UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): No. 09-4483-CV

Caption [use short title]

CHOWDHURY
v.
WORLDTEL BANGLADESH HOLDING, LTD., AND KHAN

Motion for: Leave to file an amicus brief

Set forth below precise, complete statement of relief sought:

EarthRights International & Center for Constitutional Rights seek the court's leave to file an amicus brief in support of plaintiff-appellee, Chowdhury's, supplemental letter brief in support of affirmance.

MOVING PARTY: EarthRights International

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Worldtel Bangladesh Holding, Khan

MOVING ATTORNEY: Richard Herz

OPPOSING ATTORNEY: J. Eric Charlton

[name of attorney, with firm, address, phone number and e-mail]

Richard Herz
EarthRights International
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Washington, D.C. 20006

860-233-4938
rick@earthrights.org

Court-Judge/Agency appealed from: Eastern District of New York, Judge Brian Mark Kogan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): ________

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☑ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency: ________

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No If yes, enter date: ________

Signature of Moving Attorney:
s/ Richard Herz **Date:** May 17, 2013

Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: ________ By: ________

Form T-1080 (rev. 7-12)

No. 09-4483-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NAYEEM M. CHOWDHURY
Plaintiff-Appellee,

v.

WORLDTEL BANGLADESH HOLDING, LTD., AND KHAN
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
CASE No. 1:08-cv-01659

MOTION OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS AND EARTHRIGHTS INTERNATIONAL FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT BELOW

Amici curiae the Center for Constitutional Rights (CCR) and EarthRights International (ERI) hereby move the Court for leave to file a Brief in Support of Plaintiff-Appellee, in order to address the impact of *Kiobel v. Royal Dutch Petro. Co.*, 185 L. Ed. 2d 671 (U.S. 2013), on this appeal. *Amici*'s brief is limited to 2,500 words—half the length of the parties'—and has been timely submitted and served

on May 17th, 2013, seven days after plaintiff-appellee's brief, per Federal Rules of Appellate Procedure (FRAP) 29(e), and would otherwise conform to the rules set out for *amicus* briefs in the Federal Rules of Appellate Procedure.[1] Plaintiff consents to the filing of this brief, Defendants oppose filing.

Amici have substantial organizational interests in the issues addressed in this brief. Moreover, these issues fall within *amici's* areas of expertise. The **Center for Constitutional Rights** is a non-profit 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 out of the civil rights movement, CCR has litigated several international human rights cases under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS) before this Court, including *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Doe v. Karadžić*, 70 F. 3d 232 (2d Cir. 1995), and *Wiwa v. Royal Dutch Petroleum,* 226 F.3d 88 (2d Cir. 2000), as well as numerous other ATS cases before other courts, including the pending ATS cases *Al Shimari v. CACI Premier Technology, Inc.*, No. 08-cv-827 (E.D. Va.) and *Sexual Minorities Uganda v. Lively*, No. 3:12-cv-30051 (D. Ma). CCR routinely submits *amicus* briefs to appellate courts on the

[1] The Brief is attached to this Motion as an Exhibit. *Amicus* also will conditionally lodge 6 paper copies of the brief with the clerk's office in the event that the motion for leave to file is granted.

applicability of the ATS and the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA"), including three amicus briefs to the Supreme Court in *Kiobel*.

EarthRights International 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. ERI's organizational mission includes the objective of ensuring accountability and effective remedies for victims of human rights and environmental abuses worldwide.

Moreover, ERI is counsel in one pending Alien Tort Statute (ATS) case, *John Doe I v. Chiquita Brands International, Inc.*, No. 08-80421-cv-MARRA/JOHNSON (S.D. Fla.), No. 12-14898 (11th Cir.), and has been counsel in several other ATS and Torture Victim Protection Act (TVPA) cases that are now concluded, including *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.). All these cases involve human rights abuses that took place in foreign countries. *Amicus* also routinely submits *amicus* briefs to appellate courts on the applicability of the ATS and the TVPA, including two *amicus* briefs to the Supreme Court in *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 an interest in 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.

