No. 15-349

In The Supreme Court of the United States

NESTLÉ U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; AND CARGILL, INCORPORATED,

Petitioners,

v.

JOHN DOE I; JOHN DOE II; JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

This case is an inappropriate vehicle for resolving the broad issues petitioners ask this Court to hear in their petition. The court below remanded the case to the district court so that respondents would have an opportunity to amend their pleadings to meet new requirements under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), arising from cases decided after their operative complaint was filed in 2009: in particular, this Court's decision in *Kiobel v. Royal Dutch Petroleum, Inc.*, 133 S. Ct. 1659 (2013). Review in this case would address a soon to be superseded complaint and would, in effect, be an advisory opinion.

The court below made, in essence, an interim ruling. Though it rejected the plainly incorrect *mens rea* standard for aiding and abetting liability under the ATS adopted by the district court – a standard without support in international or domestic law – it expressly declined to decide between the purpose and knowledge standards for aiding and abetting liability. Respondents pled both knowledge and purpose in their 2009 pleading. The Ninth Circuit held that respondents need not plead that the corporations were motivated by the specific and subjective desire that child slave labor occur on the Cote d'Ivoire cocoa plantations supplying most of the cocoa they used in their chocolate operations. Respondents may strengthen their allegations when they amend their complaint.

Nor did the court below make a decision on the application of this Court's "touch and concern" test to determine if *Kiobel*'s presumption against extraterritoriality was displaced in this case. The Ninth Circuit delayed that decision until respondents had the opportunity to amend their complaint to show that their ATS claims meet that test. In the absence of a definitive ruling, the decision does not create a conflict with the other circuits and review of this case is premature in this Court.

Finally, there is no circuit split on the issue of corporate liability. The lower court was correct in finding that private actors, including corporations, can be held liable for slavery and forced labor under international law.

The petition should be denied.

STATEMENT

Statement of Facts

Respondents are former child slaves who were forced to work on cocoa plantations in Cote d'Ivoire. Between the ages of twelve to fourteen, respondents were forced to work on cocoa farms for twelve to fourteen hours per day, six days a week. They were not paid for their work and were given only scraps of food to eat. Respondents were beaten with whips and tree branches when the guards felt that they were not working quickly enough, and were forced to sleep in a small, locked room with several other children on

the floor. Respondents knew that children who tried to flee the farms would be severely beaten if caught. John Doe II had witnessed the guards cut open the feet of the other little children who tried to escape. John Doe III knew little children who tried to escape were forced to drink urine by the guards when they were caught.

Cote d'Ivoire produces seventy per cent of the world's cocoa, a majority of which is imported to the United States by the petitioners. Petitioners dominate this cocoa market by maintaining exclusive buyer/supplier relationships with Ivorian cocoa farmers in order to maintain a continuous stream of the cheapest cocoa and maximize their profits.

Petitioners maintain an unusual degree of control over the cocoa market because of their enormous buying power and the resources they provide to plantations knowing that these plantations use child slave labor to provide the low cost cocoa petitioners crave. Petitioners offer both financial and technical assistance to the cocoa farmers. Petitioners control the conditions on the cocoa farms by providing local farmers and/or farmer cooperatives with 1) ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers; 2) farming supplies, including fertilizers, tools and equipment; 3) training and capacity building in particular growing and fermentation techniques and general farm maintenance, including appropriate

labor practices, to grow the quality and quantity of cocoa beans they desire. The training and quality control visits occur several times per year and require frequent and ongoing visits to the farms either by petitioners directly or by their agents. Due to these visits, they have firsthand knowledge of the child slave labor problems on the farms. Pet. App. 4a.

Petitioners are well-aware of the endemic nature of child slavery on Cote d'Ivoire cocoa plantations. While they claim to be trying to end child slave labor in Cote d'Ivoire, the facts show otherwise. For example, petitioners have actively lobbied against legislation intended to make the use of child slave labor on cocoa farms transparent to the public. Pet. App. 5a. In addition, petitioners have continued to provide farmers that use child slave labor with technical and financial assistance, including unrestricted cash advances. *Id.*

Despite their in-depth knowledge of the use of child slave labor on cocoa farms in the Cote d'Ivoire, petitioners continue to facilitate the child slave labor system in a variety of ways that contribute to the maintenance of what amounts to chattel slavery on Cote d'Ivoire plantations. Petitioners do so with the "goal of finding the cheapest sources of cocoa." Pet. App. 4a.

