No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, ET AL., PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR ENGILITY CORPORATION
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

Engility Corporation is a United States-based publicly held corporation with extensive worldwide operations.[1] Engility provides government services in engineering, professional support, and mission support to the Department of Defense and other agencies of the American

[1] Written consents from both parties to the filing of amicus briefs in support of either party are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel contributed money to the preparation or submission of this brief.

government, as well its allies.[2] Engility is committed to conducting its business in a lawful and responsible manner in compliance with international law and with respect for human rights. Nevertheless, Engility has been subject to numerous claims arising in foreign sovereign territory brought under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, including claims brought by battlefield detainees based upon Engility's provision of linguists and interrogators to the U.S. military—claims that well illustrate the difficulties raised by extraterritorial ATS claims. *See, e.g.*, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011).

News media publication in 2004 of pictures depicting apparent abuse of Iraqis detained by the U.S. military at Abu Ghraib prompted civil suits by hundreds of Iraqis detained by the U.S. military across Iraq during a period spanning more than five years. Plaintiffs alleged that contractors aided and abetted or conspired with military personnel to mistreat them in violation of state law and international law.

In the first set of such cases, after 21 depositions of contractor and military personnel, the D.C. Circuit properly rejected common law torts, including claims under the ATS, as an appropriate means of regulating such battlefield conduct. *See Saleh*, 580 F.3d at 2-16.

In May and June of 2008, a second wave of actions was filed by scores of former Iraqi detainees. Two district courts within the Fourth Circuit declined to follow

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[2] Engility, formerly L-3 Services, Inc., was spun off from L-3 Communications in July 2012.

the D.C. Circuit's decision in *Saleh*. In *Al-Quraishi v. Nakhla*, for example, the district court refused to dismiss any claims because defendants were not soldiers and discovery would be required to rule on the defenses asserted. 728 F. Supp. 2d 702 (D. Md. 2010). A panel of the Fourth Circuit adopted the rationale of the D.C. Circuit and ordered all claims dismissed, *Al-Quraishi v. L-3 Services, Inc.*, 657 F.3d 201 (4th Cir. 2011), but the en banc court dismissed the appeal for lack of interlocutory appellate jurisdiction and remanded to the district court for discovery and trial, *Al Shimari*, 679 F.3d 205.

If the Court adopts the extraterritorial application urged by petitioners and their amici here, ATS claims against American companies providing services in support of U.S. military operations abroad, like those asserted against Engility in *Al-Quraishi* and *Saleh*, would be allowed to proceed. Even the qualified approach of the United States would leave open the question of whether the ATS applies to the conduct of U.S. companies in support of U.S. military operations abroad. These claims implicate serious separation-of-powers concerns and may lead to intrusive discovery against contractors and the military.

Engility therefore has a strong interest in the proper interpretation of the ATS and in particular clarifying whether it applies extraterritorially.

SUMMARY OF ARGUMENT

This Court should affirm the judgment below and hold that the ATS does not allow courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. In the alternative, the Court should affirm on the ground that corporations are not subject to ATS claims for the reasons previously set forth by res-

pondents and by the Second Circuit in the decision below.

It is well established that when a statute gives no clear indication that Congress intended it to have extraterritorial reach, it has none. Petitioners and their amici attempt to locate such a clear indication in the text and history of the ATS, but these sources are at best inconclusive and fall well short of providing the clear indication necessary to overcome the presumption against extraterritoriality.

The United States agrees with respondents that the Court should not recognize the extraterritorial ATS claims asserted here, but urges a case-by-case approach. That approach is at odds with its position in several previous cases in this Court and the lower courts, and conflicts with this Court's analysis of the extraterritorial reach of other statutes.

The parties and the United States focus their analysis on whether such claims would entail adverse consequences for U.S. foreign policy where the defendants are not present in the United States. Extraterritorial ATS claims, however, may also raise other concerns of similar magnitude, as demonstrated by ongoing efforts to use the ATS against American corporations as a vehicle to challenge U.S. military operations abroad. Those claims raise serious separation-of-powers concerns—concerns that provide an additional reason why this Court should avoid a construction of the ATS that recognizes extraterritorial claims absent a clear indication to the contrary from Congress. Indeed, the United States has in the past argued that the ATS should not be construed as extending to such matters.