The attached brief demonstrates that *Kiobel* is narrow, and does not preclude the claims at issue in this case, which involve a defendant living in the United States. The Supreme Court dismissed *Kiobel* based on a presumption against the extraterritorial application of ATS claims, holding only that the "mere corporate presence" in the United States of a foreign multinational corporation did not overcome the presumption. 185 L. Ed. 2d at 686. However, the *Kiobel* presumption is displaced where the claims "touch and concern" the United States with "sufficient force." *Id.* Defendants misstate the Court's holding by suggesting that *Kiobel* bars all claims arising abroad.

The Court's holding did not purport to address, let alone limit, claims against individuals residing in the United States. The Court's application of its presumption against extraterritoriality was informed by the "principles" animating the presumption: "to protect against unintended clashes between our laws and those of other nations which could result in international discord." 185 L. Ed. 2d at 677 (internal quotation omitted). Cases involving individuals residing in the United States will not trigger the "international discord" that the Court was concerned about in *Kiobel*, where there were minimal links to the U.S.

The Court specifically relied on the fact that multinational corporations "are often present in many countries," for its holding and to inform its reasoning, 185 L.Ed. 2d at 686; the Court's reasoning would not apply to individuals – particularly those who have expressed an intent to permanently reside in one place. Notably, this Court's landmark decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which allowed ATS claims for torture committed abroad against a defendant living in the United States, was expressly approved by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

Indeed, the U.S. government, whose position the Court in *Kiobel* largely adopted, urged the Court to preserve *Filártiga* as consistent with the foreign policy interest in the United States not being a safe haven for torturers and genocidaires. Given this important U.S. interest, ATS claims against U.S. residents sufficiently touch and concern the United States.

Kiobel also does not bar claims that could not be brought in other forums. The Court reasoned that the foreign multinational was "present in many countries," 185 L. Ed. 2d at 686, implying that courts should not generally hear claims against defendants with no connection to the forum, where other *fora* are available and more appropriately suited to hear the claims. The reasoning does not apply when there is no other possible forum.

Similarly, *Kiobel* does not preclude ATS claims where the Plaintiff has other

viable claims based on the same facts that will proceed irrespective of the ATS. The ATS claims "touch and concern" the United States because the *dispute* will be adjudicated in U.S. courts. The *Kiobel* Court's concerns with creating international friction by hearing cases with little connection to the United States are accounted for in ordinary, generally applicable doctrines such as *forum non conveniens* or comity.

Amici also demonstrate that the Supreme Court's decision in *Kiobel* undermines this Court's panel decision, which held that the ATS does not afford jurisdiction over claims against corporations. *See* 621 F.3d 111, 148-49 (2d. Cir. 2010). The Supreme Court's decision is clear that whether the ATS reaches any particular extraterritorial conduct is not a matter of subject matter jurisdiction. Because the Court reached that question, it necessarily did not accept the panel's conclusion that courts lack jurisdiction over corporate defendants. The panel's decision that the ATS did not provide jurisdiction for suits against corporations has been implicitly overruled.

Last, *amici* show that Defendants err in suggesting that *Kiobel* gives this Court license to dismiss Plaintiff's TVPA claim. *Kiobel* applies only to the ATS and the presumption could not apply to the TVPA, which expressly applies extraterritorially.

ARGUMENT

The Court should grant *amici*'s motion because *amici's* brief offers arguments and evidence on the interpretation of the ATS and *Kiobel* that are not available from the parties, and because *amici*'s interest in ensuring remedies for human rights abuses committed outside of the United States (in whole or in part), by or with the complicity of business entities, is likely to be affected by the outcome of this case.

Courts in this Circuit accept *amicus curiae* submissions that "offer insights not available from the parties." *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994). *Amici* have significant expertise in questions of international law and the application of the ATS and the TVPA to abuses related to corporate activities abroad. The brief addresses issues and makes points not covered by Plaintiff.

