19-1530

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ESTATE OF ARTURO GIRON ALVAREZ,
by and through Maria Ana Giron Galindo, *et al.*,
Plaintiffs-Appellees,
v.
THE JOHNS HOPKINS UNIVERSITY, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland
No. 1:15-cv-00950-TDC
(The Honorable Theodore D. Chuang)

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

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Marco Simons Date: September 18, 2019

Counsel for: EarthRights International

CERTIFICATE OF SERVICE

****

I certify that on September 18, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Marco Simons (signature) September 18, 2019 (date)

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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 and expertise in the issues addressed in this brief. 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.); and *Doe v. Chiquita Brands Int'l, Inc.*, No. 08-CIV-80421 (S.D. Fla.). All of these cases save *Wiwa* involved or involve claims against U.S. corporations. EarthRights routinely submits *amicus* briefs to appellate courts on the ATS, including two briefs to the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and one in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

The outcome of this case directly affects EarthRights' mission of ensuring accountability and effective remedies for victims of human rights violations. EarthRights therefore has an interest in the proper interpretation of the ATS, as well as the availability of the ATS as a remedy for human rights violations, particularly those committed by U.S. corporations.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Plaintiffs-Appellees argue that the question of whether domestic corporations can be sued under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, is not properly on appeal. Plaintiffs-Appellees Br. (PAB) at 35-36. If the Court nonetheless considers the issue, *amicus* demonstrates that Supreme Court precedent, statutory text, the common law nature of an ATS claim and the traditional rule that corporations can be held liable for torts all show that domestic corporations may be held civilly liable for violations of certain international law norms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Corporate legal personhood is a bedrock tenet of American law. Indeed, although corporations are a legal fiction, the Supreme Court has held that they enjoy rights, including constitutional rights. And a central feature of corporate personhood is that corporations can sue on their own behalf and be sued. Corporate liability for torts has been part of our Anglo-American common law tradition for

centuries. This rule should not be abrogated to afford U.S. corporations special immunity when they commit the very worst kinds of torts – violations of universally recognized human rights such as genocide.

Defendants-Appellants assert that the ATS should provide just such an unwarranted immunity, even though ATS claims are common law claims. Defendants make two arguments. First, they say that the Supreme Court's holding as a prudential matter that *foreign* corporations cannot be sued due to specific foreign policy concerns, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), should be extended to exclude suits against domestic corporations. Defendants'-Appellants Brief (DAB) 19-30. While this argument is outside the scope of this brief, *amicus* agrees with Plaintiffs that it is meritless. PAB 36-52.

Here, *amicus* demonstrates that Defendants' second claim, that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), precludes liability for any corporation, even United States corporations, is wrong. DAB 32-43. Both *Sosa* and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), assumed that corporations can be sued. *Sosa* noted that corporations were on the same footing as any other private actor. 542 U.S. at 732, n.20. And *Kiobel II*'s holding that "mere corporate presence" alone was insufficient to displace the presumption against extraterritoriality contemplates that at least some corporations can be sued. 133 S. Ct. at 1669.

The text of the ATS also supports corporate liability. It does not limit the class of defendants. 28 U.S.C. § 1350. And by creating a "tort" action, the text incorporates ordinary tort principles, like corporate liability.

Of the five Circuits to have considered the question, four have agreed that the ATS permits suits against corporations. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50-51 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Doe. v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018). That is also the position of the United States. Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Dec. 2011) ("U.S. *Kiobel* Br.").

Defendants seize on the solitary outlier, the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), 621 F.3d 111 (2d Cir. 2010), in which a sharply divided panel held that the ATS provides no jurisdiction over claims against corporations. They do so even though a later Second Circuit panel acknowledged that the Supreme Court's subsequent decision in *Kiobel II* suggests *Kiobel I* is wrong. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155-56 (2d Cir. 2015).