This Court should adopt a categorical rule against extraterritorial application of the ATS. Such an ap-

proach would allow Congress the opportunity to clarify its intent before the Judiciary is thrust into the forefront of foreign affairs and required to confront difficult separation-of-powers issues underlying ATS claims in the context of U.S. military operations abroad.

ARGUMENT

THE COURT SHOULD RULE CATEGORICALLY THAT THE ATS DOES NOT ALLOW COURTS TO RECOGNIZE CAUSES OF ACTION BASED ON CONDUCT OCCURRING IN TERRITORY OF FOREIGN SOVEREIGNS

A. The Presumption Against Extraterritoriality Applies Categorically In All Circumstances

1. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). Unless there is "the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, the Court "must presume it is primarily concerned with domestic conditions." *Id.* (internal quotation marks omitted). In addition, absent a clear indication of congressional intent, statutes should be construed so that constitutional issues are not "needlessly confronted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). These cannons of statutory construction apply with particular force where military affairs are implicated. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

This Court has consistently applied the presumption against extraterritorial application categorically to "all cases," *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010)—not to particular "circumstances," as

the United States argues, *see* U.S. Supp. Br. 2. Courts are not to attempt to divine "what Congress would have wanted if it had thought of the situation before the court." *Morrison*, 130 S. Ct. at 2881. And for good reason. If the courts were to "guess anew" in each case what Congress intended, the presumption would fail to preserve "a stable background against which Congress can legislate with predictable effects." *Id.* It also would require lower courts to determine the effect of each case on foreign affairs and confront difficult separation-of-powers issues without a clear mandate from Congress or any indication of how Congress would resolve such questions. Moreover, this Court has observed in the past that the complexities of diplomatic relations might prevent the United States from expressing its views on such issues "at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1964). In circumstances where this is the case, the Judiciary would be left to make such difficult judgments without meaningful input from the Executive.

2. Contrary to the position it takes here, the United States previously argued that the Court should take a categorical approach and deny extraterritorial application to the ATS in all circumstances. While the United States has changed its conclusion, it has not disavowed or refuted the reasons that supported its advocacy of a categorical rule.

In particular, the United States correctly recognized that case-specific deference to the Executive Branch would not sufficiently alleviate the ATS's potential adverse impact on foreign affairs. *See* U.S. Br. at 21, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No.

07-919). The lack of a clear rule against extraterritorial application would predictably discourage "U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on economic and political conditions." U.S. Br. at 44-45, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339); *see also* U.S. Br. at 21-22, *Am. Isuzu Motors, supra* (explaining "case-by-case approach could complicate the Nation's foreign relations still further and exacerbate the . . . deterrent effect on international trade and investment"). This would reduce the effectiveness of certain foreign policy tools available to the United States. *See id.* The United States has not addressed these arguments here much less refuted them, and its previous rationale remains valid and undermines the persuasiveness of its current position. *Cf. Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

B. Extraterritorial ATS Claims Are An Inappropriate Vehicle For U.S. Courts To Adjudicate Claims Arising In The Military Context Without Clear Congressional Direction

Extraterritorial ATS claims raise important and difficult issues beyond the adverse consequences for U.S. foreign policy upon which the parties and the United States focus. Ongoing efforts to use the ATS against American corporations as a vehicle to challenge U.S. military operations abroad are one such example. The separation-of-powers concerns implicated by such claims provide an additional reason this Court should not construe the ATS to recognize extraterritorial claims absent a clear indication to the contrary from Congress.

1. Aliens have used the ATS as a vehicle for bringing human-rights lawsuits against foreign multinational

corporations in U.S. courts. These cases often allege corporate complicity in human-rights abuses allegedly committed by foreign government officials against foreign citizens in foreign countries. Because this case involves such facts, the parties focus their arguments on these circumstances and the serious foreign-policy implications of such suits.