Courts in this Circuit also accept *amicus curiae* submissions "when the *amicus* has an interest in some other case that may be affected by the decision in the present case." *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

Amici are currently litigating ATS cases involving some events occurring

outside of the United States, have 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 *amici*'s institutional missions of ensuring accountability and effective remedies for those who suffer egregious human rights violations worldwide, including torture, especially to the extent that it influences the outcome of other ATS cases and the interpretation of *Kiobel* in the lower courts. *See Auto. Club of N.Y., Inc. v. Port Auth.*, No. 11 Civ. 6746 (RJH), 2011 U.S. Dist. LEXIS 135391 (S.D.N.Y. Nov. 22, 2011) (granting leave to file *amicus* brief where policy at issue would have a "disproportionate affect" on purported *amici*).

CONCLUSION

For the foregoing reasons, *amici curiae* Center for Constitutional Rights and EarthRights International respectfully request leave to file a brief in support of plaintiff-appellee's letter brief and in support of affirmance, limited to 2,500 words, to be filed on May 17, 2013.

Dated: May 17, 2013

___/s/Richard Herz__
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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for proposed *amici curiae* makes the following disclosure: *amici curiae* are nongovernmental corporations. There is no corporation that is a parent corporation of any *amicus* or that owns 10% or more of any *amicus*'s stock.

CERTIFICATE OF SERVICE

I, Richard Herz, the undersigned, hereby certify that I am employed by EarthRights International, 1612 K St., NW, Suite 401, Washington, DC 20006; I am over the age of eighteen and am not a party to this action. I further declare under penalty of perjury that on May 17, 2013, I served the foregoing **Motion for Leaves of *Amici Curiae* Center for Constitutional Rights and EarthRights International to File a Brief in Support of the Plaintiff-Appellee and in Support of Affirmance** by sending electronic copies to the following recipients by electronic mail:

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Dated: May 17, 2013

/s/Richard Herz
Richard Herz
EARTHRIGHTS INTERNATIONAL

May 17, 2013

By E Mail

Catherine O'Hagen Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
40 Centre Street Foley Square
New York, New York 10017

Re: *Chowdhury v. Worldtel Bangladesh Holding Ltd. and Khan*, Case No. 09-4483-CV

Dear Ms. Wolfe:

Amici curiae EarthRights International and the Center for Constitutional Rights respectfully address the impact of *Kiobel v. Royal Dutch Petro. Co.*, 185 L. Ed. 2d 671 (U.S. 2013), on this appeal.[1]

A jury found Defendants responsible for torture under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note. Defendant Khan is a lawful permanent resident (LPR) of the United States. Although unwilling to say so explicitly, Defendants ask this Court to hold that *Kiobel* overturned this Court's landmark decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which allowed ATS claims for torture committed abroad against a defendant living in the United States. Defendants' suggestion that *Kiobel* bars all claims arising abroad misstates the Court's holding.

[1] No counsel for a party authored this brief in whole or part and no persons other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission.

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The Court dismissed *Kiobel* based on a presumption against the extraterritorial application of ATS claims, holding only that the "mere corporate presence" in the United States of a foreign multinational corporation did not overcome the presumption. 185 L. Ed. 2d at 686. However, the *Kiobel* presumption is displaced where the claims "touch and concern" the United States with "sufficient force." *Id.* Thus, *Kiobel* did not purport to address, let alone limit, claims against individuals living in the United States.

The Supreme Court expressly approved *Filártiga* in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), another case *Kiobel* in no way overruled. And the U.S. government, whose position *Kiobel* essentially adopted, urged the Court to preserve *Filártiga* as consistent with the U.S. foreign policy interest in not being a safe haven for torturers and genocidaires. Given this interest, ATS claims against U.S. residents sufficiently touch and concern the United States.

Kiobel also does not preclude claims that could not be brought in other forums, nor ATS claims where the Plaintiff has other viable claims based on the same facts that will proceed irrespective of the ATS.