Respondents' allegations are based on petitioners' control of the cocoa market and supply chain in the Cote d'Ivoire, their provision of practical assistance and encouragement of the existing

slavery-based system, their active efforts to avoid scrutiny and accountability for these actions, and their deep knowledge and involvement in the widespread use of child slave labor to produce the cocoa they use to satisfy the demand for chocolate.

Proceedings Below

Petitioners filed a motion to dismiss the first amended complaint that was filed in 2009. The district court granted the motion. The court expressly refused to "unlock the doors to discovery" and made the order based on the *Iqbal/Twombly* framework applicable at this stage of the proceedings. Pet. App. 50a. The district court held that respondents had to show specific intent to meet the *mens rea* element of aiding and abetting liability under the ATS, and that respondents' First Amended Complaint did not meet that standard. Pet. App. 108a.

The Ninth Circuit reviewed the district court's order de novo, and construed the facts in the pleadings in the light most favorable to respondents. Finding that, construed in this manner, the facts alleged were sufficient to support a finding of the requisite *mens rea* under either the purpose or the knowledge standard, the court explicitly declined to adopt one standard over the other. Pet. App. 18a.

Turning to *Kiobel's* "touch and concern" test, the court held that the respondents should be allowed the opportunity to amend their complaint to add more facts in light of *Kiobel*. Pet. App. 27a. The court

expressly declined to decide the issue of whether the respondents' ATS claims were barred by *Kiobel* until respondents had the opportunity to amend their pleadings. Pet. App. 27a-28a. For these reasons, the panel reversed and remanded the case to the district court for further proceedings. Pet. App. 28a.

REASONS FOR DENYING THE WRIT

I. A Decision About *Mens Rea* on This Record Would Be Premature.

A. This Case Is Not a Good Vehicle for Supreme Court Review.

The court below did not decide whether a *mens rea* of knowledge was sufficient to support an aiding and abetting claim under the ATS. Pet. App. 18a. The panel found that respondents had also pled that petitioners acted with "purpose" within the meaning of the Rome Statute. *Id.* Thus, the court found that there was no need to reach whether a purpose or knowledge standard should be applied. *Id.* The Ninth Circuit did no more than find that respondents' allegations, which it allowed them to amend on other grounds, were sufficient under any standard. Before proceeding to evaluate which standard applies, this Court would benefit from a more complete record or, at a minimum, the consideration of the amended complaint which respondents intend to file.

This case has a unique factual context. As the Ninth Circuit noted below, respondents have adequately alleged that petitioners were motivated to encourage and support child slavery because it provided them with a cheap source of cocoa. Pet. App. 21a. The petitioners are well-aware that this cocoa is produced with child slave labor. The petitioners provide the farmers both financial and technical assistance which directly facilitates the use of slave labor. Petitioners profited from child slavery and took steps to ensure that greater transparency would not be imposed on their industry by Congress.[1]

In light of these outrageous facts, the Ninth Circuit found that respondents had sufficiently alleged either purpose or knowledge. It is premature to take this case to review the standard for *mens rea* when petitioners intend to amend their complaint and the Ninth Circuit has not yet analyzed the legal standard or made a definitive decision as to its content aside from finding that the petitioners' allegations were sufficient.

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[1] Petitioners claim that the Ninth Circuit erred in concluding that petitioners' "alleged lobbying efforts also corroborate the inference of purpose." Pet. 6, 19-20. But it is absurd to suppose that someone's speech, regardless of its legality, cannot be evidence of their mental state and particularly of their purpose or knowledge at the time. This Court has already stated that the right to petition is not absolute. *McDonald v. Smith,* 472 U.S. 479, 484 (1985). The lobbying activities act as support for an inference, not as the lone basis of liability.

The Court granted leave for Plaintiffs to amend their complaint as to whether the conduct touched and concerned the United States. Pet App. 27a-28a. In so doing, Plaintiffs may further strengthen the evidence that Nestle acted with the purpose to facilitate child slavery. For that reason, it is premature to take the case as currently presented.