Kiobel I held that international law determines whether corporations can be

sued and, limiting its analysis to international *criminal* law, held that international law does not provide for corporate liability. 621 F.3d at 118-20. Both propositions are mistaken. Federal common-law rules apply. *Sosa* held that the ATS is "only jurisdictional." 542 U.S. at 712. Its text provides that jurisdiction requires only a "violation" of international law. 28 U.S.C. § 1350. Thus, the violation suffered by the plaintiff must be barred by the law of nations. But there need not be an international law cause of action for that violation. Once jurisdiction is established, an ATS cause of action is provided by *federal common law*. *Sosa*, 542 U.S. at 724. Thus, questions regarding who can be sued are determined by federal common law.

But even if courts looked to international law to determine corporate liability, international law itself leaves the question of how international norms will be enforced to domestic law. This principle has been recognized since the drafting of the ATS. Faithful adherence to it is especially warranted in the context of private civil liability, for which international law typically does not provide a forum, and for corporations, which are created by municipal law.

Therefore, in assessing whether corporations can be held liable, courts look to well-established federal or traditional common law rules. *Sosa*'s threshold test for identifying jurisdiction-conferring norms of international law does not apply. And the applicable rule must give effect to Congress' purposes in enacting the

ATS.

Corporate liability has been a feature of the common law since the Founding. International law turns to domestic law to recognize corporate legal personality, and – in the form of general principles recognized by all of the world's legal systems – also recognizes such liability. No matter what body of law applies, corporations can be held liable.

Corporate immunity is anathema even for garden-variety torts. But *Kiobel I* exempted from liability acts that are so universally reviled that they render the perpetrator "an enemy of all mankind." *See Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). *Kiobel I* therefore contravenes the centuries-old understanding, common to our legal system and every other, that juridical persons can be sued just like natural persons.

Corporate liability is inherent in the whole notion of incorporation, which allows suits against the corporation in exchange for the limitation of shareholder liability. Corporate immunity would frustrate the congressional purpose of providing an adequate federal forum for enforcing fundamental human rights norms, by uniquely shielding the corporate "person," even where all other persons and individual actors would be responsible. The ATS provides no such exception.

Under *Kiobel I*, victims of human rights abuses cannot sue corporations – no matter how horrific the abuse or extensive the corporation's participation.

"Sometimes, it's in the interest of a corporation's shareholders for management to violate . . . norms of customary international law." *Flomo*, 643 F.3d at 1018. Yet *Kiobel I* rewards those few corporations that choose to profit from atrocity and penalizes corporations that respect fundamental rights, forcing them to compete on an uneven playing field. Worst of all, it denies redress to those harmed. In short, *Kiobel I* would immunize corporations in the last situation in which they should be given a free pass. Nothing in federal or international law requires this anomaly. That decision is wrong as a matter of law, and would enshrine an illogical and harmful double standard. This Court should join the majority of Circuits that have rejected it.

ARGUMENT

I. The Supreme Court has accepted that domestic corporations can be sued.

The Supreme Court's decisions in *Sosa* and *Kiobel II* assume that the ATS allows corporations to be sued. *Sosa* grouped private corporations and individuals together, treating corporations and natural persons the same way. The Court noted that a court must consider whether the international-law norm at issue can be violated by private actors "if the defendant is a private actor such as a corporation or an individual." *Sosa*, 542 U.S. at 732 n.20. Thus, in distinguishing between norms that require state action and those that do not, the Supreme Court equated all private actors. *See Doe VIII v. Exxon*, 654 F.3d at 50-51; *Kiobel I*, 621 F.3d at 165

(Leval, J., concurring in the judgment); U.S. *Kiobel* Br. at 18.[1]

Kiobel II also necessarily assumed corporate liability. *Sosa* explained that the ATS does two things: (1) it provides subject matter *jurisdiction* to the federal courts; and (2) it allows federal courts to recognize certain *causes of action* as a matter of *federal common law*. 542 U.S. at 724. Under this framework, the Supreme Court in *Kiobel II* dismissed ATS claims due to the policies underlying the presumption against extraterritoriality, which was a "merits question." 133 S. Ct at 1664. Thus, *Kiobel II* implicitly found that jurisdiction was proper, because it could not otherwise have reached the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, (2008). But *Kiobel I* held that the ATS does not provide *jurisdiction* over suits against corporations. 621 F.3d at 148-49. That conclusion was necessarily rejected by the Supreme Court's analysis in *Kiobel II*, which found no jurisdictional bar to considering a case involving a corporate defendant.

