19-1328

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY, INC.,

Defendant and 3rd-Party Plaintiff-Appellant,

—and—

TIMOTHY DUGAN; CACI INTERNATIONAL, INC.; L-3 SERVICES, INC.,

Defendants,

—v.—

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Plaintiffs-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
CASE NO. 1:08-CV-00827
HON. LEONIE M. BRINKEMA

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Plaintiffs,

—and—

UNITED STATES OF AMERICA; JOHN DOES 1-60,
Third-Party Defendants.

UNITED STATES OF AMERICA,
Amicus Supporting Appellant.

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae EarthRights International (EarthRights) is a nonprofit corporation, which has no parent corporation nor stock held by any publicly held corporation.

STATEMENT OF AUTHORITY TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No counsel for a party authored this brief in whole or in part. No person contributed money to *amicus* for the purpose of funding the preparation or submission of this brief.

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

EarthRights International has substantial organizational interest in the issues addressed in this brief, and these issues fall within *amicus*'s areas of expertise. EarthRights is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. EarthRights has been counsel in several lawsuits against corporations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, alleging liability for aiding and abetting torture and other violations of international law, including *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 Civ. 8386 (S.D.N.Y.); *Doe v. Chiquita Brands Int'l, Inc*., No. 08-CIV-80421 (S.D. Fla.). All these cases involve human rights abuses taking place in foreign countries; three involved claims against U.S. corporations. EarthRights routinely submits *amicus* briefs to appellate courts on the ATS, including two *amicus* briefs to the Supreme Court in

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), and an *amicus* brief in *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386 (2018).[1]

EarthRights is currently litigating cases against U.S. nationals involving injuries occurring abroad, 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 EarthRights' mission of ensuring accountability and effective remedies for victims of human rights violations worldwide, including survivors of torture. EarthRights therefore has an interest in the proper interpretation of the Supreme Court's decisions in *Kiobel* and *Jesner*, as well as the general question of the availability of the ATS as a remedy for human rights violations, particularly those committed or abetted by U.S. nationals.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Amicus agrees with Plaintiffs that there is no jurisdictional basis to hear this appeal of the district court's interlocutory subject matter jurisdiction orders. *See* Plaintiffs-Appellees Br. at 34. But should the Court disagree, *amicus* herein shows that application of the ATS to these claims, involving U.S. citizens who committed torture at a U.S. military prison, is

[1] *Amicus* has also previously submitted an amicus brief in this case, in *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012)(en banc).

not impermissibly extraterritorial because the claims "touch and concern" the United States with sufficient force under *Kiobel*. This is the proper test in ATS cases, not the "focus" test from *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247 (2010). Regardless, this case is a paradigmatic example of exactly the type of scenario the First Congress had in mind when it enacted the ATS. There is no authority or basis for overturning this Court's decision in *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014) ("*Al Shimari III*"), because it is consistent with both the *Kiobel* standard and *Morrison*, and poses none of the concerns that warranted judicial caution in *Jesner*.

SUMMARY OF THE ARGUMENT

In the unlikely event the Court decides it has jurisdiction to hear Defendant CACI Premier Technology, Inc.'s ("CACI") appeal of the district court's interlocutory subject matter jurisdiction orders, *amicus* supports affirmance.

This case involves allegations that a U.S. defendant, working pursuant to a contract with the U.S. government, tortured Iraqi nationals in U.S. military prisons during a time of U.S. occupation. This Court has already properly concluded that Plaintiffs' ATS claims bear extensive U.S. connections that "touch and concern" the United States with sufficient force

to displace the presumption against extraterritoriality under *Kiobel*. *Al Shimari III*, 758 F.3d at 530-31. There is no basis to revisit that decision.

Kiobel concluded that the "principles" underlying the presumption apply to the ATS, but acknowledged that it was unusual to apply the presumption to a jurisdictional statute, as it typically applies to statutes that regulate conduct. 569 U.S. at 116-17. Because it does not regulate conduct, the extraterritoriality question in the ATS context is different than usual: "the question is not what Congress has done but instead what courts may do." *Id.* at 116. Thus, while finding similar principles apply to the ATS as to conduct-regulating statutes, the Court in *Kiobel* did not adopt wholesale the *Morrison* framework. Instead, it crafted a modified standard, directing courts to evaluate whether ATS *claims* "touch and concern" U.S. territory with sufficient force to "displace" the presumption. *Id.* at 124-25.