B. The Ninth Circuit's Narrow Ruling as to Cases Where the Violation Directly Maximizes Profits Does Not Create a Circuit Split with Rulings on Other Types of Violations.

The unique facts make it unclear whether a conflict would be created with the Second and Fourth Circuits if the record was complete. The Ninth Circuit stated that this ruling does not apply in all circumstances, and limited its ruling to violations such as child slavery. Pet. App. 18a.

Petitioners cite to *Presbyterian Church Of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 263 (2d Cir. 2009), as evidence that the Second Circuit would have decided this case differently. Pet. 15-16. This is speculative.

The *Talisman* court held "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Id.* at 259. In *Talisman*, the court ruled only after summary judgment and used the facts at summary judgment, including but not limited to whether the

company ultimately profited from the violations, to establish whether purpose had been alleged. *Id.* at 244, 263. The Second Circuit examined the effects of the violations and drew inferences from them concerning the purpose of the corporation based on a *complete* factual record.

Petitioners also rely on *Aziz v. Alcolac, Inc.,* 658 F.3d 388 (4th Cir. 2011), to demonstrate a conflict with the Fourth Circuit. Pet. 16. The *Aziz* court held that "the ATS imposes liability for aiding and abetting violations of international law, but only if the attendant conduct is purposeful." *Aziz,* 658 F.3d at 390. The reason the *Aziz* court chose the purpose standard over the knowledge standard was because the court was "persuaded by the Second Circuit's *Talisman* analysis and adopt[ed] it as the law of this circuit." *Id.* at 398. The Fourth Circuit in *Aziz* found that Alcolac's sale of a product that was to be used for human rights violations did not amount to aiding and abetting the human rights violations. There is no reason to believe that the Fourth Circuit's analysis is necessarily in conflict with the decision below. The Fourth Circuit has not elaborated on this issue after *Aziz.*

The Ninth Circuit opinion did *not* hold that "the purpose standard is satisfied merely because the defendants intended to profit by doing business in the Ivory Coast. Doing business with child slave owners... does not by itself demonstrate a purpose to support child slavery." Pet. App. 21a. Here, "the defendants allegedly intended to support the use of

child slavery as a means of reducing their production costs." *Id.* It was the fact that the violations occurred that allowed the corporations to reap the profits they did. *Id.* This direct causal link between the benefits and the violations in this particular context makes the factual context qualitatively different from cases not involving slavery or forced labor.

The facts of this case can be more fully fleshed out once the complaint is amended and the case has been allowed to proceed. There is no compelling reason to grant review in this case before a full record on these issues is created in the district court.

C. This Narrow Ruling Will Not Lead to Any Adverse Consequences.

In an obvious attempt to urge the court to overlook the fact that this case is not ready for review, petitioners contend that the decision to allow this case to continue will invite a parade of horribles: an expanded scope of ATS liability, unfairly stigmatized corporations, a moratorium on private foreign investment in developing countries, and, most surprisingly, a threat to human rights. Petitioners are arguing that allowing this case to continue on its particular facts, where a corporation has benefitted for years from human rights violations which keep costs down, will lead to a plethora of cases against innocent corporations. There is no basis for such a claim.

There is no evidence for petitioners' claim that the Ninth Circuit's decision, or indeed any ATS decision, will trigger a moratorium on private foreign investment in developing countries.[2] Despite the overwhelming use of a *mens rea* standard of knowledge, or purpose as set forth in the opinion below, in the U.S. states and when this Court interprets federal criminal law, the United States economy, corporations operating in the U.S., and foreign investment have not suffered any tangible adverse effects. A look at comparative criminal law shows though certain U.S. allies– Israel, New Zealand, and Canada– use a purpose *mens rea* standard for aiding and abetting, these allied foreign nations likewise refuse to require a volitional commitment to the outcome of the crime. *See* James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute,* 47 N.Y.U. J. Int'l L. & Pol. 121, 149 (2014). There is no evidence that the economies of these allied countries or their foreign investment have been adversely affected by these liability standards.

