No. 15-20225

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAMCHANDRA ADHIKARI, *et al.*,
Plaintiffs-Appellants,

v.

DAOUD & PARTNERS, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

AMICUS CURIAE BRIEF OF EARTHRIGHTS INTERNATIONAL AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLANTS AND REVERSAL

Marissa Vahlsing
Counsel of Record
Richard Herz
Marco Simons
Michelle Harrison
EarthRights International
1612 K Street, N.W. Suite 401
Washington, DC 20006
202-466-5188 · marissa@earthrights.org
Counsel for *Amici Curiae*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Ramchandra Adhikari, Plaintiff-Appellant
2. Devaka Adhikari, Plaintiff-Appellant
3. Jit Bahdur Khadka, Plaintiff-Appellant
4. Radhika Khadka, Plaintiff-Appellant
5. Bindeshore Singh Koiri, Plaintiff-Appellant
6. Pukari Devi Koiri, Plaintiff-Appellant
7. Chittij Limbu, Plaintiff-Appellant
8. Kamala Thapa Magar, Plaintiff-Appellant
9. Maya Thapa Magar, Plaintiff-Appellant
10. Bhakti Maya Thapa Magar, Plaintiff-Appellant
11. Tara Shrestha, Plaintiff-Appellant
12. Nischal Shrestha, Plaintiff-Appellant
13. Dil Bahadur Shrestha, Plaintiff-Appellant
14. Ganga Maya Shrestha, Plaintiff-Appellant

15. Satya Narayan Shah, Plaintiff-Appellant

16. Ram Narayan Thakur, Plaintiff-Appellant

17. Samundri Devi Thakur, Plaintiff-Appellant

18. Jitini Devi Thakur, Plaintiff-Appellant

19. Bhim Bahadur Thapa, Plaintiff-Appellant

20. Bishnu Maya Thapa, Plaintiff-Appellant

21. Bhuji Thapa, Plaintiff-Appellant

22. Kul Prasad Thapa, Plaintiff-Appellant

23. Buddi Prasad Gurung, Plaintiff-Appellant

24. Kellogg Brown & Root, Incorporated, Defendant-Appellee

25. Kellogg Brown & Root Services, Incorporated, Defendant-Appellee

26. KBR, Incorporated, Defendant-Appellee

27. KBR Holdings, L.L.C., Defendant-Appellee

28. Kellogg Brown & Root L.L.C, Defendant-Appellee

29. KBR Technical Services, Incorporated, Defendant-Appellee

30. Kellogg Brown & Root International, Incorporated, Defendant-Appellee

31. Service Employees International, Incorporated, Defendant-Appellee

32. Overseas Administration Services, Defendant-Appellee

33. Agnieszka M. Fryszman, Cohen Milstein Sellers & Toll PLLC, counsel for Plaintiffs-Appellants

34. Alysson Ford Ouoba, Cohen Milstein Sellers & Toll PLLC, counsel for Plaintiffs-Appellants
35. Paul L. Hoffman, Schonbrun, Desimone, Seplow, Harris, Hoffman & Harrison LLP, counsel for Plaintiffs-Appellants
36. Catherine Sweetser, Schonbrun, Desimone, Seplow, Harris, Hoffman & Harrison LLP, counsel for Plaintiffs-Appellants
37. Geoffrey L. Harrison, Susman Godfrey, L.L.P., counsel for Defendants-Appellees
38. Richard W. Hess, Susman Godfrey, L.L.P., counsel for Defendants-Appellees
39. Warren W. Harris, Bracewell & Giuliani, L.L.P., counsel for Defendants-Appellees
40. Yvonne Y. Ho, Bracewell & Giuliani, L.L.P., counsel for Defendants-Appellees
41. Jeffrey L. Oldham, Bracewell & Giuliani, L.L.P., counsel for Defendants-Appellees
42. Hon. Keith P. Ellison, United States District Judge for the Southern District of Texas

Additionally, the following persons are not financially interested in the outcome of this litigation, but are participating in this appeal:

43.Marissa Vahlsing, EarthRights International, counsel for Amici Curiae

44.Marco Simons, EarthRights International, counsel for Amici Curiae

45.Richard Herz, EarthRights International, counsel for Amici Curiae

46.Michelle Harrison, EarthRights International, counsel for Amici Curiae

47.EarthRights International, Amicus Curiae

48.Center for Constitutional Rights, Amicus Curiae

/s/ Marissa Vahlsing
Counsel for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

Amici curiae EarthRights International (ERI) and the Center for Constitutional Rights (CCR) are nonprofit corporations, which have no parent corporation nor stock held by any publicly held corporation.

TABLE OF AUTHORITIES

Page(s)

U.S. CASES

FOREIGN CASES

STATUTES AND RULES

TREATISES

INTERNATIONAL SOURCES AND FOREIGN LAWS

OTHER AUTHORITIES

STATEMENTS PURSUANT TO RULE 29

All parties to this appeal have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part.[1] No person contributed money to amicus for the purpose of funding the preparation or submission of this brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

EarthRights International (ERI) is a non-profit organization based in Washington, D.C., that advocates on behalf of victims of human rights abuses. ERI's mission includes the objective of ensuring accountability and effective remedies for victims of human rights and environmental abuses worldwide.