The holding in *Kiobel II* that "mere corporate presence" was insufficient to displace the presumption against extraterritoriality also presumes that, under other

[1] Footnote 20 of *Sosa* cites two cases, one involving a natural person defendant, *Kadic v. Karadžic*, 70 F.3d 232, 237 (2d Cir. 1995), and the other involving a juridical person defendant, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 775 (D.C. Cir. 1984), but *Sosa* simply called both "private actor[s]." 542 U.S. at 732 n.20.

circumstances, corporations are amenable to suit. *See* 133 S. Ct. at 1669. The Second Circuit suggested as much after *Kiobel I*. *In re Arab Bank*, 808 F.3d at 155; *accord In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34, 44 (2d Cir. 2016) (Pooler, J., dissenting from denial of *en banc* review).

II. The text of the ATS contemplates corporate liability.

The ATS grants jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. Two aspects of the text indicate that the statute encompasses corporate liability.

First, while the statute limits the class of *plaintiffs* who may sue, (aliens only), it "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). This alone shows that the ATS does not bar corporate liability. *Romero*, 552 F.3d at 1315.

Second, when Congress creates a tort action, it "legislates against a legal background" of ordinary tort liability rules and intends "to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Should Congress wish to abrogate a common-law rule, the statute must "speak directly" to the question addressed by the common law. *Id*.

Corporate liability for torts has been the rule for centuries, and was an established tort principle when the ATS was passed. "At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be

maintained against corporations for torts." *Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210-11 (1859). *Accord* U.S. Kiobel Br. at 25-26 (collecting cases); *Exxon Mobil*, 654 F.3d at 47-48 (collecting cases); 1 William Blackstone, *Commentaries on the Laws of England* 463 (1768) (corporations may "sue or be sued").

Thus, Congress must be presumed to have "incorporate[d]" the rule of corporate tort liability.

III. Federal common law governs the issue of whether corporations can be sued under the ATS.

If the text leaves any doubt that corporations can be sued, the Court must resolve that question by looking to federal common law. The *Kiobel I* panel erroneously concluded that, in order for corporations to be held liable under the ATS, customary international law must specifically provide for corporate liability. 621 F.3d at 118. That conclusion conflicts with the statute's text, *Sosa*'s holding that an ATS claim is a common law cause of action, the historic practice of federal courts applying federal common law to effectuate federal claims, the ATS's original purpose of ensuring that claims involving international law could be heard in federal court, and the structure of international law, which leaves the means of enforcement of international norms to domestic law.

All of this points to a single conclusion: while customary international law defines the content of the right whose violation gives rise to ATS jurisdiction,

federal common law determines whether corporations may be held liable.

A. The text of the ATS, *Sosa*, the ordinary role of federal common law and the purpose of the ATS all direct the court to federal common law.

1. The text of the ATS requires that federal common law governs.

The statute's plain language refutes the contention that international law governs. The text of the ATS does not require that the cause of action "arise under" the law of nations; "by its express terms," ATS jurisdiction requires "nothing more than a *violation* of the law of nations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring); *accord In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). *Kiobel I* misread the text, concluding that its silence as to who can be sued suggests that a specific cause of action against a corporation must exist under customary international law. 621 F.3d at 121-22. But the text does not require that international law define who can be a proper defendant, only that the infringed-upon *right* be recognized under international law.

The statute's use of the word "tort," a domestic law concept, also requires that domestic tort principles control. Once there is jurisdiction over a tort suit for the violation of a particular international norm, domestic tort law, including corporate liability, applies. The *Kiobel I* panel's reading of the ATS cannot be reconciled with the plain text.