Petitioners, and their *amici*, imply that unless this Court overrules the Ninth Circuit's decision and safeguards it and other corporations that knowingly

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[2] The Eleventh Circuit has utilized the federal common law knowledge *mens rea* for aiding and abetting liability for many years and there is no evidence that such adverse effects have occurred. *See, e.g., Doe v. Drummond Co.*, 782 F. 3d 576, 609 (11th Cir. 2015).

profit from and protect the use of child slavery then the advancement of international human rights will cease, perhaps even retreat, because corporations will refuse to invest in foreign countries. Pet. 24. There is no evidence that judicial enforcement of universally accepted norms prohibiting child slavery will undermine rather than advance the cause of human rights for child slaves. As Nobel prize-winning economist Joseph Stiglitz wrote in his amicus brief in the Kiobel case:

> Concern that the expected cost of potential future ATS suits will cause corporations to withdraw from LDCs appears to be little more than hyperbole, lacking empirical support. The risk of liability - *any* liability - is just one among many considerations that drive investment decisions. And although corporations have faced the specter of ATS liability for more than a decade, there is little empirical evidence that it has had any impact on foreign direct investment.

Brief of Joseph E. Stiglitz as *Amicus Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (No. 10-1491).

On the other hand, if this Court were to adopt petitioners' specific intent standard, it would undermine international efforts to address the most serious human rights crimes. The adoption of the

knowledge standard in international customary law, starting at Nuremberg and reaffirmed by all international criminal tribunals since, has created the legal framework for eradicating international crimes like child slave labor. The United States has supported such international efforts.

Moreover, neither the United States government nor any foreign government has intervened in this case in support of petitioners' claims. This case has now been pending for a decade, without the government intervening to suggest that the lawsuit or the Ninth Circuit's decision pose any of the potential adverse consequences claimed by petitioners.

Finally, petitioners suggest that unless this Court intervenes before the respondents have the opportunity to amend their complaint, other plaintiffs might be encouraged to file numerous ATS cases. Pet. 22-23. However, there is no empirical support for this proposition.

This Court's *Kiobel* decision has already screened out a number of ATS cases against corporations. *See, e.g.*, *Sarei v. Rio Tinto*, PLC, 722 F.3d 1109, 1110 (9th Cir. 2013). Virtually all of the cases cited by petitioners were commenced before *Kiobel* was decided. Pet. 22-23. The courts have been considering which of these pre-*Kiobel* cases survive the presumption against extraterritoriality. That is all that is happening in this case. There is no evidence that any significant number of new cases

have been filed in the last several years. There is no reason to believe that failure to grant review in this case will have any effect on the filing of new ATS cases.

D. Under International Law, Knowledge Is The *Mens Rea* and These Allegations Would Also Have Survived Dismissal

When the Ninth Circuit ultimately decides the question of the appropriate *mens rea* for aiding and abetting liability, international law dictates the use of a knowledge standard. In *Sosa*, this Court held that in determining which ATS claims were actionable, such claims "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously recognized." *Sosa v. Alvarez-Machain,* 542 U.S. 692, 733 (2004). All current sources of international law recognize knowledge as the standard under international law.

In *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 275 (2d Cir. 2007), Judge Katzmann pointed out that there is no doubt that international law would recognize a defendant's liability for aiding and abetting a violation of customary international law. He found clear evidence of aiding and abetting liability in international law from a wide variety of international source from Nuremberg to the Rome Statute. *Id.* at 272-77. Although Judge Katzmann recognized that the *mens rea* for aiding and abetting liability might well be knowledge, he decided that the

Rome Statute's "purpose" *mens rea* was more clearly universally accepted as of 2007 because of the acceptance of the Rome Statute. *Id.* at 275-76. He was confident that if international law became clearer, the ATS would employ any new international standards. *Id.* ("While I conclude that, at present, only aiding and abetting liability imposed in accordance with the standard outlined above is sufficiently well-established and universally recognized under international law to trigger jurisdiction under the ATCA, I appreciate that this definition is not necessarily set in stone. International law, like our domestic law, can change, and the ATCA was intended to change along with it.").