ERI has represented plaintiffs in lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for aiding and abetting security forces in carrying out torture and extrajudicial killings in foreign countries, including the following: *Doe v. Unocal Corp*., No. 00-56603 (9th Cir.); *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.); *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96-cv-8386 (S.D.N.Y. Feb. 28, 2002); *Doe v. Chiquita Brands Int'l, Inc*., No. 08-CIV-80421 (S.D. Fla.). All these cases involve human

[1] Among the sources consulted for this brief were a variety of briefs in other cases, and counsel for Plaintiffs-Appellants also served as counsel on some of those briefs.

rights abuses taking place in foreign countries; three involved claims against U.S. corporations. ERI routinely submits amicus briefs to appellate courts on the ATS and the TVPA, including two amicus briefs to the Supreme Court in *Kiobel*.

ERI is currently litigating cases against U.S. nationals involving injuries occurring outside of the U.S., has litigated several such cases in the recent past, and may litigate more such cases in the near future. Moreover, the outcome of this case directly affects ERI's mission of ensuring accountability and effective remedies for victims of human rights violations worldwide, including torture.

The **Center for Constitutional Rights** (CCR) is a nonprofit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Since its founding in 1966, CCR has litigated many international human rights cases under the ATS, 28 U.S.C. § 1350, against natural persons, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and against both U.S. and foreign corporations, including (*inter alia*) *Wiwa*, 226 F.3d 88, *Unocal*, 395 F.3d 932. CCR is currently representing plaintiffs in two ATS cases against U.S. nationals, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) and *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013). CCR has also served as amicus in numerous ATS cases, including *Kiobel*.

Amici therefore have an interest in the proper interpretation of the reasoning

and holding of the Supreme Court's decision in *Kiobel*, as well as the general question of the availability of the ATS as a remedy for human rights violations that took place on foreign soil, and for claims involving corporations alleged to have conspired in, or committed violations of international law.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

This case involves allegations that U.S. corporations participated in the illegal trafficking of laborers to work on a U.S. military base in Iraq fulfilling Defendants' contract with the U.S. Government. Defendants allegedly forced one plaintiff to work for over a year on the U.S. base. Twelve other trafficking victims were allegedly kidnapped and murdered by insurgents while being trafficked to the U.S. base; their survivors are plaintiffs here.

The district court dismissed Plaintiffs-Appellants' ATS claims because it found them barred by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The court concluded that the tortious conduct occurred outside the United States and that therefore the claims did not "touch and concern" the United States.

Amici agree with Plaintiffs-Appellants that there are numerous critical – and in some cases, individually sufficient – connections between these claims and the United States that together satisfy the *Kiobel* test. These include the fact that Defendants trafficked or attempted to traffic the victims to a U.S. military base, that Defendants did so to fulfill a contract with the U.S. government, that human

trafficking is an inherently transboundary offense, and that adjudication of the particular facts of this case promotes U.S. foreign policy. AOB at 2-4, 36. Nonetheless, for the purposes of this brief only, *amici* assume that those factors, whether considered individually or collectively, are insufficient to displace the *Kiobel* presumption against extraterritoriality.

Amici address only the question of whether ATS claims necessarily touch and concern the United States with sufficient force where the defendant alleged to have violated universally recognized human rights norms is a U.S. national. They do.

SUMMARY OF ARGUMENT

Claims under the ATS have a sufficient nexus to the United States to be cognizable where they are asserted against U.S. national defendants. *Kiobel* held that the principles underlying the presumption against the extraterritorial application of federal statutes similarly limit the circumstances in which courts should enforce the ATS. *Kiobel*, 133 S. Ct. at 1669. Claims arising abroad that "touch and concern the territory of the United States . . . with sufficient force" are actionable. *Id*. That test is met when the defendant is a U.S. national.

Despite some courts giving broad effect to the Supreme Courts holding, *Kiobel* is, in fact, quite narrow. It held only that where the acts occurred entirely outside the United States, a foreign multinational defendant's "mere corporate

presence" in the United States was insufficient. Nothing in *Kiobel* establishes any requirement that the conduct at issue occur in the United States. The Court did not address the situation here, where there is a U.S. defendant; *Kiobel* was explicitly limited to its facts. Indeed, the *Kiobel* defendants' connections to the United States were so tenuous that serious questions can be raised whether the requirements for establishing personal jurisdiction would be satisfied. In such circumstances, it is unsurprising that the claims in *Kiobel* were dismissed, and such dismissal does not remotely call into question the viability of claims against U.S. defendants.

The fact that, unlike in *Kiobel*, the defendant here is a U.S. national displaces the *Kiobel* presumption, for at least three reasons.