2. *Sosa* directs courts to apply federal common law.

Other than the substance of the right violated, federal common law generally applies to issues under the ATS. The ATS's "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide [the] cause of action." *Sosa*, 542 U.S. at 724. While at the jurisdictional threshold there must be a "violation[] of [an] international law norm," ATS claims are "claims under federal common law." *Id.* at 732; *accord id*. at 721. This conclusion flows from the eighteenth-century understanding of international law. *See id.* at 714-24. *Sosa* recognized certain violations of international norms by private parties were "admitting of a judicial remedy" – *i.e.*, subject to domestic enforcement. *Id*. at 715; *accord id.* at 729 (noting that under ATS, "federal courts may derive some *substantive* law in a *common law way*.") (emphasis added). International law cannot define all aspects of an ATS action; otherwise, *Sosa*'s holding that the ATS allows federal courts to recognize causes of action at federal common law would be meaningless. 542 U.S. at 724.

Kiobel II reaffirmed this approach, holding that the question in ATS cases is "whether the court has authority to recognize a cause of action *under U.S. law* to enforce a norm of international law." 133 S. Ct. at 1666 (emphasis added). For this reason, a Second Circuit panel noted that *Kiobel II* both suggests "that *Kiobel I* relies in part on a misreading of *Sosa*" and "appears to reinforce Judge Leval's

reading of *Sosa*," under which international law governs "only the conduct proscribed, leaving domestic law to govern" whether corporations can be sued. *In re Arab Bank*, 808 F.3d at 155.

Indeed, the cause of action must be determined as a matter of common law because international law, both when the ATS was passed and today, generally does not address the scope of *civil* liability for violations but instead leaves such matters to domestic law. Blackstone, upon whom *Sosa* relied, confirms that when violations of international law are "committed by private subjects," they "are then the objects of the municipal law." William Blackstone, *An Analysis of the Laws of England* 125 (6th ed. 1771). Kent's *Commentaries*, also cited by *Sosa*, note that "[t]he law of nations is likewise enforced by the sanctions of municipal law." 1 James Kent, *Commentaries on American Law* *181-82 (1826). This is why *Sosa* speaks of recognizing claims "under federal common law for violations of [an] international law norm." 542 U.S. at 732.

That international law provides norms rather than claims remains true today. As ATS cases have long recognized, and the United States noted, international human rights law leaves the manner in which it is enforced to States' discretion. *E.g., Kadić*, 70 F.3d at 246 (holding international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task

of defining the remedies that are available"); U.S. *Kiobel* Br. at 19.[2]

Consistent with that international principle, *Sosa* adopted the position, discussed in detail by Judge Edwards in his concurrence in *Tel-Oren*, 726 F.2d at 777-82, that under the ATS, international law itself need not provide a private cause of action; the Court rejected the contrary view, which would have nullified the ATS. *Sosa*, 542 U.S. at 714, 724, 729-31. Thus, *Sosa*, like international law, distinguishes the question of whether a person has suffered a violation of an international right from the scope of the remedial cause of action a state chooses to provide.[3]

The *Kiobel I* majority conceded that international law "leave[s] remedial questions to States." 621 F.3d at 147. But it defined "remedial" as narrowly limited to forms of *relief* available – damages, declaratory relief, an injunction – without regard to how the term is used in international law. *Id.* at 147 & n.50. As *Sosa* recognized, however, "remedy" in this context signifies the means to enforce a

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[2] *Accord Exxon Mobil*, 654 F.3d at 51; *Flomo*, 643 F.3d at 1020; *Marcos*, 25 F.3d at 1475; *Kiobel I*, 621 F.3d at 172-76, 187-89 (Leval, J., concurring); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007)(Hall, J., concurring); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

[3] *See Flomo*, 643 F.3d at 1019 (distinguishing a customary international law principle from "the means of enforcing it, which is a matter of procedure or remedy"); *Exxon Mobil*, 654 F.3d at 41-42 (holding that because international law "creates no civil remedies and no private right of action [] federal courts must determine the nature of any [ATS] remedy . . .by reference to federal common law").

right, equivalent to a cause of action. In discussing whether to allow a cause of action for the brief detention at issue in that case, the Supreme Court referred to "the creation of a federal remedy." 542 U.S. at 738. That plainly speaks to whether a cause of action was available, not what form of relief the plaintiff might recover.