Nothing in *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090 (2016), changed the governing test in ATS cases; it did not overrule *Kiobel*, or undermine the analysis in *Al Shimari III*. Indeed, the Supreme Court in *Jesner* reiterated that the "touch and concern" test applies. Regardless, this Court's thorough extraterritoriality analysis in *Al Shimari III* is also consistent with the proper understanding of the "focus" of the ATS, and thus with *Morrison*.

Advancing an overly formalistic test that would foreclose extraterritorial claims altogether, CACI claims that the "focus" of the ATS is restricted to the conduct it seeks to regulate. CACI Br. at 29. But a statute's "focus" also includes the parties and interests Congress sought to protect. Since the ATS does not regulate conduct, an inquiry limited only to conduct is a poor fit for understanding the ATS.

Congress' focus in passing the ATS was ensuring redress for international law violations where the failure to do so could lead other nations to hold the U.S. responsible, and avoiding the international discord that could otherwise result, no matter where the act occurred. The claims here, against U.S. defendants and with substantial U.S. connections, is precisely the sort of case where the U.S. would be deemed responsible for failing to provide redress.

Finally, the district court properly concluded that *Jesner* does not warrant dismissal. The holding in *Jesner* was limited to the unique problems created by claims against foreign corporations, which are not implicated here.

ARGUMENT

I. *Kiobel*'s "touch and concern" standard – an ATS-specific extraterritoriality rule – and this Court's faithful application of that standard in *Al Shimari III* are binding precedent.

CACI seeks to relitigate this Court's extraterritoriality ruling in *Al Shimari III*, 758 F.3d at 520. There, this Court conducted a thorough "fact-based inquiry," pursuant to the standard articulated by the Supreme Court in *Kiobel*, *id.*, and held that "plaintiffs' ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application," *id.* at 530. While CACI asserts that a subsequent Supreme Court decision "supersede[d]" *Kiobel*, CACI Br. at 29, it did no such thing. The *Kiobel* standard remains unchanged and is controlling in ATS cases. Accordingly, there is no basis for this panel to revisit Circuit precedent. *McMellon v. United States*, 387 F.3d 329, 332-33 (4th Cir. 2004) (earlier panel opinion applies unless "overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court").

A. The *Kiobel* "touch and concern" standard applies the presumption against extraterritoriality in the distinct context of the ATS and does not incorporate the *Morrison* "focus" test wholesale.

In *Kiobel*, the Supreme Court concluded that "the principles underlying" the presumption against extraterritoriality canon of statutory

construction constrain courts considering ATS claims. 569 U.S. at 116. The Court found that the statute itself did not "rebut" the presumption, but expressly contemplated that some extraterritorial claims may nonetheless "touch and concern" U.S. territory "with sufficient force" to "displace" the presumption, even where the claims involve extraterritorial conduct. *Id*. at 124-25.[2]

Kiobel's "touch and concern" language reflects a particularized application of extraterritoriality principles to the distinct context of claims arising under the ATS. As the Supreme Court explained, it "typically appl[ies] the presumption to discern whether an Act of Congress regulating conduct applies abroad," while the ATS is "strictly jurisdictional" and "does not directly regulate conduct or afford relief." *Id.* at 116 (internal quotations omitted). Noting the purpose of the presumption is to "protect against unintended clashes between our laws and those of other nations," *id.* at 115,

[2] *Kiobel* did not, as CACI argues, create a categorical bar prohibiting all ATS claims "for violations . . . occurring outside the United States." CACI Br. at 30 (internal citations omitted). In *Kiobel*, both the plaintiffs and defendants were foreigners, and "*all* the relevant conduct" occurred outside the United States. 569 U.S. at 111, 124 (emphasis added). The Supreme Court held that where the "mere corporate presence" of the foreign corporate defendant was the *only* U.S. connection, "[o]n these facts," the presumption had not been displaced. *Id*. at 124-25. This Court has already rejected CACI's overly broad reading of *Kiobel*. *Al Shimari III*, 758 F.3d at 528.

and noting similar "foreign policy implications" of ATS claims, *id.* at 117, the Court concluded that the "*principles* underlying the canon . . . similarly constrain courts considering causes of action that may be brought under the ATS." *Id.* at 116 (emphasis added). The question in the ATS context is thus different from the usual context in which the presumption typically applies: because the ATS is not a conduct-regulating statute "the question is not what Congress has done but instead what courts may do." *Id.*[3]