First, the original purpose of the ATS confirms that the ATS permits claims against U.S. nationals who violate international law abroad, and would be subverted if it did not. The focus of the ATS was to uphold the laws of nations and to ensure that the United States met its international obligation to provide a forum for violations. That obligation took on particular force and consequence when the violation was committed by a U.S. national. Thus, the ATS was not enacted with purely domestic conduct in mind. And while state courts had and still have jurisdiction to hear transitory torts, the point was to ensure a federal, and thus a uniform, adequate and fair forum.

Second, while, as in *Kiobel*, the acts of a foreigner outside of the United

States generally have little to no bearing on or in the United States, the acts of an American abroad are of overriding concern to our nation. The concern that motivated the First Congress to pass the ATS remains vitally important today. Now, as then, the U.S. bears responsibility for its nationals' acts abroad, and if the U.S. does not provide redress, it is responsible for its failure to do so. Forcing victims harmed by U.S. nationals to go to state courts – or worse, foreign courts that may not be adequate or even available – may leave the United States in violation of its international obligations to provide a remedy. That is why the United States Government urged the Supreme Court in *Kiobel* not to bar such suits. And *Kiobel*, which was carefully limited to the facts before it, is perfectly consistent with the United States' position.

Third, while *Kiobel* was alive to the foreign policy and comity concerns that might arise from adjudicating so-called "foreign-cubed" cases, there are no such concerns when a U.S. court hears a claim against a U.S. national. Every nation has the well-established and undisputable right to regulate and adjudicate its own nationals' actions. Indeed, as has just been noted, where human rights violations are at issue, every nation has the obligation to do so. Other States will not complain, and indeed, will welcome, when the United States acts to fulfill its international obligations by holding its own national accountable for internationally-recognized human rights violations. In fact, the very foreign nations

that argued in *Kiobel* that the claims in that case exceeded the proper jurisdictional reach of U.S. courts under international law also expressly confirmed that there was no such problem where the defendant is a U.S. national.

Because the neither the express holding nor the reasoning of *Kiobel* applies in these circumstances, *Kiobel* does not preclude such claims.

ARGUMENT

I. The Supreme Court's decision in *Kiobel* is narrow

A. *Kiobel* is limited to its facts and expressly contemplates that some extraterritorial cases may proceed.

The Supreme Court's holding in *Kiobel* was narrow. *Kiobel* concluded that the "principles underlying" the presumption-against-extraterritoriality canon of statutory construction constrain courts considering ATS federal-common-law claims, 133 S. Ct. at 1664, but it expressly contemplated that some extraterritorial claims may proceed. *Id.* at 1669.[2] In particular, ATS claims that "touch and concern" the territory of the United States with "sufficient force" may "displace"

[2] *See also Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 56 (2d Cir. 2014) (Pooler, J., concurring) ("[A]s to the question of 'whether' the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States, the answer was an unequivocal 'Yes.'"); *Doe v. Drummond Co.*, 782 F.3d 576, 585; *John Doe I, et al. v. Nestle USA, et al.*, 766 F.3d 1013, 1027 (9th Cir. Cal. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014).

the presumption even when the claims involve extraterritorial conduct. *Id.*[3]

The Court did not purport to determine the circumstances in which ATS claims for violations occurring abroad are actionable. *Kiobel* was self-consciously limited to the facts. The Court held only that the "mere corporate presence" in the United States of a foreign multinational corporation defendant was insufficient. 133 S.Ct. at 1669. *Kiobel* was a "foreign-cubed" case; the plaintiffs and defendants were foreigners and all of the conduct and events at issue occurred outside the United States. The "mere corporate presence" of foreign corporate defendants – who were headquartered outside the United States and had operations in many places – was the *only* connection to the United States. "On these facts," the *Kiobel* majority found the presumption was not been displaced. *Id.* at 1669.

At least seven Justices made clear that the Court was intentionally leaving open important questions about when claims arising abroad sufficiently "touch and concern" the United States to be actionable. Justice Kennedy acknowledged that the Court was "careful to leave open a number of significant questions regarding

[3] *See Al Shimari*, 758 F.3d at 530 ("plaintiffs' ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application" regarding torture and war crimes in Abu Ghraib in Iraq); *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107, at *46 (D.D.C. July 6, 2015) (approving claims for abuses committed in Indonesia); *Lively*, 960 F. Supp. 2d at 324 (approving claims for abuses committed in Uganda) (quotation marks omitted); *Abukar Hassan Ahmed v. Abdi Aden Magan*, No. 2:10-cv-00342, 2013 U.S. Dist. LEXIS 117963, at *4 (S.D. Ohio Aug. 20, 2013) (approving claims for abuses committed in abuses in Somalia).

the reach and interpretation of the [ATS]"; that "[o]ther cases may arise" that are not covered by the Court's holding and that "proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *Id.* at 1669 (Kennedy, J., concurring). Justice Alito, joined by Justice Thomas, likewise observed that the "touch and concern" test "obviously leaves much unanswered." *Id*. (Alito, J, concurring). Justice Breyer's concurrence for four Justices noted that the Court "le[ft] for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" *Id.* at 1673 (Breyer, J., concurring).[4] Indeed, *Kiobel* ruled only "'under what circumstances' a court may *not* recognize a cause of action under the ATS" on the facts before it. *Doe v. Drummond Co.*, 782 F.3d 576, at 585 (11th Cir. 2015).