Thus, international law provides the right and domestic law provides the cause of action – the remedy to enforce that right. The "remedy" at issue in this context is the means of enforcement and redress generally, and is thus much broader than merely what kind of relief a plaintiff may recover. *Kiobel I*, 621 F.3d at 175 n.33 (Leval, J., concurring). Indeed, in conflating "remedy" with "relief," *Kiobel I* departed from Second Circuit law. In *Kadić*, the Second Circuit equated "creat[ing] private causes of action" under the ATS with "defining the remedies." 70 F.3d at 246.

The *Kiobel I* position would render meaningless the principle that international law allows States to define domestic remedies, and would render the ATS a dead letter. The specific type of relief available only matters if there *is* a civil cause of action. But international law does not provide one. Under the panel's approach, there would be *no* claims for which the courts could apply relief – against a corporation or a natural person, *see Flomo*, 643 F.3d at 1019; *Kiobel I*, 621 F.3d at 153, 176, 178 (Leval, J., concurring) – and thus no issue left to domestic law.

In ruling that international law must provide a specific right to sue corporations, the *Kiobel I* majority appeared to embrace the position that international law must provide the right to sue, *see* 621 F.3d at 122, n.24 – a position *Sosa* squarely rejected. *See Kiobel I*, 621 F.3d at 176 (Leval, J., concurring in the judgment). Since international law does not typically provide a right to sue *anyone* for customary international law violations, it cannot be expected to explicitly provide a right to sue a corporation. *Id.*

Whether a corporation may be held liable in tort for violations of international law is a question international law leaves to states to determine for themselves. For this reason, courts and judges have explicitly rejected the *Kiobel I* approach and instead applied federal common law to this issue, finding that the ATS recognizes corporate liability. *Flomo*, 643 F.3d at 1019-20; *Exxon Mobil*, 654 F.3d at 41-43, 50; *Kiobel I*, 621 F.3d at 174-76 (Leval, J., concurring); *see also Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (Lynch, J., dissenting from denial of rehearing *en banc*) (four judges opining that, "for the reasons stated by Judge Leval," the *Kiobel* decision is "very likely incorrect"). The *Kiobel I* majority's opinion cannot be reconciled with the manner in which international law contemplates its own enforcement.

The *Kiobel I* panel incorrectly relied on *Sosa*'s footnote 20 to conclude that customary international law governs whether a corporation can be liable. 621 F.3d

at 127-28. Footnote 20 did not address liability. It recognized that certain international norms of *conduct*, like that barring torture, require state action, while others, like genocide, do not, and that whether a given norm requires state action is a question of international law. 542 U.S. at 732 n.20. Where international law requires state action, it is an element of the substantive offense. Accordingly, looking to international law to determine whether the jurisdiction-triggering norm requires state action fully accords with the distinction between the *right* violated (defined by international law) and the scope of the remedial *cause of action* (provided by domestic law).

Whether a corporation can be held liable is not an element of the international right whose violation triggers jurisdiction. It is a question that arises only after the plaintiff establishes jurisdiction. And under *Sosa*, the cause of action is found in federal common law. Thus, *Sosa* contemplated an ordinary common law tort claim to remedy violations of universally recognized human rights norms. Accordingly, corporate liability is defined by the federal common law as part of the cause of action. *Exxon Mobil*, 654 F.3d at 50-51.