Kiobel is clear that the extraterritoriality question in the ATS context is whether the "*claims* under the ATS" "touch and concern" U.S. territory with "sufficient force to displace the presumption." *Id.* at 124-25 (emphasis added). In creating this standard, the Supreme Court referenced the portion of *Morrison* that discusses the use of a "focus test," after determining a statute has not overcome the presumption against extraterritoriality, to determine whether a particular case constitutes a permissible domestic application of a statute. *See id.* at 125 (citing *Morrison*, 561 U.S. at 247, 266-73). Although Justice Alito expressly argued for the "focus" standard in his separate concurrence, *id.* at 126-27 (Alito, J., concurring), the *Kiobel*

[3] And unlike the typical scenario, "any substantive norm enforced through an ATS claim necessarily is recognized by other nations as being actionable." *Al Shimari III*, 758 F.3d at 529-30.

majority did not adopt it wholesale for ATS claims. Instead, the Court crafted a new standard, using the "touch and concern" terminology, which appears nowhere in *Morrison*. Both the "touch and concern" test and the "focus" test reflect extraterritoriality principles, but the former is narrowly tailored to the specific circumstances of assessing claims under the non-conduct-regulating ATS.

Put another way, the extraterritoriality analysis in *Morrison* and *Kiobel* both start with the same question: whether the statute clearly indicates extraterritorial application. But assuming the statute does not rebut the presumption, *Morrison* and *Kiobel* differ at the next step. Under *Morrison*, the next step would be "to determine whether the [case] involved a *domestic* application" of the statute, even if some conduct occurred abroad. *RJR Nabisco*, 136 S.Ct. at 2100 (discussing *Morrison*, 561 U.S. 247). This requires determining the statute's "focus." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S.Ct. 2129, 2137 (2018). *See also infra* Section II.A. By contrast, under *Kiobel*, courts in ATS cases consider whether the presumption is "displace[ed]" by determining whether the claims sufficiently "touch and concern" the United States. 569 U.S. at 124-25. *Accord Jesner*, 138 S.Ct. at 1398, 1406.

B. *RJR Nabisco* did not overturn or modify *Kiobel*'s "touch and concern" standard – or its application in *Al Shimari III* – and *Jesner* confirms its continuing validity.

This Court faithfully applied the *Kiobel* standard in *Al Shimari III*, 758 F.3d at 527-31. CACI asserts that the Supreme Court's decision in *RJR Nabisco* "supersedes" *Kiobel* and "mandates a different approach," CACI Br. at 29, but it did no such thing, and the Supreme Court has subsequently confirmed that *Kiobel*'s "touch and concern" test is the proper standard in an ATS case. *See Jesner*, 138 S.Ct. at 1398. There is, therefore, no basis to revisit this Court's application of the "touch and concern" standard. *See McMellon*, 387 F.3d at 332-33.

While *RJR Nabisco* discusses *Kiobel*, it at no point purports to overrule *Kiobel*'s holding, modify its "touch and concern" test, or otherwise call into question this Court's application of that test in *Al Shimari III*. Nor did it have any occasion to do so, since *RJR Nabisco* addressed the specific question of whether RICO applies extraterritorially; the Court was not applying the ATS. 136 S.Ct. at 2096.

RJR Nabisco treats the *Kiobel* and *Morrison* standards as arising from the same underlying principles, but it *does not*, as CACI claims, "hold that *Morrison* and *Kiobel* require the same standard for analyzing extraterritoriality issues." CACI Br. at 34. The *Kiobel* standard is a modified

version of the inquiry at the second step, tailored to the ATS context. *See supra* Section I.A. Nothing in *RJR Nabisco* can be read to overrule that standard in favor of the "focus" test the Court considered, but the majority did not adopt. *Id.* Indeed, as this Circuit has already noted, "*RJR Nabisco* did *not* overturn *Kiobel*." *Roe v. Howard*, 917 F.3d 229, 240 n.6 (4th Cir. 2019) (emphasis added).[4] But even if the Court in *RJR Nabisco* had purported to alter the *Kiobel* test, such language would have been *dicta*, since the ATS was not at issue.

CACI argues that after *RJR Nabisco*, in ATS cases, "a court does not review claims… only the conduct the statute seeks to regulate," and thus may only consider whether there is sufficient "domestic conduct… that violated international law." CACI Br. at 29. But that is precisely the standard advanced by Justice Alito's separate opinion in *Kiobel*, and *not* embraced by the majority. *Kiobel*, 569 U.S. at 126 (Alito, J., concurring); *accord Al Shimari III*, 758 F.3d at 528 (rejecting identical argument). *Kiobel* expressly requires consideration of the *claims* to determine whether the presumption is displaced. 569 U.S. at 124-25.