The district court's focus on U.S.-based conduct is thus misplaced and inconsistent with *Kiobel*. *Adhikari v. Daoud & Partners*, No. 4:09-CV-1237, 2015

[4] *Accord Drummond Co*., 782 F.3d at 585 ("[t]he Court left important questions unresolved as to the application of these rules when claims are brought under different circumstances, especially with regard to what claims would displace the presumption and permit jurisdiction under the ATS. All three of the concurrences in *Kiobel* averred that the Court clearly and intentionally left these questions unanswered."); *Nestle USA*, 766 F.3d at 1027-28 (noting that *Kiobel* held only that the touch and concern test "is not met when an ATS plaintiff asserts a cause of action against a foreign corporation based solely on foreign conduct" and "leaves important questions about extraterritorial ATS claims unresolved."); *Doe v. Exxon Mobil Corp*., 2015 U.S. Dist. LEXIS 91107, at *16.

WL 1387941, at *4 (S.D. Tex. Mar. 24, 2015). Only Justices Alito and Thomas asserted that the ATS reaches only domestic tortious conduct; indeed, their concurrence acknowledged that the Court's "narrow approach" left "much unanswered," and that they were advocating for a "broader standard" that would exclude more claims than that adopted by the majority. 133 S. Ct. at 1669-70 (Alito, J., concurring). As the Fourth Circuit has noted, "the standard proposed by Justice Alito . . . is far more circumscribed than the majority opinion's." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527. *Kiobel* certainly did not adopt any bright-line rule that the violation must occur within U.S. territory; notably the majority opinion gave no indication that it intended to overturn *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and its progeny, which the Court had previously explicitly endorsed. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

In particular, *Kiobel* did not consider a case such as this one where the defendant is a U.S. national. As the Eleventh Circuit has recognized, *Kiobel* thus left the significance of U.S. nationality in the "touch and concern" analysis open. "The Supreme Court did not exclude the significance of U.S. citizenship, as *Kiobel* did not concern U.S. citizens nor did the opinion directly address the same. Instead, *Kiobel* implicitly supports that citizenship or corporate status may be relevant to whether a claim touches and concerns the territory of the United States."

Drummond Co., 782 F.3d at 594; *see also Chowdury v. Worldtel Bangladesh Holding Ltd.*, 746 F.3d 42, 57 n.4 (2d Cir. 2014) (Pooler, J., concurring) ("The *Kiobel* Court at least implied that nationality could be relevant for determining whether a claim brought under the ATS would 'touch and concern' the territory of the United States, as . . . 'it would reach too far' for 'mere corporate presence' to suffice to make out a claim under the circumstances in *Kiobel*.") (quoting *Kiobel*, 133 S. Ct. at 1669)).

B. In light of *Kiobel*'s unique history and facts – and especially after *Daimler AG v. Bauman* – *Kiobel* holds little relevance for cases against U.S. defendants.

The narrowness of the *Kiobel* ruling – and its limited relevance for cases against U.S. nationals – can only be properly understood in the context of *Kiobel*'s unusual history, in which personal jurisdiction was never raised, and in all likelihood, personal jurisdiction over the defendants would have been found to be lacking. This is clear after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), in which the Supreme Court rejected personal jurisdiction over a foreign corporation based on "sizable" sales in the forum, where the corporation was neither incorporated in the forum nor had its principal place of business there. *Id.* at 761. It therefore seems inescapable that where the only connection to the United States is the "mere corporate presence" of a foreign corporation, as was the situation in *Kiobel*, 133 S. Ct. at 1669, general personal jurisdiction would be absent. It was due only to

quirks in the procedural history of the case that the issue was never addressed in *Kiobel*, and the Supreme Court faced an ATS case with fewer connections to the United States than is generally understood to be sufficient for general personal jurisdiction.

i. Due to *Kiobel*'s unique history, the courts never addressed personal jurisdiction in a case where, after *Daimler*, it was likely lacking.

A brief examination of *Kiobel*'s procedural history is necessary to place the Supreme Court's decision in context.

That history begins not with *Kiobel* but with a related case, *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386 (S.D.N.Y.). *Wiwa* was filed in 1996, six years before *Kiobel*. In that case Royal Dutch/Shell sought to dismiss the case due to lack of personal jurisdiction and on the basis of *forum non conveniens*, initially succeeding on the latter ground. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96-cv-8386, 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).

The Second Circuit reversed, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), and while its *forum non conveniens* analysis is less relevant here, its treatment of personal jurisdiction is significant. Relying on the rule that general personal jurisdiction is present whenever the defendant maintains "continuous and systematic business contacts," *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 416 (1984), the Second Circuit found that

Royal Dutch/Shell's maintenance of an Investor Relations Office in New York was sufficient to confer general personal jurisdiction. *Wiwa*, 226 F.3d at 98-99. The Supreme Court denied certiorari in March, 2001. *Royal Dutch Petroleum Co. v. Wiwa*, 532 U.S. 941, 121 S. Ct. 1402, 149 L. Ed. 2d 345 (2001).