As noted above, footnote 20 *supports* corporate liability because the Court drew no distinction between liability for natural persons and corporations. *Supra* Section I. And this is reflected in international law as well: there is no act that would violate international law if committed by an individual, but would not if

committed by a corporation. U.S. *Kiobel* Br. at 20.[4] An abuse that is of universal concern is not any less so because a corporation is responsible.

Defendants note that in this Circuit, aiding and abetting liability is determined under international law, DAB 33, citing *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398 (4th Cir. 2011), but the question of whether corporations can be sued is altogether different. Corporate liability is determined according to domestic law even if accomplice liability is not. *Kiobel I*, 621 F.3d at 187-89 (Leval, J., concurring); *Kiobel*, 642 F.3d 380-81 (Katzmann, J., dissenting from denial of rehearing *in banc*). The argument for an international-law aiding-and-abetting rule is that this is a "conduct regulating norm." William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L.J. 635, 650 (2006); *accord* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 72–74 (2008). But the type of entity against which a claim can be asserted is not conduct-regulating, and so is determined under domestic law. Keitner, *supra*, at 72; *Kiobel I*, 621 F.3d at 187-89 (Leval, J., concurring).

The *Kiobel I* majority erred in holding that ATS cases cannot be brought

[4] *Accord Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 21, 2006) (noting that international law provides little reason to differentiate between corporations and natural persons); *see also Prosecutor v. Tadić*, Case No. IT-91-1-T, Opinion & Judgment ¶ 655 (May 7, 1997) (crimes against humanity can be committed by "*any* organization or group").

against corporations unless international law itself expressly provides for corporate liability.

3. Courts generally look to federal liability rules to effectuate federal causes of action.

Federal courts regularly apply general liability rules to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (fashioning a "uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law").

Where a statute "clearly covers a field formerly governed by the common law," courts should interpret the statute "consistently with the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010). If a statute that *displaces* the common law should be interpreted consistently with common law rules, then surely a statute like the ATS – which does *not* displace the common law, but instead creates jurisdiction to hear *common law claims* – must be too.

Courts also apply federal common law "to fill the interstices of federal legislation." *Kimbell Foods*, 440 U.S. at 727; *accord Sosa*, 542 U.S. at 726 (discussing this rule); *Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (applying this rule to the ATS). The text of the ATS neither precludes corporate liability nor requires that the question be resolved under international law. *See supra* Section II, III.A.1. Thus, even if the text and *Sosa* were agnostic on the proper body of law to

apply, which they are not, such silence would be a further reason to look to federal common law.

4. Congress' original purpose of providing a federal forum suggests that who can be sued must be determined by common law rules.

In passing the ATS, Congress sought to provide a federal forum to redress torts that implicate international law. The First Congress was concerned about "the inadequate vindication of the law of nations." *Sosa*, 542 U.S. at 715-19. State courts already had jurisdiction over such suits. *Id*. at 722; *Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring). But Congress was afraid that state courts could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations; it therefore wanted to provide an alternative, *federal* forum. *Tel-Oren*, 726 F.2d at 783-84, 790-91 (Edwards, J., concurring); 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).

Given these aims, the First Congress would have expected federal courts to resolve the question of who could be sued by reference to the familiar body of general common law – just as state courts would do.

B. International law itself compels the conclusion that federal common law applies.

Even if courts must *first* look to international law, the applicable rule would

still ultimately come from federal common law, because international law directs courts right back to domestic law. As detailed above, the Framers' understanding that international law is enforced through domestic law remains true today. *Supra* section III.A.2. Since international law leaves issues like corporate civil liability to domestic law, courts are following international law when they apply domestic law.

IV. Federal common law provides for corporate liability.

Since federal common law rules govern the issue of corporate liability, the Court must discern the applicable rule. Here, that is easy. Under ordinary common law principles, and under international law, corporations are liable on an equal footing with natural persons. Accordingly, the Court should simply adopt the usual rule of corporate liability rather than creating a special rule that corporations should be immune from suit when they participate in violations of universally recognized human rights.