[4] CACI claims *Roe* "acknowledged" the test in *Al Shimari III* is "in irreconcilable conflict with the focus test required by *RJR Nabisco*," CACI Br. at 33; in fact, *Roe* affirmed that the "touch and concern" test was appropriate for ATS cases, but accepted that *RJR Nabisco* provided the general framework for other statutes. 917 F.3d at 240 & n.6.

The Supreme Court has instructed courts not to assume that more recent cases "by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). "[I]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id. Kiobel* is directly applicable and directly controls. *RJR Nabisco* does not, and provides no basis to revisit this Court's decision in *Al Shimari III*.

More importantly, *Jesner* later confirmed that the "touch and concern" test governs ATS cases after *RJR Nabisco*. 138 S. Ct. at 1398, 1406. *Jesner* – an ATS case, unlike *RJR Nabisco* –makes no mention of the "focus" test.[5]

[5] CACI cites the Fifth Circuit's opinion in *Adhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, 199-200 (5th Cir. 2017) in arguing *RJR Nabisco* changed the applicable test. CACI Br. at 32-33. *Amicus* believe the Fifth Circuit is incorrect with respect to the effect of *RJR Nabisco*. *See supra* Section I.B*; Adhikari*, 845 F.3d at 208 (Graves, J., dissenting) (noting "[t]he majority's application of the 'focus' test" is "inconsistent with the Supreme Court's ATS jurisprudence" and "belies the *actual* focus of the ATS"). But *Adhikari* was decided before *Jesner* reaffirmed the "touch and concern" standard.

Although CACI also cites *Doe v. Nestle*, 906 F.3d 1120, 1125 (9th Cir. 2018), CACI Br. at 33, decided after *Jesner*, the Ninth Circuit did not even mention *Jesner's* affirmation of the "touch and concern" standard. Despite its use of the focus test, the Ninth Circuit reversed the lower court's dismissal of the ATS claims for aiding and abetting slave labor in Côte d'Ivoire based on domestic conduct far less relevant to the alleged violations than the conduct in this case, and based on far fewer U.S. connections than the claims here. 906 F.3d at 1125.

The "touch and concern" analysis this Court applied in *Al Shimari III* was – and still is – the proper lens through which to evaluate ATS claims. Since neither the Supreme Court, nor this Court sitting *en banc*, has overruled *Al Shimari III*, there is no basis for the panel to reconsider that decision.

II. *Al Shimari III*'s extraterritoriality analysis is consistent with both the "touch and concern" standard and the "focus" test.

While *amicus* maintains that *Kiobel* established a distinct standard for ATS claims, *supra* Section I.A., *Al Shimari III*'s thorough extraterritoriality analysis is also consistent with the "focus" of the ATS, and thus with the *Morrison* framework.

The Supreme Court's jurisprudence neither compels nor supports a test based solely on the location of alleged tortious conduct. The true "focus" of the ATS includes ensuring the availability of a federal forum for redress of international law violations, where the failure to provide one might cause another nation to hold the U.S. responsible. CACI's far narrower view, limited to only the location of the conduct that constitutes the violation of international law, CACI Br. at 35, fails to properly reflect the fact that the ATS is not a conduct-regulating statute and ignores Congress' actual concern. The claims in this case, which have substantial connections to the United States, are at the very heart of the ATS.

A. The "focus" of the ATS is providing redress for violations of international law where the United States could be held responsible for the failure to do so.

In determining the "focus" of a statute under *Morrison,* courts inquire as to the "focus of congressional concern." 561 U.S. at 266. "The focus of a statute is 'the object of its solicitude,' which can include the conduct 'it seeks to regulate,' as well as the parties and interests it 'seeks to protect' or vindicate." *WesternGeco*, 138 S. Ct. at 2137 (quoting *Morrison*, 561 U.S. at 267)(additional quotations and alterations omitted).

In explaining the "focus" of a provision of the Exchange Act at issue in *Morrison,* the Supreme Court looked to the overall objectives of the Act, the transactions the statute sought to "regulate," as well as the "parties or prospective parties" that the statute sought to "protect." 561 U.S. at 267 (internal quotations and citations omitted). And in *WesternGeco*, the Supreme Court framed the focus inquiry by looking to the "overriding purpose of" and the "question posed by" the statute in question to determine its focus. 138 S. Ct. at 2137 (internal quotations omitted).