The *Kiobel* case was filed in 2002 as a companion to *Wiwa*, and related to the same court. Presumably because the personal jurisdiction issue had already been litigated in *Wiwa*, Royal Dutch/Shell apparently did not contest personal jurisdiction in *Kiobel*. The case proceeded in tandem with *Wiwa* for four years, until 2006, when the district court dismissed key claims in the *Kiobel* case – most notably, ATS claims for extrajudicial killing. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006). The *Kiobel* plaintiffs challenged this ruling through an interlocutory appeal. The Second Circuit declined to address the issues decided by the district court, and issued its widely-criticized ruling that corporations cannot be held liable for violations of international law. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *cf. Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017 (7th Cir. 2011) (criticizing the "outlier" *Kiobel* decision).

The Supreme Court granted certiorari on the corporate liability issue, and then, after oral argument, ordered supplemental briefing and reargument on the question of extraterritoriality. Order Restoring Case for Reargument, *Kiobel v.*

Royal Dutch Petroleum Co., 132 S. Ct. 1738, 182 L. Ed. 2d 270 (2012). In answering that question, the Court considered a case in which the issue of personal jurisdiction over a foreign multinational had not been raised, to determine whether that case had sufficient connections to the United States to proceed under the ATS.

ii. After *Daimler*, it appears likely that the *Kiobel* case did not even have sufficient connections to establish general personal jurisdiction.

In *Wiwa*, the Second Circuit assessed Royal Dutch/Shell's contacts for the purposes of personal jurisdiction on the basis of the "continuous and systematic" business test. More recently, however, in *Daimler*, the Supreme Court clarified this test. The Court held that the basic "continuous and systematic" contacts test was applicable to *specific* jurisdiction; for *general* jurisdiction, however, the question was whether the "corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State.'" *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear Dunlop Tires Operations, S.A., v. Brown*, 564 U.S., at ___, 131 S. Ct. 2846, 2851, 180 L. Ed. 796 (2011)).

In *Kiobel*, the Supreme Court characterized Royal Dutch/Shell's connections to the United States as "mere corporate presence." 133 S. Ct. at 1669. While that presence may have been sufficiently continuous and systematic to render the corporation subject to jurisdiction under the prior test, it seems unlikely that mere corporate presence would meet the *Daimler/Goodyear* "essentially at home"

standard. Indeed, Justice Breyer's concurrence in *Kiobel* openly questioned whether personal jurisdiction would have been present:

> [Royal Dutch/Shell's] only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. . . .
>
> Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, *but see Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011), it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest . . . .

133 S. Ct. at 1677-78 (Breyer, J., concurring). Justice Breyer's use of the "*but see*" signal clearly indicates that he thought such jurisdiction was lacking.

iii. Because *Kiobel* was examining contacts with the U.S. in the context of a case against a foreign company where personal jurisdiction was likely lacking, it holds little relevance for cases against U.S. nationals.

As noted above, *Kiobel* is a narrow decision. But its narrowness can only properly be understood in the context of this unusual history, in which personal jurisdiction was never raised, due to a prior decision in a related case under a standard that was later superseded. It is therefore not surprising that the Supreme Court found the case lacking in sufficient connections to the United States; it most likely lacked even sufficient connections to establish personal jurisdiction.

This contrasts markedly with a case in which not only is a corporation more than merely present in the United States – it is a U.S. national. The Supreme Court in *Kiobel* had no occasion to examine such a situation. Its entire discussion of foreign policy implications and comity concerns occurred in the context of a case against a non-U.S. corporation that most likely would not even be considered "at home" in the United States. As one commentator has pointed out, these foreign policy concerns are generally absent when the defendant is a U.S. corporation:

> It is unproblematic to see *Kiobel* as satisfied whenever personal jurisdiction is obtained by reason of the defendant's domicile. In those cases, there is certainly some nexus with the territory of the United States. They might be foreign-conduct cases, but they are not foreign-cubed. The plaintiff may be an alien, the conduct may have occurred for the most part overseas, but the defendant will either be a U.S. national or a resident alien. Were state courts to provide foreign plaintiffs with inadequate satisfaction, either because of the law applied or the fairness of their proceedings, the national honor might certainly be implicated in ways that drove the ATS in the first place. A similar logic applies to corporate defendants that have their principal place of business in the United States. Such suits could in many cases be heard under the federal courts' diversity jurisdiction, but the ATS both provides a uniform cause of action subject to federal control and fills in the gaps of diversity jurisdiction. . . .
>
> This is not to argue that [*Daimler AG v.*] *Bauman* can completely eclipse *Kiobel*, but only that *Kiobel* should be read narrowly, its policy objectives having been satisfied by *Bauman*.

Ross J. Corbett, Kiobel, Bauman, *and the Presumption Against the Extraterritorial Application of the Alien Tort Statute*, 13 NW. U. J. INT'L HUM. RTS. 50, 80-81 (2015). In other words, the concerns expressed by the *Kiobel* majority are

addressed if the defendant is a U.S. corporation or otherwise "at home" in the U.S. under the *Daimler*/*Goodyear* standard.