In discerning a federal common law rule, courts ordinarily must decide whether to adopt state law or apply a uniform federal rule, *e.g. Kimbell Foods*, 440 U.S. at 727; the latter is appropriate in cases involving international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-26 (1964). This is especially true here, since one purpose of the ATS was to ensure that a uniform body of law would apply to these kinds of claims. *Supra* Section III.A.4.

Where the Court looks however, is unimportant. The common law uniformly subjects corporations to the same civil liability as natural persons; this is inherent in the whole notion of corporate personality. *Amicus* is aware of no state that departs from this rule. *See generally United States v. Bestfoods*, 524 U.S. 51, 62-65 (1998) (applying ordinary common law principles to CERCLA and finding corporations can be held liable).

Applying ordinary common law corporate liability is consistent with the rule that Congress must "speak directly" to a question in order to abrogate a common law principle. *Meyer*, 537 U.S. at 285. Indeed, "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of" this rule. *Bestfoods*, 524 U.S. at 63.

While it is not necessary to consult international law, here it accords with established federal law. International law principles support corporate liability. *Exxon Mobil*, 654 F.3d at 51-54. For example, general principles of law – a species of international law derived from principles common to States' domestic law – provide rules applicable in ATS cases. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). Legal systems the world over recognize that corporations can be sued; this is a general principle of law. *Exxon Mobil*, 654 F.3d at 53-54.[5]

[5] *See* Brief of *Amici Curiae* International Human Rights Organizations in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. June 13, 2012), available at

The International Court of Justice has recognized corporate personality under international law, either in the form of general principles or by looking to the specific law of the incorporating jurisdiction. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), the ICJ noted that international law recognized corporations as institutions "created by States" within their domestic jurisdiction, and that the court therefore needed to look to general principles of law to answer questions about corporate separateness. *Id.* at 33-34, 37, 39.

More recently, the ICJ held that a corporation has "independent and distinct legal personality" under international law if it has that status under the domestic law of the relevant nation. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objection Judgment, 2007 I.C.J. 582, 605 (May 24, 2007). Just as international law generally looks to domestic law for its means of local enforcement, international law looks to domestic law for rules of corporate personality.

The Supreme Court, citing *Barcelona Traction*, approved liability against a corporation for a claim "aris[ing] under international law." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983). There, the

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http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_international.authcheckdam.pdf.

Court upheld a counterclaim against a Cuban government corporation for the illegal expropriation of property, under principles "common to both international law and federal common law." *Id.* The "understanding of corporate personhood [reflected in *FNCB* and *Barcelona Traction*] is directly contrary to the conclusion of the majority in *Kiobel [I]*." *Exxon Mobil*, 654 F.3d at 54.

Since the rule that corporations can be held liable in tort is clear in both domestic and international law, it should be applied under the ATS.

V. The history and purposes of the ATS support corporate liability.

"[T]he historical background against which the ATS was enacted," *Kiobel*, 133 S. Ct. at 1666, reinforces the presumption that Congress intended to incorporate the background common-law principle of corporate liability. As *Sosa* recognized, the ATS was enacted to vindicate the laws of nations. 542 U.S. at 717. The ATS expresses a Congressional policy of using tort law to redress international wrongs. The same corporate liability rule that ordinarily applies in tort cases best effectuates Congress' goals in passing the statute.[6]

First, liability rules under the ATS must reflect the universal condemnation

[6] The federal common law rule must implement the policies underlying the statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (applying Textile Workers to the ATS). Thus, the applicable rule in this case must give effect to Congress' decision to recognize tort liability for violations of international law.

of the underlying violations. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984). A holding that the corporate liability that applies to run-of-the-mill torts does not apply to genocide or crimes against humanity would "operate[] in opposition to the objective of international law to protect [fundamental] rights." *Kiobel I*, 621 F.3d at 150 (Leval, J., concurring). International law would be subverted if, for example, a modern day Tesch & Stabenow – whose top officials were convicted at Nuremberg for supplying poison gas to the death chambers of Auschwitz, *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1–8, 1946) – could participate in and benefit from atrocities and not be held to account by the victims.