Plaintiffs' claims against the corporate defendant are not barred. Under the Supreme Court's decision, the existence of corporate liability is not a jurisdictional question. Thus, the *Kiobel* panel's decision was implicitly overruled.

Last, Defendants err in suggesting that *Kiobel* gives this Court license to dismiss Plaintiff's TVPA claim. The TVPA expressly applies extraterritorially, and *Kiobel* did not limit the claim Congress provided.

I. The *Kiobel* presumption permits the claims in this case.

A. Courts evaluate ATS claims arising abroad on a case-by-case basis.

Kiobel's holding was extremely narrow and left open the issues presented here. The Court held that "the *principles underlying*" the presumption against extraterritoriality "constrain courts considering [ATS] causes of action." 185 L. Ed. 2d at 680. The Court found only that "mere corporate presence" of a foreign corporation does not suffice to "displace" the presumption. *Id.* at 686. However, where cases involve extraterritorial conduct but the claims "touch and concern" the United States "with sufficient force," the presumption *is* "displace[d]." *Id*. The decision did not indicate how this standard applies to facts differing from "mere corporate presence." Nonetheless, at least three propositions are clear.

First, the "touch and concern" standard refutes any suggestion that the Court categorically barred ATS claims arising abroad. Indeed, the Court ruled "[o]n these facts," *id.*, making clear that this standard must be applied on a fact-specific basis.

Second, because the holding was restricted to the facts, it is quite narrow. *Kiobel* was notable for the absence of connections to the United States. There, Nigerians sued UK and Dutch parent companies alleged to have abetted Nigerian military abuses in Nigeria. *Id.* at 678-9, 686. Defendants' only U.S. connection was that they were listed on the New York Stock Exchange and maintained an investor servicing office owned by a separate corporate affiliate. *Id.* at 695 (Breyer J., concurring).

All three concurrences—for seven justices—confirm that the holding is limited. Justice Kennedy noted that the Court was "careful to leave open a number of significant questions" and made clear that "[o]ther [ATS] cases may arise" that are not foreclosed "by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and

explanation." *Id.* at 686 (Kennedy J., concurring). Justice Breyer observed that the majority "leaves for another day the determination of just when the presumption against extraterritoriality may be 'overcome.'" *Id.* at 690 (Breyer J., concurring) (quoting *id*. at 682). And Justice Alito confirmed that the decision "leaves much unanswered." *Id.* at 686 (Alito J., concurring).

Third, the Court did *not* require conduct in the United States. Only Justices Alito and Thomas would have preferred a "broader standard" than the majority's "narrow approach"; they would have required conduct in the United States that itself amounts to a violation of international law. *Id*.

The Court left for future cases the application of the *Kiobel* presumption in most circumstances, including those here.

B. Courts should consider the United States' interests in and relationship to the claims.

1. Claims against U.S. residents are not precluded.

Since *Kiobel* applied the "principles" animating the presumption, courts should hear claims that do not contravene the presumption's underlying purpose: "to protect against unintended clashes between our laws and those of other nations which could result in international discord." 185 L. Ed. 2d at 677, (internal quotation omitted). Accordingly, *Kiobel* does not preclude cases involving individuals living here, where the risk of "international discord" is minimal, even if they are foreign nationals who were outside the U.S. at the time of the abuse.

As the United States argued in *Kiobel*, such claims are "consistent with [our] foreign relations interests." *See* Plaintiff's brief at 8, citing Supplemental Brief of the United States, 2012 WL 2312825. Thus, the Government urged the Court to preserve *Filártiga*, *id.*, in which this Court held that a Paraguayan could bring an ATS claim for torture committed in

Paraguay, against a Paraguayan defendant residing in New York. 630 F.2d at 878.

Sosa approved *Filártiga*. 542 U.S. at 732 (noting *Sosa* is "generally consistent" with *Filártiga*; quoting *Filártiga*'s holding that "for the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind"). The *Kiobel* Court also considered *Filártiga* – at argument, Justice Kennedy described it as "binding and important precedent," Tr. of Feb. 28, 2012 Oral Argument in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 at 13:21-23 – and the majority gave no indication that it was overriding this precedent. Instead, the Court relied on the fact that "[c]orporations are often present in many countries," 185 L. Ed. 2d at 686; this is not true of individuals, (particularly those who have expressed an intent to permanently reside in one place).