Determining the "focus" thus requires consideration of Congress's objectives in enacting the ATS, as well as the parties and interests it sought to protect. That "the conduct the statute seeks to regulate," CACI Br. at 29, cannot be the sole consideration in this determination is particularly true

with respect to the ATS, as it is "a jurisdictional vehicle . . . rather than a federal statute that itself details conduct to be regulated or enforced," and the wrongs relevant to the ATS are already "recognized by other nations as actionable," *Al Shimari III*, 758 F.3d at 530. Since the ATS does not regulate conduct, an inquiry focused solely or primarily on asking what conduct Congress sought to regulate would be ill-suited for determining the focus of congressional concern. [6]

In fact, Congress was *not* primarily concerned with the location of the conduct at issue. As the Supreme Court recently explained, "[t]he principal objective" of the ATS "was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Jesner*, 138 S. Ct. at 1397. *Accord* Br. of the United States as Amicus Curiae Supporting Neither Party, at 7, *Jesner*, 138 S. Ct. 1386 (No. 16-499) ("U.S. *Jesner* Br.") (describing the ATS's "function" as ensuring "remedies in circumstances where other nations might hold the United States accountable if it did not provide a remedy"). Before the ATS was enacted,

[6] CACI says *RJR Nabisco* requires courts to "confine" their analysis to the "conduct the ATS seeks to regulate," CACI Br. at 31, which CACI defines as "conduct that transgresses international norms," *id.* at 35. But *RJR Nabisco* itself was not so limited; rather it looked at "conduct *relevant* to the statute's focus." 136 S. Ct. at 2101 (emphasis added).

"the inability . . . to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems." *Jesner*, 138 S.Ct. at 1396. *See also Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 787 (E.D. Va. 2018) ("failure to provide an adequate remedy . . . could cause significant international tension" or lead another country "to attempt to hold the United States . . . responsible"). Concern about "the inadequate vindication of the law of nations" thus led the First Congress to enact the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004).

The "focus" of the ATS is thus properly understood as encompassing the objectives of the First Congress in providing a federal forum for law of nations violations against non-citizens, without which the United States could be deemed responsible and risk international discord. The obligation to provide a forum for violations of the laws of nations took on particular force and consequence when the violation involved a U.S. national, as such instances 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. *See also infra* Section II.B. U.S. nationality is therefore a critical consideration.

With this context, and in light of *Kiobel*'s "touch and concern" language, it is evident that while domestic conduct constituting an

international law violation would be *sufficient*, it is not *necessary*. Only Justice Alito's concurrence endorsed a standard in *Kiobel* that would bar ATS claims "unless the domestic conduct is sufficient to violate an international norm." 569 U.S. at 127 (Alito, J. concurring). Rather than "assess[ing] what would displace the presumption against extraterritorial application," as *Kiobel* directed, a requirement that "ATS violations must take place on domestic soil" would render the majority's "touch and concern" language "meaningless" and "eliminate the extraterritorial reach of the statute completely." *Adhikari*, 845 F.3d at 208 (Graves, J., dissenting); *accord Al Shimari III*, 758 F.3d at 528.

As this Court observed in *Al Shimari III*, *Kiobel* "used the phrase 'relevant conduct' to frame its 'touch and concern' inquiry," and "broadly stated that 'claims' rather than the alleged tortious conduct," must touch and concern the U.S. with sufficient force, thus "suggesting that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action in addition to the conduct at issue." 758 F.3d at 527 (citing *Kiobel*, 133 S. Ct. at 1669). *Accord* U.S. *Jesner* Br. at 26 ("The requisite claim-specific inquiry [under *Kiobel*] necessarily takes place against the backdrop of the ATS's function of providing redress in situations where the international community might

consider the United States accountable."). That is consistent with the Supreme Court's articulation of the focus inquiry and the actual focus of the ATS.