Second, in creating a tort remedy, the Framers sought to effectuate tort law's twin aims – compensation and deterrence – but neither can be achieved without corporate liability. Where a corporation is involved in abuse, the corporation, not its agents, reaps the profits. Thus, there is no reason to believe that the agents have the wherewithal to provide redress. *Flomo*, 643 F.3d at 1019; *Kiobel I*, 621 F.3d at 179 (Leval, J., concurring); U.S. *Kiobel* Br. at 24. And since it is sometimes in a corporation's interests to violate international law, *Flomo*, 643 F.3d at 1018, a rule that only a corporation's agents are potentially liable would under-deter abuse.

Third, Congress passed the ATS in part because it preferred claims

involving international law to be heard in federal rather than state court. *See supra* Section III.A.4. ATS plaintiffs typically also plead state-based common law tort claims. Precluding corporate liability under the ATS would disadvantage aliens' claims arising under the law of nations *vis-a-vis* their state law claims – thus "treat[ing] torts in violation of the law of nations less favorably than other torts," contrary to the Framers' understanding. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 100 (2004).[7]

VI. This Court should not create a new immunity for corporations.

Amicus has shown that precedent, statutory text, the common law nature of an ATS claim and the statute's history and purposes all converge on the straightforward conclusion that corporations can be sued for human rights abuses under the ATS just like for any other tort. Defendants nonetheless urge this Court to toss all of this aside in the name of "caution." DAB 40. But there is nothing "cautious" about creating a new immunity by overriding the familiar guideposts of statutory interpretation and the centuries-old principle of corporate liability.

Plaintiffs-Appellees refute Defendants' specific arguments. PAB 46-50.

[7] This brief's argument that ATS claims were part of the common law and required no implementing legislation was adopted in *Sosa*. 542 U.S. at 714.

Refusing to recognize corporate liability would also lead to absurd results. The ability to sue the corporation is inherent in the notion of limited shareholder liability; plaintiffs may sue the corporation *because* limited liability ordinarily immunizes the shareholders. If corporations were not legal persons that could be sued, they could not be considered legal persons separate from their shareholders. They would simply be an aggregation of agents (the corporation's directors, officers and employees) acting on the shareholders' behalf. Thus, if corporations cannot be sued, the *shareholders* would be liable on an agency theory for everything that employees of the company do, without need to pierce any veil.

To find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* – that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, and yet not subject the corporation to liability. Neither federal common law nor international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are two sides of the same coin, and both derive from principles of domestic law common to all legal systems.

Basic fairness demands corporate accountability in this context. Defendants' proposed rule "offers to unscrupulous businesses advantages of incorporation

never before dreamed of. So long as they incorporate, businesses [would] be free to" participate in all sorts of human rights abuses. *Kiobel I*, 621 F.3d at 150 (Leval, J., concurring). Defendants want the benefits of corporate personhood, while evading the responsibilities. But they cannot pick and choose only the aspects of corporate personality they like. *See Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) (holding that "[o]ne who has . . . chosen [a corporation] as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which [a] statute lays upon it for the protection of the public").

Under the ATS, the violation of a universally recognized right gives rise to a federal common-law tort cause of action. The corporate liability that applies to ordinary torts should not be relaxed for abuses that transgress humanity's most fundamental values.

CONCLUSION

Supreme Court precedent and the text of the statute show domestic corporations may be sued under the ATS for atrocities. In any event, the question is determined by federal common law. Centuries-old common-law principles subject corporations to the same tort liability as natural persons. Nothing in law or logic warrants a new, special immunity for corporations involved in the very worst kinds of torts. For the foregoing reasons, *amicus* support affirmance.

DATED: September 18, 2019

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September 18, 2019

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I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on September 18, 2019. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on Sept. 18, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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