Regardless of the citizenship of the parties, however, cases involving extraterritorial ATS claims repeatedly raise additional difficult questions of constitutional and international law. These questions include, for example, whether and to what extent U.S. courts are empowered to: (a) export rules of decision for cases arising in sovereign territory of other nations, (b) sit in judgment of acts undertaken on behalf of a foreign sovereign in its own territory, and (c) fashion common-law causes of action for claims brought by those against whom U.S. military force has been directed upon foreign battlefields.

2. The difficulties presented by extraterritorial ATS claims are well illustrated by *Saleh* and *Al-Quraishi*, *supra*. These cases involve claims brought by Iraqi detainees of the U.S. military against contractors who were called upon by the U.S. military to address shortfalls in the military ranks. Such contractor personnel were integrated into the military chain of command, supervised by military personnel, and essential to the military mission. *See Saleh*, 580 F.3d at 2; *see also Allegations of Mistreatment of Iraqi Prisoners: Hearing Before the U.S. Senate Committee on Armed Services*, 108th Congress 22-24, 42-45 (May 7, 2004); *The Department of the Army Inspector General Report on Detention Operation Doctrine and Training: Hearing Before the U.S. Senate Committee on Armed Services*, 108th Congress 675, 1020-23 (July 22, 2004).

The government conducted extensive investigations into the allegations of abuse, resulting in the court-martial of eleven soldiers. *See Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005), *aff'd in part*, *Saleh*, *supra*. No contractor employees were criminally charged, though some were investigated, and the government did not pursue available contractual remedies against the contractors. *See Saleh*, 580 F.3d at 2.

In *Saleh*, the district court ordered discovery into the nature and extent of the military's supervision of the contract employees. This discovery included 21 depositions of contractor and military personnel. In light of the criminal jurisdiction and administrative remedies available, the potential interference with U.S. military operations, and Congress's apparently purposeful failure to provide a civil cause of action, the D.C. Circuit ordered all claims dismissed. It held that "where a private service contractor is integrated into combatant activities over which the military retains command authority," *id.* at 9, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place," *id.* at 7.

The Solicitor General opposed certiorari, noting that "[t]he United States has at its disposal a variety of tools, enhanced in the wake of events at Abu Ghraib, to punish the perpetrators of acts of torture, to prevent acts of abuse and mistreatment, and to compensate individuals who were subject to abusive treatment while detained by the United States military." U.S. Br. (May 27, 2011) at 8, *Saleh v. Titan Corp.*, 131 S. Ct. 3055 (2011) (No. 09-1313). This Court denied certiorari. 131 S. Ct. 3055 (2011).

3. Two district courts in the Fourth Circuit subsequently declined to follow the D.C. Circuit's rationale, and the en banc Fourth Circuit held that it lacked interlocutory appellate jurisdiction to review the district courts' orders. *See Al Shimari*, 679 F.3d 205. Those cases—*Al Shimari* and *Al-Quraishi*—have been remanded for discovery and trial, which will be expensive and burdensome for the parties and the military.

Al-Quraishi in particular is illustrative of the expense and burden of discovery in such cases. *See* 728 F. Supp. 2d 702. The 72 plaintiffs were detained at 26 different detention facilities across Iraq during a period spanning more than five years. The plaintiffs and defendants' employees in these facilities interacted with scores of military personnel and personnel from intelligence agencies (including the CIA according to plaintiffs' allegations that some were held as "ghost" detainees) whose testimony will be sought by both sides. Military policies and the actions of military and intelligence personnel will be central to the litigation. Discovery will include requests to produce voluminous sensitive documents such as interrogation and detention policies, records of detainee status board hearings, medical records, interrogation plans, interrogation logs, and recordings of interrogations.