B. The claims in this case are at the heart of the ATS.

The claims in this case have "substantial ties to United States territory," *Al Shimari III*, 758 F.3d at 529, and are at the very heart of the objectives the First Congress had in mind in enacting the ATS. Plaintiffs allege torture, against persons in U.S. custody, "committed by United States citizens" employed by a U.S. corporation, at a facility operated by the U.S. government, and pursuant to a contract with the U.S. government for interrogation services, executed in the United States. *Id.* at 530-31. Other critical factors cited by this Court in finding the claims "displaced the presumption," included the alleged conduct of CACI's managers in the United States, including "tacit approval" of acts of torture and attempted "cover up" of misconduct, as well as "the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Id.*

Claims against U.S. defendants implicate U.S. obligations under international law, a central concern of the ATS. "Nations have long been

obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad." *Kiobel*, 569 U.S. at 136 (Breyer, J., concurring). 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). Similarly, Emmerich de Vattel – "[t]he international jurist most widely cited in the first 50 years after the Revolution," *U.S. Steel Corp. v. Multistate Tax Comm'n,* 434 U.S. 452, 462 n.12 (1978) – 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).

From the beginning, the ATS was understood to apply where U.S. nationals violated international law abroad. This is confirmed by Attorney General Bradford's "Breach of Neutrality" opinion, 1 Op. Atty. Gen. 57 (1795), addressing violations by U.S. nationals in Sierra Leone, then under British rule. The Attorney General concluded that "there can be no doubt" that the victims would have an ATS claim against the Americans involved in the attack on the colony. *Id*. at 59. *Kiobel* distinguished the Bradford Opinion from the facts at issue in that foreign-cubed case by noting that the attack involved a possible treaty violation and U.S. citizens. 569 U.S. at 123.

While, as in *Kiobel* and *Jesner*, the acts of a foreigner abroad generally have little or no bearing on the responsibility of the United States, the acts of an American abroad are of overriding concern to the United States. The United States bears responsibility for its nationals' acts abroad, and if it does not provide redress, it is responsible for its failure to do so. The claims in this case directly serve the interests of providing for vindication of international law violations where the United States could be seen as responsible.

Indeed, the foreign policy consequences of failing to provide redress for wrongs committed by U.S. defendants are all the more significant in a case such as this, where the abuses were committed while plaintiffs were in U.S. custody, in the name of, and pursuant to a relationship with, the United States itself. *See Adhikari*, 845 F.3d at 211 (Graves, J., dissenting) (observing "foreign policy concerns are particularly heightened where . . . the defendant's conduct directly implicates the United States and its military")). While ATS claims against foreign nationals based solely on foreign conduct raised the prospect of *creating* international discord in *Kiobel* and *Jesner*, the reverse is true here, where the failure to allow ATS claims would raise the specter of impunity for U.S. nationals that engage in egregious violations of international law while working on behalf of the

United States, and risk provoking the very foreign-relations tensions the First Congress sought to prevent. *See supra* Section II.A;

"The political branches already have indicated that the United States will not tolerate acts of torture . . . committed by U.S. citizens . . . ." *Al Shimari III*, 758 F.3d at 530.[7] As the United States told the Court in *Kiobel*, it is "consistent with the foreign relations interests of the United States" to allow suits based on torture abroad where the accused torturer is in the United States, Supp. Br. for the United States as Amicus Curiae in Partial Support of Affirmance, at 4-5, *Kiobel*, 569 U.S. 108 (No. 10-1491), and CACI's connection to the United States is far stronger than that. The President and both Houses of Congress have condemned the atrocities committed at Abu Ghraib. *Al Shimari III*, 758 F.3d at 521. Investigations conducted by the Defense Department concluded that CACI interrogators directed or participated in some of the abuses, *id.*, and Congress has called for "'all individuals responsible for such despicable acts [to] be held accountable,'" *id.* (quoting S. Res. 356, 108th Cong. (2004)).

[7] *See also* Senate Report of the Committee on Armed Services: Inquiry into the Treatment of Detainees in U.S. Custody, 110th Cong. S. Prt. 110-54, at xxv (2008) (noting abuse of detainees at Abu Ghraib had "significant" impacts; "that America is seen in a negative light by so many, complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives").

In addition to these significant U.S. connections, this Court also concluded that "the plaintiffs' claims reflect extensive 'relevant conduct' in United States territory, in contrast to the 'mere presence' of foreign corporations that was deemed insufficient in *Kiobel*." *Id.* at 528. In a later case, this Circuit again emphasized the "extensive relevant conduct in United States territory" and "extensive United States contacts" in this case, explaining "the alleged conduct b[ore] such a strong and direct connection to the United States" that it fell within *Kiobel's* "touch and concern" language. *Warfaa v. Ali*, 811 F.3d 653, 659-60 & n.7 (4th Cir. 2016) (discussing *Al Shimari III*, 758 F.3d at 529-31) (quotation marks omitted). The Court distinguished the "strong and direct 'touches'" in *Al Shimari III*, from the claims in *Warfaa* by noting that "[n]othing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States." *Id*. at 660.[8]