Since *Khulumani*, it has become clear that the *mens rea* for aiding and abetting liability under international law is knowledge. To keep faith with *Sosa*'s admonition that universally accepted customary international law norms should govern ATS claims, the federal courts should now recognize that knowledge is the *mens rea* for aiding and abetting claims. *See Co-Prosecutors v. Nuon Chea and Khieu Samphan* Case No. 002/19-09-2007/ECCC/TC, Judgment, ¶ 704 (Aug. 7, 2014); *Prosecutor v. Šainović (Sainović),* Case No. IT-05-87-A, Judgment, ¶ 1772 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); *Prosecutor v. Perišić,* Case No. IT-04-81-A, Judgment, ¶ 48 (Int'l Crim Trib. for the Former Yugoslavia Feb. 28, 2013); *Prosecutor v. Taylor,* Case No. SCSL-03-01-T, Judgment, ¶¶ 486-87 (May 30, 2012); *Prosecutor v.*

Mrkšić, Case No. IT-95-13/1-A, Judgment, ¶ 159 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009); *Prosecutor v. Orić*, Case No. IT-03-68-A, Judgment, ¶ 43 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008). Every one of these post-*Khulumani* decisions makes it clear that knowledge is the *mens rea* for aiding and abetting liability in international law.

As the Special Court for Sierra Leone made clear in *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeal Judgment, ¶¶ 403, 440, 483 (Sept. 26, 2013) (quoting the trial judgment ¶ 487):

> "Although the lending of practical assistance, encouragement, or moral support must itself be intentional, the intent to commit the crime or underlying offence is not required. Instead, the Accused must have knowledge that his acts or omissions assist the perpetrator in the commission of the crime or underlying offence. Such knowledge may be inferred from the circumstances. . . . [T]he aider and abettor need merely know of the perpetrator's intent-and need not share it."). Moreover, under the Rome Statute an aider and abettor is simply an actor who intended to facilitate the commission of a crime and act with the knowledge that the consequence will occur in the ordinary course of events.

See also Brief of Ambassador David J. Scheffer as *Amicus Curiae* in Support of Appellants, *Balintulo et al. v. Ford et al.* (Feb. 4, 2015), at 3-14.

Recently, a Pre-Trial Chamber of the ICC, found that aiding and abetting would be established if a defendant's actions ". . .were intentional and were performed for the purpose of *facilitating* the commission of the crimes. In addition, they were performed in the *knowledge* that the crimes were committed as part of a widespread and systematic attack against the civilian population . . . .". *Prosecutor v. Blé Goudé,* Case No. ICC-02/11-2/11, ¶170 (Dec. 11, 2014) (emphasis added). And in *Vujadin Popović*, decided at the beginning of this year, the Appeals Chamber for the ICTY once again confirmed that knowledge remains customary international law's *mens rea* standard for accomplice liability. The Appeals Chamber wrote:

> "'[S]pecific direction' is not an element of aiding and abetting liability under customary international law." The * * * *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and the *mens rea* is "the knowledge that these acts assist the commission of the offense." The Appeals Chamber therefore dismisses Pandurević's

> argument to incorporate a requirement of specific direction in the *mens rea* or the actus reus for aiding and abetting. Accordingly, the Appeals Chamber also dismisses Pandurević's argument that it was required that his failure to act was purposeful.

Prosecutor v. Vujadin Popović et al, No IT-05-88-A, Appeal Judgment, ¶ 1758. (Int'l Crim. Trib. for the former Yugoslavia Jan. 30, 2015).

It should be noted that the purpose language in the Rome Statute was adopted from the Model Penal Code (MPC). The MPC does not provide for the kind of specific intent requirement that petitioners wish to read into the Rome Statute's definition of "purpose." The purpose test under the MPC requires purpose to only apply to the assistance and not the consequences of that assistance. Most U.S. states adopt either the MPC definition of purpose or reject a purpose requirement altogether in aiding and abetting cases. *See* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. Rev. 237 (2008). The rule is similar in federal criminal aiding and abetting cases. In *Rosemond v. United States*, 134 S. Ct. 1240, 1248-49, 188 L. Ed. 2d 248 (2014), for example, this Court held "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. . .We have previously found that intent requirement

satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." There is no reason to think that the negotiators of the Rome Statute intended to adopt a more stringent *mens rea* for aiding and abetting the most serious international crimes. *See generally* Brief of Ambassador David J. Scheffer as *Amicus Curiae* in Support of Appellants, *Balintulo et al. v. Ford et al.* (Feb. 4, 2015), at 3-14.