II. The *Kiobel* presumption is displaced where the defendant is a U.S. citizen or national.

Claims against U.S. nationals that commit serious violations of universally recognized human rights abroad are actionable under the ATS. Such violations give rise to U.S. responsibility under international law and failure to remedy them would be inconsistent with the United States' duties under international law. *Sosa*, 542 U.S. at 717. A central purpose for which Congress enacted the ATS was to uphold the law of nations. *Kiobel* did not change this. Today, the ATS remains a vehicle through which the United States' upholds its obligations under international law, as the U.S. Government itself recognized in *Kiobel*. Moreover, the foreign policy concerns underlying *Kiobel* do not apply where the ATS defendant is a U.S. national.[5]

A. The history and purpose of the ATS shows that it applies to claims against U.S. nationals no matter where they violate international law.

[5] Even if U.S. nationality alone would not be sufficient to displace the presumption, it is undoubtedly a relevant factor. *See, e.g., Al Shimari*, 758 F.3d at 530-31 (defendant's U.S. corporate citizenship and other connections to U.S. territory satisfied the "touch and concern" test); *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 at *22.

The First Congress enacted the ATS because it was concerned about "the inadequate vindication of the law of nations." *Sosa*, 542 U.S. at 717. Failure to provide a remedy when a United States citizen violated international law was then, as today, a breach by the United States of its own international duties.

As Blackstone explained, if a sovereign failed to provide redress for its citizen's acts, it would itself be considered an abettor. William Blackstone, Commentaries on the Laws of England, bk. 4, 67-68 (1791). The Supreme Court has noted that "[t]he international jurist most widely cited in the first 50 years after the Revolution was Emmerich de Vattel," *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978), and Vattel confirms that nations "ought not to suffer their citizens to do an injury to the subjects of another state." Vattel, *The Law of Nations* 162 (1797). Even modern commentators critical of the ATS agree that when the ATS was enacted, "the United States would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed." Curtis Bradley, *Agora: Kiobel, Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509, 526 & n.112 (2012) (collecting authorities).[6]

[6] *Amici* understand that a number of distinguished professors of legal history will be submitting an *amici* brief showing in detail that the ATS's history demonstrates that it provides a federal forum as an instrument for fulfilling US obligations vis-à-vis international law.

State courts already had (and still have) jurisdiction over such suits. *Sosa*, 542 U.S. at 722; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 790 (D.C. Cir. 1984) (Edwards, J., concurring). But the First Congress preferred claims involving international law to be heard in federal rather than state court, because the federal government was primarily responsible for fulfilling international obligations. Worried about the potential for inconsistent or biased outcomes in state courts, Congress provided a federal forum. *See, e.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 235-36 (1996).

Consistent with its purpose, the ATS was understood from its inception to apply where American nationals violated international law abroad. Attorney General Bradford's "Breach of Neutrality" opinion, 1 Op. Atty. Gen. 57 (1795), confirms as much. The Bradford Opinion addressed an attack on a British colony abetted by U.S. nationals, and a formal protest by the British government. The underlying events occurred in large part in Sierra Leone, then under British rule, and far outside the territory of the United States. The Attorney General concluded that "there can be no doubt" that the victims would have an ATS claim against the Americans who participated in the attack. *Id.* at 59. *Kiobel* distinguished the Bradford Opinion from the facts at issue in that foreign-cubed case by pointing out that the attack on Sierra Leone involved a possible treaty violation and U.S.

citizens. 133 S. Ct. at 1668.[7] The Bradford Opinion "provides support for the extraterritorial application of the ATS to the conduct of U.S. citizens." Bradley, *supra*, 106 AM. J. INT'L L. at 510.

Thus, barring ATS suits against U.S. nationals who have violated human rights abroad would conflict with the statute's original purposes. The United States' international obligations continue to require that it provide a means of redress where U.S. nationals violate universally recognized human rights principles, as discussed below. In light of the First Congress' aims, a claimant subject to a violation of internationally-recognized norms abroad by a U.S. national must have an ATS claim in federal court.

B. Because international law requires the U.S. to provide a remedy for those harmed by international law violations committed by U.S. nationals, failure to provide that remedy would interfere with U.S. foreign relations.

When it comes to the conduct of a U.S. national in violation of international law, the United States is not merely permitted to ensure compliance with international law obligations related to a right to a remedy, it is required to do so. Although concerns about international law and foreign policy counseled against the claim in *Kiobel*, here, they cut precisely the other way.

[7] *See also Sosa*, 542 U.S. at 721 (noting that "[a]lthough it is conceivable that Bradford . . . assumed that there had been a violation of a treaty, 1 Op. Atty. Gen., at 58, that is certainly not obvious").

That is the distinction the United States drew in its supplemental brief in *Kiobel*. The Government argued that the claims at bar should be dismissed for insufficient U.S. connection, but it urged the Supreme Court not to adopt a categorical rule against the extraterritorial application of the ATS. Suppl. Br. for the U.S. as *Amicus Curiae* in Partial Supp. of Affirmance ("U.S. *Kiobel* Br."), at 4-5, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2161290. The United States stressed that it was in our national interests to maintain ATS jurisdiction over extraterritorial human rights violations where individual perpetrators would otherwise have "safe haven" on U.S. territory. U.S. *Kiobel* Br. at 19-20.