Should these cases proceed under the framework embodied by the district courts' decisions, the government will face the prospect of high-ranking officials being subject to discovery and ultimately summoned to court. To fully explore whether U.S. contractors committed violations of international law in support of U.S. military operations, discovery would include subpoenas, numerous requests to produce, Rule 30(b)(6) depositions of document custodians at various intelligence and de-

fense agencies, and lengthy and probing depositions of high-ranking government officials with national security clearances and personal knowledge of some of the Nation's most sensitive information. This would distract the affected officials from their normal defense- and intelligence-related duties. A trial on the merits would be a spectacle with Iraqi detainees summoning America's present and former military leaders to a federal courthouse to answer their charges and putting U.S. military operations on trial. This massive litigation would have been authorized not by a congressionally established statutory cause of action, but under implied federal common law pursuant to the ATS, passed in 1789 in response to ambassadorial assaults committed in the territorial United States.

4. A case-by-case approach to extraterritorial jurisdiction would allow lower courts to permit cases like *Al-Quraishi* and *Saleh* to go forward, which would distract the military and burden its personnel, increase the cost of contracting for such critical battlefield support, and chill contractors from providing battlefield services. These concerns are heightened for ATS claims because its prolonged statute of limitations results in a lingering threat of litigation.

This continued threat of such litigation would force military commanders to choose between doing without such contractors to aid core functions or subjecting the battlefield to tort regulation and the intrusion of civil suits. *Cf. United States v. Stanley*, 483 U.S. 669, 682-83 (1987). And as this Court recognized in adopting a categorical rule against *Bivens* claims in the military context, "[e]ven putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking),

the mere process of arriving at correct conclusions would disrupt the military regime." *Id.* at 683.

Evaluating and weighing the degree of intrusion and interference, including whether case management tools sufficiently mitigate such risks, is for Congress, not the Judiciary. *See id.* at 682; *Lebron v. Rumsfeld*, 670 F.3d 540, 555 (4th Cir. 2012), *cert. denied*, 2012 WL 1425145 (June 11, 2012). Requiring district courts to make this assessment on a case-by-case basis, as would occur if the Court were to adopt the approach urged by the United States here, would usurp the role of Congress in making such determinations.

5. The separation-of-powers concerns implicated by such claims are of similar magnitude to the adverse consequences for U.S. foreign policy that respondents and the United States correctly identify in this case. Like foreign affairs, war powers are uniquely committed by the Constitution to the political branches.[3] This Court has long recognized that permitting tort claims in the context of U.S. military operations in the absence of guidance from Congress is problematic. Civil litigation arising out of U.S. military operations is inconsistent with military efficiency, *Dow v. Johnson*, 100 U.S. 158, 165 (1880); hampers battlefield operations, *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950); interferes with

[3] *See* U.S. Const. art. II, § 2, cl. 1 (making President Commander-in-Chief); *id.* cl. 2 (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to "declare War"); *id.* cl. 12 (authorizing Congress to "raise and support Armies"); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval Forces").

Executive authority, *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); and fetters military discipline and command, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Congress recognized as much in retaining the United States' sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war." 28 U.S.C. § 2680(j). And this Court, based on separation-of-powers concerns, has been appropriately reluctant to infer a cause of action in the military context because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683; *see also Al Shimari*, 679 F.3d at 225-48 (Wilkinson, J., dissenting).

6. Consistent with such concerns, the United States previously argued that the ATS "is not intended as a vehicle for U.S. courts to judge the lawfulness of U.S. government actions abroad in defense of national security." U.S. Br. at 7, *Alvarez-Machain v. Sosa*, 266 F.3d 1045 (9th Cir. 2001) (No. 99-56880). The United States expressed concern that allowing ATS claims in the context of U.S. military operations might make attacks on al Qaeda facilities actionable. *See id.* at 14. Any remedies for such actions "are appropriately matters for resolution by the political branches, not the courts." *Id.*

7. Construing the ATS not to extend extraterritorially does not leave U.S. contractors supporting U.S. military operations abroad unregulated or victims of substantiated abuse uncompensated. Congress has passed comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad through the Military Commissions Act, 10 U.S.C. § 948a *et seq.*, the federal criminal torture statute, 18 U.S.C. § 2340-2340A, the War Crimes Act, 18 U.S.C. § 2441, the

Foreign Claims Act, 10 U.S.C. § 2734, and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq*. In doing so, Congress clearly has preferred criminal statutes and Executive-administered compensation over civil liability in the context of U.S. military operations abroad.