II. A DECISION ON THE APPLICATION OF THE "TOUCH AND CONCERN" TEST ON THIS RECORD IS PREMATURE.

The decision below breaks no new ground regarding the application of this Court's "touch and concern" test set forth in *Kiobel*. 133 S. Ct. at 1669. *Kiobel* was decided long after respondents filed their Amended Complaint in 2009 at a time when no court had applied the presumption against extraterritoriality to ATS claims. For this reason, respondents did not allege any facts concerning the way in which their ATS claims touched or concerned the United States. The decision below gives respondents the opportunity to make such allegations and have the district court consider them under *Kiobel*. Pet. App. 27a-28a.

This Court's review of the 2009 Amended Complaint in this action would amount to an advisory opinion in the absence of respondents' new allegations. Moreover, the Ninth Circuit has yet to

elaborate on its view of the "touch and concern" test. In *Mujica v. AirScan, Inc.*, 771 F. 3d 580, 594 (9th Cir. 2014), a Ninth Circuit panel held that the U.S. citizenship of an ATS defendant alone was insufficient to meet the "touch and concern" test.[3] However, the *Mujica* court did not elaborate on the other factors that would lead to the displacement of the *Kiobel* presumption. *Id.*

The Second Circuit has addressed the "touch and concern" test in several post-Kiobel opinions. See *Balintulo v. Ford*, 796 F.3d 160, 166-67 (2d Cir. 2015) (*"Balintulo II"*); *Ellul v. Congregation of Christian Bros.,* 774 F.3d 791 (2d Cir. 2014); *Mastafa v. Chevron Corp.,* 770 F.3d 170 (2d Cir. 2014); *Balintulo v. Daimler AG,* 727 F.3d 174 (2d Cir. 2013) ("*Balintulo I*"). Though the Second Circuit has focused on the location of the tortious activity, it has found that U.S.-based acts of aiding and abetting causing injury abroad may be the basis for displacing the Kiobel presumption. *Balintulo II*, 796 F. 3d at 166-67; *Mastafa*. 770 F.3d at 186, 189. The Second Circuit has found the U.S. citizenship of the defendant is irrelevant. *See id.* at 188; *Ellul* 774 F.3d at 797-98. Because the Ninth Circuit has not elaborated its view of the "touch and concern" test beyond finding that U.S. citizenship alone is insufficient, it would be premature to grant review of this interim decision on this issue.

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[3] A Petition for Certiorari is pending in that case. *Mujica v. Occidental Petroleum Corporation*, Docket No. 15-283.

The Eleventh Circuit has addressed the "touch and concern" test in three opinions. *See Baloco v. Drummond Co.,* 767 F.3d 1229, 1237-38 (11th Cir. 2014); *Cardona v. Chiquita Brands Int'l, Inc.,* 760 F.3d 1185, 1189-90 (11th Cir. 2014); and *Doe v. Drummond Co.,* 782 F.3d 576, 590 (11th Cir. 2015) (noting that *Baloco* was "of little guidance"). In *Doe v. Drummond*, the Court focused on three factors: the United States citizenship of the defendant, United States interests, and any United States conduct. *Id.* at 594-97. The Drummond court found that the presumption was not displaced in that case. *Id.* at 600-01.

These are the same three factors the Fourth Circuit used in its only decision interpreting the "touch and concern" test. *Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516, 530 (4th Cir. 2014). In *Al Shimari*, the Fourth Circuit determined that the ATS claims before it sufficiently "touched and concerned" the United States to displace the presumption. *Id.*

As indicated above, the Ninth Circuit has yet to do more than hold that the U.S. citizenship of a corporation is insufficient alone to displace the presumption. It has yet to examine multiple factors arguably showing that an ATS claim "touches and concerns" the United States so it is difficult to determine whether the Ninth Circuit will adopt an approach in conflict with the emerging tests in the Second, Fourth and Eleventh Circuits. Thus, while differences in the application of the "touch and concern" test are emerging, this case is the wrong

vehicle for resolving such differences because the Ninth Circuit itself has not reached a final conclusion on these issues and the record in this case has yet to be developed on this issue. Other cases present this issue in a more final and complete context rather than simply granting leave to amend. Indeed, there are other pending petitions for certiorari that are better vehicles for resolving this particular issue.