Where the defendant is a U.S. resident, the claims concern the United States. "International norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent)." *Id.* at 691 (Breyer, J., concurring). This is why the U.S. government defended *Filártiga* in *Kiobel*. Plaintiff's brief at 8. Claims should proceed where:

> the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer.

185 L. Ed. 2d at 691-92 (Breyer J., concurring) (distinguishing *Kiobel* from *Filartiga* because, given defendants' "minimal and indirect American presence," that case did not vindicate the U.S. interest in not providing a safe harbor).[2]

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[2] Justice Breyer's analysis accords with the rationale underlying the "touch and concern" formulation. He considered the circumstances under which international law allows nations to apply their law to claims arising abroad "in light of both the ATS's basic purpose (to provide compensation for those

Just as international law allows nations to apply their law to their citizens acting abroad, Restatement (Third) of the Foreign Relations Law of the U.S., § 402(2) (1987), it likewise recognizes a state's right to apply its law to its residents. *Id.*, comment e.

The defendant in *Filártiga* came to the U.S. on a non-immigrant visa and overstayed, residing here for nine months before being sued. 630 F.2d at 878-79. The U.S. interest is even stronger where the defendant has lawful permanent resident status – which indicates intent to reside here permanently.[3] Indeed, Khan has apparently lived in the U.S. for at least 25 years. *See* Plaintiffs Brief at 7. To provide a permanent home for LPRs who engage in egregious rights abuses and then deny their victims access to justice would contravene the ATS's basic purpose.[4]

2. Claims that could not be brought elsewhere are not precluded.

The *Kiobel* Court reasoned that the foreign multinationals were "present in many countries," 185 L. Ed. 2d at 686, implying that courts should not generally hear claims against defendants with no connection to the forum, where other *fora* are available; the *Kiobel* plaintiffs conceded that their claims could have been brought in the defendants' home countries. Tr.

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injured by today's pirates) and *Sosa*'s basic caution (*to avoid international friction*)." 185 L. Ed. 2d at 691 (Breyer J., concurring) (emphasis added).

[3] Defendants suggest Khan resided in Bangladesh at the time of the torture, but that would have amounted to abandonment of the intent to permanently reside here and thus his LPR status. *See, e.g., Singh v. Reno*, 113 F.3d 1512, 1514-16 (9th Cir. 1997).

[4] The U.S. has ratified treaties prohibiting and requiring all countries to punish torture, regardless of national links. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 5 and 14 (requiring signatories to punish torturers present in their countries and establish mechanisms for redress for victims).

of Oct. 1, 2013 Oral Argument in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 at 14:19-25. This does not apply if there is no other possible forum.

Since the jury apparently found that Defendants used the Bangladeshi justice system to have Plaintiff tortured, Bangladesh should be presumed to be an inappropriate forum.

3. *Kiobel* does not bar ATS claims that are intertwined with other viable claims.

Where there are other claims in the same case, based on the same facts, which would proceed absent the ATS claims—such as here where TVPA claims lie against the individual defendant—*Kiobel*'s rationale and holding is inapplicable. The ATS claims "touch and concern" the United States because the *dispute* will be adjudicated in U.S. courts. Indeed, to *dismiss* ATS claims satisfying *Sosa* based on the *Kiobel* presumption could *cause* international friction by allowing some claims to proceed while others have to be pursued elsewhere.

Moreover, the *Kiobel* Court's concerns with creating international friction by hearing cases with little connection to the United States are accounted for in ordinary, generally applicable doctrines such as *forum non conveniens* or comity.

Similarly, it makes little sense to dismiss ATS claims against parties with fewer connections to the U.S. if claims arising out of the same facts would proceed against other defendants.