For example, Congress enacted criminal statutes that apply to U.S. contractors accompanying military forces overseas. *See, e.g.*, 18 U.S.C. §§ 2340A, 2441, 3261. And the Executive has not hesitated to use such authority to prosecute and punish U.S. contractors in appropriate cases. *See United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1551 (2010); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012). Congress also has provided authority that the Executive has used to compensate detainees who establish legitimate claims for relief. *See* 10 U.S.C. § 2734; *Saleh*, 580 F.3d at 2-3.

Congress has declined, however, to create a civil cause of action in connection with U.S. military operations. In the TVPA, Congress exempted American government officers and private persons supporting the U.S. government from suit by restricting the cause of action whereby U.S. residents could sue for torture to conduct in connection with *foreign* state action. *See* 28 U.S.C. § 1350 note (TVPA); Statement by President George [H.W.] Bush Upon Signing H.R. 2092, 1992 U.S.C.C.A.N. 91 (Mar. 12, 1992) ("I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad . . . ."). In response to the Abu Ghraib incident, Congress extended the Uniform Code of Military Justice to cover military contractors; it did not enact a civil cause of action. *See* 10 U.S.C. § 802; *Saleh*, 580 F.3d at 13 n.9; *Ali*, 71 M.J. 256.

It would be incongruous to construe the ATS as permitting recognition of a civil cause of action arising out of U.S. military operations overseas given Congress's frequent activity in the field and its choices to exclude U.S. military operations from the sweep of the TVPA and to opt for extending military criminal jurisdiction to contractors in lieu of creating a private cause of action.

C. A Categorical Rule Against Extraterritorial Application Of The ATS Is Consistent With The Obligations Of The United States To The International Community

The parties debate whether extraterritorial application of the ATS to the non-resident parties in this case is consistent with international law, while the United States argues for a case-by-case approach to allow for a case in which the defendant was located in the United States. *See* U.S. Supp. Br. 4 (discussing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)). To the extent that the position of the petitioners and the United States imply that the categorical rule advocated by respondents is inconsistent with international law, that position is incorrect.

International law requires only that states *criminally* prosecute (or extradite) persons accused of extraterritorial torture (even when such conduct occurs beyond sovereign territory). *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85. There is no obligation to provide a civil cause of action for such extraterritorial conduct. *See id.* arts. 13, 14. The United States has enacted criminal legislation to fulfill its international obligation in this regard. *See* 18 U.S.C. § 2340A. And, although it was not obligated to do so, Congress has gone further and supplied an express

statutory cause of action for the conduct at issue in *Filartiga* in the Torture Victim Protection Act. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 749 (2004) (Scalia, J., concurring in part and concurring in the judgment).

Petitioners and their amici similarly argue that the Court should recognize a federal common-law cause of action whenever the circumstances of a particular case fall within the scope of Congress's legislative jurisdiction. The question is not whether Congress has authority to enforce laws beyond its territorial boundaries in particular circumstances, but whether "Congress has in fact exercised [its] authority" to do so. *Aramco*, 499 U.S. at 248. Petitioners' and their amici's arguments concerning the scope of Congress's prescriptive jurisdiction—and the extent to which universal jurisdiction may augment this authority—concern the former issue rather than the latter. Accordingly, these concepts cannot overcome the presumption against extraterritoriality or justify a case-by-case approach to jurisdiction under the ATS. Indeed, this Court has consistently applied the presumption categorically in circumstances in which Congress's legislative authority is clear. *See, e.g.*, *Morrison*, 130 S. Ct. at 2875-76 (defendants included executives of a Florida-based mortgage servicing company); *Aramco*, 499 U.S. at 247 (defendants were "two Delaware corporations"); *N.Y. Cent. R.R. v. Chisholm*, 268 U.S. 29, 31 (1925).

Regardless of whether international law *prohibits* extraterritorial application of the ATS under certain circumstances, as respondents and their amici argue, it is clear that international law does not *require* it under any circumstances and the ATS should be interpreted not to apply extraterritorially as a categorical matter.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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