As an example of an appropriate case, the Government cited *Filártiga v. Peña-Irala*, which "involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay." U.S. *Kiobel* Br. at 4. The Government emphasized that the defendant "was found residing in the U.S."; this "could give rise to the prospect that [the U.S.] would be perceived as harboring the perpetrator" and thus U.S. responsibility under international law was engaged. *Id*. at 4. The United States distinguished *Filártiga* from *Kiobel*, because in the latter, with British and Dutch defendants who were present elsewhere, "the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, *while the nations directly concerned*

could." *Id*. at 5 (emphasis added). Here, the United States is the nation directly concerned.

Thus, the United States concluded that "allowing suits based on conduct occurring in a foreign country in the circumstances presented in *Filártiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights." *Id.* at 4-5. The United States' foreign relations interests are even stronger here than in *Filártiga*, since the defendant is not merely a U.S. *resident*, but is actually a U.S. national.

In *Kiobel*, no one argued that the United States had a responsibility under international law to hold foreign defendants accountable based on the actions of their Nigerian subsidiary. The defendant was likely not even "at home" in the jurisdiction according to recently clarified U.S. principles of personal jurisdiction. And the *Kiobel* plaintiffs conceded that they could have brought their claims in the defendants' home jurisdictions. Dismissal of claims against U.S. nationals, such as this one, however, raises the specter of impunity for U.S. nationals that engage in egregious violations of U.S. and international law – an outcome that *Kiobel* nowhere countenances and that is itself inconsistent with the very international norms the ATS was passed to uphold.

iv. The concerns animating *Kiobel* do not apply where, as here, the defendant is a U.S. national.

Kiobel was a "foreign-cubed" case, where the Supreme Court was concerned about the legal and foreign policy implications of haling a foreign citizen into a U.S. court without any relationship between the case and the United States. None of those concerns apply where, as here, the defendant is a U.S. national.

First, *Kiobel* noted that courts should be "wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." 133 S. Ct. at 1664 (internal citation omitted). But, as noted above, the Legislature enacted the ATS to fulfill U.S. responsibilities under international law, and the Executive has already determined that permitting cases against those who reside in the U.S. *furthers* U.S. foreign policy.

Second, the Court expressed concern about the possibility "that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Kiobel,* 133 S. Ct. at 1669. That the Court raised this issue confirms that it was specifically worried about the "serious foreign policy consequences," *id*., of hearing cases against *foreign* nationals – *not* U.S. nationals. A suit against a U.S. national in U.S. courts in no way suggests that U.S. nationals could be sued anywhere in the world.

Third, *Kiobel* reaffirmed that the primary basis for the presumption against

extraterritoriality is to avoid "unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1664 (internal citation omitted). Indeed, in *Kiobel*, the home governments of the defendant corporations claimed that the assertion of ATS jurisdiction in a foreign-cubed case would violate international law limits on the exercise of jurisdiction. Br. 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 ("Netherlands/UK *Kiobel* Br."), at 6, 24-26, *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S. Ct. 1659 (2013) (No 10-1491), 2012 WL 2312825. The German government argued that the case would interfere with comity by intruding upon a foreign nation's "inherent interest in applying its laws and using its courts" in cases where its own citizens are accused of violating international customary law. Br. of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents ("Germany *Kiobel* Br."), at 10, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 379578.

But those same governments recognized that no such concerns arise when the defendant is a U.S. citizen. "[T]he extraterritorial application of the ATS to acts committed by American individuals, corporations, and other U.S. entities in foreign sovereign territory, would be consistent with international law." Netherlands/UK *Kiobel* Br. at 15; *accord* Br. of the European Commission on

Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, at 4, 11-12, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165345.

There is no doubt about the authority of U.S. courts, or other branches of the U.S. government, to assert jurisdiction over the extraterritorial acts of U.S. citizens. *See The Appollon*, 22 U.S. 362, 370 (1824) (national laws can extend extraterritorially to govern the conduct of a nation's own citizens). Indeed, even criminal prosecutions of U.S. nationals for conduct abroad is uncontroversial. *See, e.g., Blackmer v. United States*, 284 U.S. 421, 436 (1932) ("By virtue of the obligations of citizenship, the United States retained its authority over [the defendant], and he was bound by its laws made applicable to him in a foreign country."); *United States v. Bowman*, 260 U.S. 94, 98 (1922) ("Some . . . offenses . . . are such that to limit their locus to the strictly territorial jurisdiction would be to greatly to . . . leave open a large immunity for frauds as easily committed on the high seas and in foreign countries as at home . . . .").