[8] *Amicus* respectfully disagree with *Warfaa*'s refusal to consider the defendant's U.S. residency on the basis that it was acquired after the abuses occurred, 811 F.3d at 660. Later-obtained residency can still "give rise to the prospect that [the U.S.] would be perceived as harboring the perpetrator," thus engaging U.S. responsibility under international law. Suppl. Br. for the U.S. as Amicus Curiae in Partial Supp. of Affirmance at 4, 19-20, *Kiobel*, 569 U.S. 108 (No. 10-1491). Regardless, for purposes of this case, *Warfaa* supports U.S. citizenship as a key factor.

Al Shimari III's thorough extraterritoriality analysis is consistent with the focus of the ATS and thus with *Morrison*.

III. The foreign-relations and separation of powers concerns that animated the Supreme Court's "judicial caution" in *Jesner* do not apply to this case.

Defendants argue that even if the ATS claims would otherwise be actionable, claims relating to U.S. military operations are "inappropriate" and should have been dismissed under *Jesner*, because they "infringe" on the role of the political branches and "do not serve the foreign-relations objective of [the] ATS." CACI Br. at 16-17. But this case is nothing like *Jesner*.

The Supreme Court's narrow holding in *Jesner* – that "foreign corporations may not be defendants in [ATS] suits" – was responsive to the "unique problems" created by suits against *foreign* corporations for extraterritorial ATS claims. 138 S. Ct. at 1407. Reiterating that *Sosa*'s "vigilant doorkeeping" directive is motivated by "separation-of-powers and foreign-relations concerns," *Jesner* held that it would be "inappropriate" for the Court, as opposed to the political branches, to "extend ATS liability" to allow claims against *foreign* corporations given the heightened concerns such cases presented. *Id.* at 1403. But *Jesner* did not create a new, heightened standard requiring that claims affirmatively advance the goals of

the ATS, CACI Br. at 45; the fact the claims in *Jesner* actively *undermined* the ATS's objectives warranted judicial caution.

Regardless, the claims in this case would advance the objectives of the ATS. The district court, although properly skeptical of CACI's overly broad reading of *Jesner*, correctly concluded that plaintiffs had "nevertheless made the required showing," *Al Shimari*, 320 F. Supp. 3d at 785 & n.4, finding jurisdiction "is consistent with the purpose of the ATS and does not conflict with either the holding or reasoning of *Jesner*," *id.* at 787-88. *See supra* Section II.B.

First, there are no separation of powers concerns here. The Supreme Court in *Jesner* noted that Congress is generally better positioned institutionally to develop causes of action generating new forms of substantive liability, 138 S. Ct. at 1402, and in light of the specific problems presented by *foreign* corporate defendants that risked undermining the objectives of the ATS, the Court ultimately concluded the decision was better left to the political branches. *Id.* at 1407-08. ATS claims against U.S. *citizens* for torture, which unquestionably satisfy *Sosa*, however, do not require the court to make the same type of policy judgments. *See Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 600-602 (E.D. Va. 2017) (concluding that "the widespread judicial agreement that torture is actionable

under the ATS constitutes a recognition that the prohibition against torture is specific, universal, and obligatory"); *accord Al Shimari III*, 758 F.3d at 530 ("[t]he political branches already have indicated that the United States will not tolerate acts of torture . . . committed by United States citizens").

Notably, the U.S. government opposed the exercise of jurisdiction in *Jesner*, arguing that continuation of the case "would undercut U.S. foreign policy interests," U.S. *Jesner* Br. at 32, "harm the United States' relationships with Jordan," and undermine its ability to fight against terrorism, *id.* at 7. By contrast, the United States has not "expressed any objection to this litigation," and has indicated it "does not believe there are significant foreign-relations problems implicated by allowing plaintiffs' claims to proceed." *Al Shimari*, 320 F. Supp. 3d at 787-88. And this Court has already held that "further litigation of these ATS claims will not require 'unwarranted judicial interference in the conduct of foreign policy.'" *Al Shimari III*, 758 F.3d at 530 (quoting *Kiobel*, 133 S. Ct. at 1664). *Accord supra* Section II.B. The district court discussed this – and other prior occasions in which it, and this Court, had already considered and rejected separation of powers arguments in this case, *Al Shimari*, 320 F. Supp. 3d at 785-86 – and properly concluded "that adjudication of plaintiffs' claims

does not impermissibly infringe on the political branches," and thus is consistent with *Jesner*. *Id.* at 785.

