06-4800-cv

06-4876-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL JURISDICTION IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA , ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKP O, ANTHONY B. KOTE-WITA H, VICTOR B.WI FA, DUM L E J. KUNENU, BENSON MAGNS U IK ARI, LEGBRAA TONY IDIG IMA,SP IU NWI NEE, KPOI BAR TU SIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Plaintiffs-Appellants-Cross-Appellees,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC,

Defendants-Appellees-Cross-Appellants,

SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Defendant.

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars with expertise in federal jurisdiction, federal courts, and civil procedure who have an interest in the proper interpretation of questions of subject matter jurisdiction.[1] A full list of *Amici* appears in the Appendix.

The decision by the panel in this case, in *Amici*'s view, conflates a merits question with the question of subject matter jurisdiction, an error that has been repeatedly highlighted by the Supreme Court because of its impact on litigants and the orderly administration of the courts. *Amici* respectfully submit this brief to urge the full court to review this question *en banc* and in support of the request for rehearing. They take no position on any of the other questions presented in this case.

ARGUMENT

The Supreme Court has recently and repeatedly expressed "a marked desire to curtail" the so-called "drive-by jurisdictional rulings" that miss the critical distinction between "true jurisdictional conditions and nonjurisdictional causes of action." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *see also Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Steel Co. v. Citizens*

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief.

for a Better Env't, 523 U.S. 83, 90 (1998); 2 *Moore's Federal Practice* § 12.30[1] (Matthew Bender 3d ed. 2010) ("the parties and courts sometimes erroneously conflate the question of subject matter jurisdiction with the question of whether the plaintiff can prove that the federal statute actually applies to the defendant or to the defendant's conduct"). The distinction is important because while a court may raise the question of subject matter jurisdiction *sua sponte* at any stage in the proceedings, an objection that a complaint fails to state a claim upon which relief can be granted must be asserted by a party. *See* Fed. R. Civ. P. 12. Moreover, although "[i]t is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.).

Subject matter jurisdiction "properly comprehended" refers to a court's "power to hear a case." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009); *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (subject matter jurisdiction is "the authority conferred by Congress to decide a given type of case"). That is, jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (quoting *Republic Nat'l Bank of Miami v.*

United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). So long as the allegations invoking the court's jurisdiction are not "wholly insubstantial and frivolous," subject matter jurisdiction exists over the merits of a controversy. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946); *see also Steel Co.*, 523 U.S. at 89; *Hagans*, 415 U.S. at 536–38; *S. New England Tel. Co. v. Global Naps Networks, Inc.*, No. 08-4518-cv, 2010 WL 3325926, at *4–5 (2d Cir. Aug. 25, 2010) (Livingston, J.); *Conyers v. Rossides*, 558 F.3d 137, 149 n.16 (2d Cir. 2009) (Raggi, J.).[2]

The question of whether a prohibition applies to a defendant's conduct is generally part and parcel of whether a plaintiff can state a claim on the merits, not whether the court has subject matter jurisdiction. Indeed, the Supreme Court has repeatedly emphasized that subject matter jurisdiction does not turn on the scope or applicability of a cause of action. *See Morrison*, 130 S. Ct. at 2877 (to ask what conduct a statute reaches is a merits question, not a question of subject matter jurisdiction); *Steel Co.*, 523 U.S. at 89–92 (scope of statute goes to merits, and does not implicate court's power to adjudicate the case); *Northwest Airlines, Inc. v. Cnty. of Kent, Mich.*, 510 U.S. 355, 365 (1994) ("whether a federal statute creates a

[2] A claim is insubstantial and frivolous "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Hagans*, 415 U.S. at 538 (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933)); *Steel Co*., 523 U.S. at 89 (dismissal only appropriate where claim is insubstantial, implausible, foreclosed by prior decisions, or otherwise so completely devoid of merit as not to involve a controversy (citing *Oneida Indian Nation v. Cnty. of Oneida, New York*, 414 U.S. 661, 666-67 (1974)).

claim for relief is not jurisdictional"); *Burks v. Lasker*, 441 U.S. 471, 476 (1979) ("whether a cause of action exists is not a question of jurisdiction"); *Bell*, 327 U.S. at 682–85 (jurisdiction is not defeated where right of petitioners to recover will be sustained if Constitution and laws are given one construction and will be denied if they are given another). In particular, subject matter jurisdiction does not turn on whether a defendant is subject to suit under a given cause of action. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (question of whether Congress intended to allow a cause of action against the Postal Service is not a question of subject matter jurisdiction); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277–79 (1977) (whether defendant is subject to suit under 42 U.S.C. § 1983 is not a question of subject matter jurisdiction); *cf. Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953) (whether Jones Act applies to suit by alien seaman against foreign ship owner not a question of subject matter jurisdiction); *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305–06 (1923) (whether transactions took place in interstate commerce not a question of subject matter jurisdiction: "jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged"). Even where a jurisdictional statute contains some elements of the cause of action, "it is unreasonable to read this as making all the elements of the cause of action . . .

jurisdictional, rather than as merely specifying the remedial *powers* of the court." *Steel Co.*, 523 U.S. at 90.

The United States relied upon this line of cases when it recommended the Supreme Court decline to review this Court's decision in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), explaining that "the validity of a federal-common-law claim under *Sosa* should generally be treated as a merits question, with the ATS conferring subject-matter jurisdiction so long as the allegations of a violation of customary international law are not plainly insubstantial." Br. for the U.S. as *Amicus Curiae* at 20, *Abdullahi v. Pfizer, Inc.*, No. 09-34 (U.S. May 2010).