Under international law, the "nationality principle" – a "principal bas[i]s of the jurisdiction to prescribe" – allows countries to regulate "the activities, interests, status or relations of its nationals *outside as well as within its territory*." Restatement (Third) of the Foreign Relations Law of the United States, Part 4, Introductory Note and § 402(2) (1987) (emphasis added). Likewise, a state may

"exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable." *Id.* § 421. Thus, it is within the prescriptive powers of the U.S. to regulate the actions of its citizens, and it is within the power of its courts to adjudicate when violations take place. Where the perpetrators are U.S. nationals, there is a sufficient nexus between the United States and the violations for the U.S. to properly assert jurisdiction under the ATS.

Indeed, there are statutory and common law examples of extraterritorial jurisdiction from numerous states – such as Canada, Australia, the United Kingdom, and South Africa – comparable to or even broader than the ATS.[8] In fact, the European Union's Brussels I Regulation, adopted in 2001, mandates that EU member state courts must adjudicate claims against corporations domiciled inside the EU, even when the conduct occurred outside the EU and involves non-EU victims,[9] as long as the "event giving rise to [the harmful event]" occurred

[8] Bribery Act, 2010, c. 23, §§ (3)(6)(a), 12(5) (U.K.) (allowing application of act even if act of bribery occurred outside U.K territory); Justice for Victims of Terrorism Act, 2012, c. 1, s. 2 (Can.); Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); Criminal Code Act 1995 (Cth), Division 268 - Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court (Austl.).

[9] Case C-412/98, *Group Josi v. UGIC*, 2000 E.C.R I-05925. Although *Group Josi* interprets the Brussels Convention rather than the Regulation, the

within the EU.[10] European Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2001 O.J. (L 12). This EU rule goes far beyond the ATS, covering nearly all claims (not only serious violations of international law). *See id*. The EU does not even permit cases against EU corporations to be dismissed on the basis of *forum non conveniens* – jurisdiction is mandatory based on domicile unless exclusive jurisdiction lies elsewhere. Case C-281/02 *Andrew Owusu v. N.B. Jackson* [ECJ 2005] 1445, 1462.

In short, adjudication of ATS cases against U.S. nationals, even where the international law violations occurred outside U.S territory, is on such firm jurisdictional ground that extraterritorial application of the ATS in such cases does not conflict with "*Sosa*'s basic caution to avoid international friction." *Kiobel*, 133 S. Ct. at 1673-74 (Breyer, J., concurring) (internal punctuation omitted).[11]

Brussels Regulation itself acknowledges its role in codifying the Convention. Recital 19 to the Brussels Regulation.

[10] Case 21/76, *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1975 ECR 1735, para. 19 (interpreting the term in Art. 5(3), "the place where the harmful event occurred," to include the place of the event giving rise to the event).

[11] *See Al Shimari*, 758 F.3d at 530 ("this case does not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad, given that the defendants are United States citizens"); *Drummond Co.*, 782 F.3d at 595 (noting that "[i]f the defendants are U.S. citizens, some of the foreign policy concerns that the presumption against

Just as Germany argued that it had an "inherent interest" in adjudicating international law claims against its own nationals, Germany *Kiobel* Br. at 10, so too does the United States. As the U.S. Government made clear, in cases involving abuses committed by Americans, *failure* to allow ATS claims would create the perception that the U.S. is a safe haven and open the United States to international censure, precisely what *Kiobel* sought to avoid.

CONCLUSION

Americans who commit international law violations abroad are not immune from ATS suits in their home forum. A contrary conclusion would create the risk that the United States would contravene its own international obligations to provide a means of redress. Such a result is contrary to ATS's purpose, and would undermine current U.S. foreign policy. Accordingly, the Court should conclude that the ATS provides a federal forum for claims against a U.S. national.

For the above reasons, the decision below should be reversed.

Dated: October 1, 2015

Respectfully Submitted,

/s Marissa Vahlsing
Marissa Vahlsing

---

extraterritorial application is intended to reduce may be assuaged or inapplicable, since we would not be haling foreign nationals into U.S. courts to defend themselves"); *Lively*, 960 F. Supp. 2d at 322-24 (holding *Kiobel* did not bar ATS claims against an American citizen, in part because "[t]his is not a case where a foreign national is being hailed [sic] into an unfamiliar court to defend himself.").

Richard Herz
Marco Simons
Michelle Harrison
EARTHRIGHTS INTERNATIONAL
1612 K Street, N.W. Suite 401
Washington, DC 20006
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I, Marissa Vahlsing, certify that today, October 1, 2015, I filed and served the foregoing ***AMICUS CURIAE*** **BRIEF OF EARTHRIGHTS INTERNATIONAL AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF APPELLANTS AND REVERSAL** by causing a digital version to be filed electronically via the court's ECF system. I also certify that after the electronic version of this brief is approved by the Court I will cause seven (7) paper copies to be filed with the Court via Federal Express overnight delivery, and will cause two (2) paper copies to be sent by the same form of delivery to counsel for Defendants-Appellees listed below:

Geoffrey L. Harrison, Esq.
Susman Godfrey, LLP
Suite 5100
1000 Louisiana Street
Houston, TX 77002

s/ Marissa Vahlsing
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman font size 14.

s/ Marissa Vahlsing
Counsel for *Amici Curiae*