, at 3 (1991). And where the United States is the sole available forum, traditional notions of justice and conflict resolution favor adjudicating the dispute, rather than letting the aggrieved party go without redress. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) ("Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . the district court may conclude that dismissal would not be in the interests of justice.").

In their cases, *Amici* could not have brought suit in the places where their abuse occurred, either because the foreign judicial system was plagued by corruption and tampering, or simply because the defendant was physically present

in the United States and thus beyond the reach of any other jurisdiction. *See, e.g.*, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In such cases, the ATS and TVPA operate in tandem to open the courthouse door, with the TVPA providing remedies for acts of torture or killing, and the ATS providing remedies for mass atrocities such as genocide. *See* H.R. Rep. No. 102-367, at 4 (1991); S. Rep. No. 102-249, at 5 ("[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.").

Adjudicating such cases is consistent with the rationale of the *Kiobel* decision. Where the U.S. is the only available forum, there is no risk of conflicting assertions of jurisdiction creating "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 133 S. Ct. at 1661, (quoting *EEOC v. Arabian American Oil Co*., 499 U.S. 244, 248 (1991)). Nor would proceeding typically risk negative foreign policy consequences. At least ten European states recognize the principle of *forum necessitates*, which allows a court to assume jurisdiction over a civil claim when the party has no alternative forum and there is a sufficient nexus between the dispute and the host state. Brief for the European Commission on Behalf of the European Union, *Kiobel*, 2012 WL 2165345, 24 n. 66 (U.S. 2012); *see also* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great

Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel*, 2012 WL 2312825, 15-16 (U.S. 2012) (clarifying that the Governments "are not suggesting that *Filartiga* be overruled").

Yet the district court's categorical bar to ATS claims based on extraterritorial conduct would have prevented *Amica* Cecilia Santos from securing a judgment for crimes against humanity, a judgment cited without reservation by the U.S. Supreme Court just last year. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012). In 1980, Ms. Santos was arrested by the National Police in San Salvador. She was electrocuted and physically tortured with acid while in custody, where she remained for three years. Nicolas Carranza, Vice-Minister of Defense of El Salvador who exercised control over the National Police during the time of her torture, and that of thousands of others, had by 1991 become a U.S. citizen living in Memphis, Tennessee. Ms. Santos joined four other survivors to sue Carranza for crimes against humanity, torture and extrajudicial killing under the ATS and TVPA.

Amica Santos and her fellow plaintiffs could not have pursued any of these claims in the courts of El Salvador. In fact, after a judgment was entered against him, Carranza appealed to the Sixth Circuit, arguing that El Salvador's 1993 Amnesty Law excused him from liability even in the United States. The Court of Appeals disagreed and affirmed the jury verdict. *Chavez v. Carranza*, 559 F.3d

486 (6th Cir. 2009). The Supreme Court endorsed the *Carranza* decision in *Mohamad*, noting congressional intent to hold individual commanders liable for acts committed by their subordinates, including, implicitly, acts taken within the territory of a foreign sovereign. *See Mohamad*, 132 S. Ct. at 1709.

The Supreme Court's decision in *Kiobel*, far from imposing a categorical bar to claims based on extraterritorial conduct, requires that lower courts engage in a case-by-case factual analysis. When U.S. courts provide the only available forum for otherwise valid ATS claims, this factor weighs in favor of recognizing a cause of action under the common law.

CONCLUSION

If the *Kiobel* Court had intended that only a legislative act could displace the presumption against extraterritorial ATS claims, as the court below supposed, it would have had no reason to suggest that claims touching and concerning the United States could proceed. A categorical bar to ATS claims alleging extraterritorial conduct is contrary to *Kiobel*'s holding and rationale. Moreover, it would deprive future plaintiffs situated similarly to *Amici* from having their day in court against serious violators of human rights found on U.S. soil.

Accordingly, the District Court's dismissal of Appellants' ATS claims should be reversed.

Dated: November 5, 2013 Respectfully submitted,

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/s/ _____

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Dated: November 5, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2013, I electronically filed foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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