Remand to the district court will allow respondents to present for the first time the full range of connections between the United States and their ATS claims that petitioners should be held accountable for the child slavery they endured. By waiting for further proceedings to develop a complete record this Court would be better able to discern not only whether the ATS claims in this case should be found to displace the *Kiobel* presumption but it will be clearer whether there is a conflict in the Circuits over the application of the "touch and concern" test and exactly the nature of the conflict. This case is not an appropriate vehicle, in this procedural posture, to render an opinion on the manner in which the "touch and concern' test should be applied.

III. THERE IS NO CURRENT SPLIT IN THE CIRCUIT COURTS OVER THE EXISTENCE OF CORPORATE LIABILITY UNDER THE ATS.

Petitioners contend that there is a split in the circuits over the existence of corporate liability under the ATS. However, because the Second Circuit's rule

on this issue is in doubt, this is not an accurate statement of the current status of this question in the Circuit courts. Except for the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum, Inc*, 621 F.3d 111, 145 (2d Cir. 2010), every circuit that has directly addressed the issue of corporate liability has held that corporations may be sued under the ATS. *See Flomo v. Firestone,* 643 F.3d 1013, 1021 (7th Cir. 2011) ("Having satisfied ourselves that corporate liability is possible under the Alien Tort Statute. . ."); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) ("we join the Eleventh Circuit in holding that neither the text, history nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."); *Sarei v Rio Tinto, Inc*, 671 F.3d 736, 748, 759-1, and 764-65 (9th Cir. 2011) (en banc), *vacated on other grounds*, 133 S. Ct. 1995 (2013) (concluding that the prohibition against genocide extends to corporations); *Romero v. Drummond Co., Inc.,* 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit is that the [Alien Tort Statute] grants jurisdiction from complaints of torture against corporate defendants") . The panel below reaffirmed the norm-by-norm corporate liability analysis decided in *Sarei* based on the direction this Court gave to federal courts in *Sosa*. *Sosa*, 542 U.S. at 732 n. 20. The panel concluded that because prohibiting slavery is a universal norm applicable against all perpetrators, corporate liability is appropriate. Pet. App. 14a.

Thus, the only Circuit that has found that corporate liability is unavailable under the ATS is the Second Circuit based on its now vacated 2010 *Kiobel* decision. *Kiobel,* 621 F.3d at 145. This Court granted certiorari to review that decision but ultimately decided to affirm the judgment in that case based on other grounds– namely, the presumption against extraterritoriality. *Kiobel*, 133 S. Ct. at 1669.

Since this Court's *Kiobel* decision the Second Circuit has not dismissed any case based on its 2011 *Kiobel* decision.[4] Indeed, it has decided a series of cases involving ATS claims against corporations on other grounds even though its *Kiobel* decision holds that there is no subject matter jurisdiction over ATS claims against corporations. *Kiobel,* 621 F.3d at 145.

Several Second Circuit decisions question the continuing binding nature of the Circuit's Kiobel decision. In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F. 3d 161, 174 (2d Cir. 2013), a Second Circuit panel specifically questioned the binding nature of the Circuit's *Kiobel* decision after this Court's decision in that case and remanded the issue to the district court rather than dismiss the case based on the Circuit's Kiobel precedent. *See also Mastafa,* 770 F.3d at 179 n.5 (explicitly noting that

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[4] In several decisions Second Circuit panels have referred to its *Kiobel* decision as an additional ground. *See, e.g.*, *Balintulo II*, 796 F.3d at 166 n. 28.

panel had "no need" to address corporate liability even though the claims were against a corporate defendant); *Sikhs for Justice, Inc. v. Nath,* No. 14-1724-cv, 2014 WL 7232492, at *2-3 (2d Cir. Dec. 19, 2014) (same).

Until the Second Circuit determines whether its original *Kiobel* decision forbidding corporate ATS liability is still good law there is no conflict in the Circuits for this Court to resolve. At this point it seems highly likely that all Circuits will reach the conclusion that corporations may be sued under the ATS.

CONCLUSION

For all the above reasons, the petition should be denied.

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Respectfully Submitted,

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