Second, while *Jesner* was concerned that allowing claims against foreign corporations could – and already had – generated precisely the type of "foreign-relations tensions" the ATS was intended to *prevent*, 138 S. Ct. at 1406-07, the claims in this case pose no such risk.

Where all the actors are foreign, and virtually all of the relevant events, relations, and conduct are unconnected to the United States, "the possibilities of international discord" are heightened, and the risk of "retaliative action" is much greater. *Id.* at 1406. Indeed, the government of Jordan strenuously objected to jurisdiction in *Jesner*, arguing that "subjecting a Jordanian corporation to U.S. jurisdiction on the basis of . . . injuries sustained abroad is a grave affront to Jordan's sovereignty." Br. of Hashemite Kingdom of Jordan as *Amicus Curiae* Supporting Respondent, at 3, *Jesner*, 138 S. Ct. 1386 (No 16-499); *accord id.* (suit has "been a recurring . . . concern in the U.S.-Jordan relationship for more than a decade."). Noting the intent of the ATS to "promote harmony in international relations," the Supreme Court found "the opposite was occurring" in *Jesner*, 138 S. Ct. at 1406, creating "the very foreign relations tensions the First Congress sought to avoid." *Id.* at 1407.

Here, however, "there is no risk that holding CACI liable would offend any foreign government" and none have "expressed any objection to this litigation." *Al Shimari,* 320 F.Supp. 3d at 787. As this Court has already found, "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." *Al Shimari III*, 758 F.3d at 530.

Although the home governments in both *Kiobel* and *Jesner* opposed the exercise of jurisdiction over extraterritorial claims against non-U.S. nationals, 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." Br. of Governments of the Netherlands and the United Kingdom of Great Britain and North Ireland as Amicus Curiae in Support of Neither Party, at 15, *Kiobel,* 569 U.S. 108 (No. 10-1491); *accord* Br. of Hashemite Kingdom of Jordan, at 4, *Jesner,* 138 S.Ct. 1386 (No 16-499)(U.S. "has the sovereign authority to regulate the conduct of its nationals"). Foreign nations have no basis to object when a U.S. national is sued in a U.S. court.

CACI suggests dismissal is required where claims "would not prevent war," noting war was "already well underway" here. CACI Br. at 48. But *Jesner* cannot be read to require proof that claims will actively prevent war, and international law does not cease to exist when war begins. Indeed, "war crimes" are actionable under the ATS, despite the obvious fact that they take place during war. *See Al Shimari*, 263 F. Supp. 3d at 605. And the "paradigms" CACI cites as purportedly showing that Congress envisioned only violations "unrelated to military operations," includes "violations of safe conducts," CACI Br. at 48, which were understood to frequently arise in wartime. *See e.g.* Thomas E. Lee, *The safe-conduct theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 872-74 (2006) (citing Blackstone and discussing First Congress's understanding of violations of "safe conducts").

The fact that other nations could conclude the "abuses at Abu Ghraib . . . were chargeable to the U.S. military," CACI Br. at 48, is plainly not a reason for dismissal. The responsibility to ensure that a remedy is available for violations of international law, as discussed in *Jesner*, *see supra* Section II.A., is distinct from the question of whether the abuses themselves are also "chargeable" to the U.S. That this case *also* implicates the U.S. military in the abuses only makes the need for redress all the more obvious.

The concerns that counseled against the claims in *Jesner*, cut precisely the other way here. This case implicates U.S. responsibilities under international law, and failure to provide for the vindication of the violations that are the basis of this suit would risk generating the tensions the ATS was intended to avoid. The district court properly concluded that allowing these claims to proceed "fully aligns with the original goals of the ATS: to provide a federal forum for tort suits by aliens against Americans for international law violations." *Al Shimari*, 320 F. Supp. 3d at 787.

CONCLUSION

For the foregoing reasons, *amicus* supports affirmance.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I hereby certify that Brief of *Amicus Curiae* EarthRights International in Support of Plaintiffs-Appellees and Affirmance complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because it is proportionately spaced and has a typeface of 14 points in Times New Roman font. The brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,473 words, as calculated by Microsoft Word, the word-processing program used to prepare the brief.

Dated: May 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 2019, a true and correct copy of the foregoing document was served on all interested parties via the Court's CM/ECF system.

Dated: May 21, 2019

Respectfully submitted,

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