Notwithstanding the care with which the Supreme Court has admonished lower courts to approach this distinction and its particularly sharp attention to this issue over recent years, the panel decision did not treat the question of whether a corporate defendant can be liable under international law as a merits question, but described its holding, which the panel explicitly termed as resolving "the scope of liability" under the statute, as a question of subject matter jurisdiction. *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 06-4876-cv, slip op. at 1 (2d Cir. Sept. 17, 2010) ("*Kiobel*"). *Amici* respectfully submit that the panel's analysis conflicts with the Supreme Court's oft-repeated directive that the scope of liability is a merits determination. *E.g.*, *Morrison*, 130 S. Ct. at 2877; *Steel Co.*, 523 U.S. at 89–92; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812–13 (1993) (Scalia,

J., dissenting); *Northwest Airlines*, 510 U.S. at 365.[3] Because such "drive-by jurisdictional rulings" are strongly disfavored, the panel decision should be reviewed and corrected by the full Court. *Amici* take no position on whether, in a case where the issue is properly raised by the parties and considered on the merits, a corporation may or may not be found liable under the ATS.

The panel did not explicitly address the question of whether the Plaintiffs' allegations of corporate liability were plainly insubstantial or frivolous, but such a finding appears to be ruled out by Judge Leval's observation that the majority opinion conflicts with virtually every other reported decision. *Kiobel*, slip op. at 24 n.14 (Leval, J., concurring); *see also id*. at 22 n.12. Indeed, this Circuit's willingness to sustain ATS cases against juridical entities over the past twelve years[4] further demonstrates that Plaintiffs' claims are not frivolous. *Hagans*, 415

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[3] Indeed, in five post-*Sosa* decisions concerning corporations' liability under the ATS, the Second Circuit has never held that the availability of corporate liability is a question of subject matter jurisdiction. *Abdullahi*, 562 F.3d 163 (upholding ATS claims against corporation), *cert. denied*, 130 S. Ct. 3541 (2010); *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*, 335 F. App'x 81 (2d Cir. 2009) (summary order) (same); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (affirming dismissal on the merits after summary judgment); *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104 (2d Cir. 2008) (affirming dismissal on the merits under Rule 12(b)(6) and Rule 56); *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254 (2d Cir. 2007) (upholding ATS claims against corporation).

[4] The Circuit's first decision concerning an ATS claim against a corporate defendant was *Jota v. Texaco Inc*., 157 F.3d 153 (2d Cir. 1998), which vacated the district court's dismissal on *forum non conveniens* grounds and remanded the case for further proceedings.

U.S. at 538. On the heels of this Circuit's decision in *Pfizer* permitting claims to proceed against a corporate defendant, 562 F.3d 163, and the Supreme Court's denial of Pfizer's petition for certiorari, 130 S. Ct. 3541 (2010), it appears even more unlikely that the plaintiffs' claims could be considered "foreclosed by prior decisions." *Steel Co.*, 523 U.S. at 89; *see also, e.g.*, *Herero People's Reparations Corp. v. Deutsche Bank*, 370 F.3d 1192, 1995 (D.C. Cir. 2004) (holding that the court had subject matter jurisdiction over ATS action against corporate defendant because allegations were not insubstantial or frivolous, despite lack of Circuit precedent, given decisions in other courts).

Thus, without taking any position on whether juridical persons should be subject to liability for violations of customary international law, *Amici* respectfully submit that this question should not have been reached *sua sponte* in the course of determining subject matter jurisdiction but should be properly resolved on the merits. The panel decision is simply incompatible with recent, and repeated, directives from the Supreme Court and is troubling in ways that reach beyond its impact in this particular case and on these litigants. The Supreme Court's focus over the last dozen years on the difference between subject matter jurisdiction and the scope of an asserted claim for relief is more than semantic. Rather, it implicates the power of the Court and its duty to exercise the jurisdiction provided by Congress and the Constitution. It has important consequences for *res judicata*,

the standard of proof, and potentially the jury right. Shifting the burden to the Court to resolve contested merits-related facts increases the burden on the courts, alters the incentives facing litigants, and undercuts the role of the adversarial process. Plaintiffs' request for rehearing should be granted.

Respectfully submitted,

October 14, 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 1,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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I, Agnieszka M. Fryszman, the undersigned, hereby certify that I am a partner at Cohen Milstein Sellers & Toll PLLC, 1100 New York Ave NW, Suite 500 West, Washington, DC 20005; I am over the age of eighteen; and I am not a party to this action.

I further declare under penalty of perjury that on this day I caused the foregoing Brief of *Amici Curiae* Professors of Federal Jurisdiction in Support of the Plaintiffs-Appellants-Cross-Appellees' Petition for Rehearing and Rehearing en Banc to be served on all parties of record by sending electronic PDF copies to the following recipients by electronic mail, and, except for those indicated as having waived paper service, by placing two true copies in envelopes addressed as follows and dispatched to a third-party commercial carrier for delivery on October 15, 2010:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

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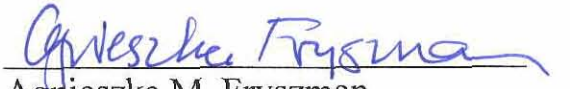

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