II. The Supreme Court's decision undermines the *Kiobel* Panel's holding that the ATS does not provide jurisdiction over suits against corporations.

Kiobel is clear that whether the ATS reaches any particular extraterritorial conduct is not a jurisdictional issue. The Court cited the

holding in *Morrison v. Nat'l. Australia Bank, Ltd.* 561 U.S. __ (2010) that application of the presumption against extraterritoriality is a "merits question." 185 L. Ed. 2d at 680. Although the ATS is "strictly jurisdictional" —"allow[ing] *federal courts* to recognize certain causes of action"—"the principles underlying the canon of interpretation *similarly* constrain courts considering *causes of action* that may be brought under the ATS." *Id.* (emphasis added). Thus, those principles "constrain courts *exercising their power* under the ATS." *Id*. at 686 (emphasis added). In short, *Kiobel* applied its presumption to the scope of federal common law *claims* asserted under the ATS, not to the scope of ATS jurisdiction.

In *Kiobel*, this Court held that the ATS provides no jurisdiction for suits against corporations. 621 F.3d 111, 148-49 (2d. Cir. 2010). The Supreme Court granted *certiorari* on that issue, which was fully briefed and argued. No Justice questioned whether corporations could be sued. Because the Court reached the non-jurisdictional question of extraterritoriality, it clearly did not see the existence of a corporate defendant as a jurisdictional bar. If the ATS provided no jurisdiction, the Court could not have reached the issue of whether "mere corporate presence" was insufficient to overcome the *Kiobel* presumption. *Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998). The fact that the Supreme Court addressed the scope of the cause of action means it implicitly overruled the *Kiobel* panel's holding that there was no jurisdiction.[5]

Circuit precedent is not binding if "its rationale is overruled, implicitly or expressly, by the Supreme Court." *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 334 n.4 (2d Cir. 2005) (internal quotation marks omitted). Moreover, the Court at least assumed

[5] *Presbyterian Church of Sudan v Talisman Energy Inc*, 582 F. 3d 244, 261 n.12 (2d Cir. 2009) treated corporate liability as non-jurisdictional; it assumed without deciding that corporations could be held liable in order to reach a merits question—an approach barred by *Steel Co.* if corporate liability is jurisdictional.

that corporations can be held liable. 185 L. Ed. 2d at 686. The panel decision is not binding.

Nor is it persuasive on the scope of an ATS claim. The Court believed either that corporate liability is not jurisdictional or that the panel's analysis was wrong. Even assuming the former, the panel's conclusion that international law governs the question of corporate liability was intertwined with its conclusion that the question is jurisdictional. 621 F.3d at 128. Thus, *Kiobel* at least casts doubt on the conclusion that international law applies. Regardless, the panel's conclusion that corporations may not be sued has been rejected by every Circuit since the decision was rendered.[6]

III. *Kiobel* does not limit the TVPA.

The concerns animating the Court's limitations on the ATS do not permit courts to create new limits on the TVPA. Def. Letter at 4. By its terms, *Kiobel* applies only to the ATS. Indeed, the TVPA is expressly extraterritorial. *E.g.* 28 U. S. C. §1350 note, Section 2(b). *Sosa* concluded that ATS claims are subject to "vigilant doorkeeping" *because* ATS claims are federal common law claims. 542 U.S. at 725-29. TVPA claims "will be determined in the future according to the detailed statutory scheme Congress has enacted." 185 L. Ed. 2d at 686 (Kennedy J., concurring). Neither *Sosa* nor *Kiobel* suggest that courts may narrow Congress's provisions.

Respectfully Submitted,

/s/ Richard Herz
Richard Herz
Marco Simons
Michelle Harrison
EarthRights International
Counsel for amicus curiae

[6] *Doe v Exxon Mobil Corp.*, 654 F, 3d 11, 41-57 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F. 3d 1013, 1017-21 (7th Cir 2011); *Sarei v Rio Tinto LLC*, 671 F. 3d 736, 747-48 (9th Cir.2011).