No. 16-499

In The Supreme Court of the United States

JOSEPH JESNER, ET AL.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* INTERFAITH CENTER ON CORPORATE RESPONSIBILITY (ICCR), INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE (ICAR), AND SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU) IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici curiae are responsible investment, human rights, and labor organizations, all of which share an interest in ensuring that corporations can be found liable for violations of customary international law under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 for both public policy and investor protection reasons.[1]

The Interfaith Center on Corporate Responsibility (ICCR) is a 46-year-old coalition of over 300 institutional investors representing faith-based communities, socially responsible asset managers, labor unions, foundations, and other organizations that engage corporations on the environmental and social impacts of their operations. ICCR members collectively hold more than $200 billion in assets under management.

The International Corporate Accountability Roundtable (ICAR) harnesses the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality. ICAR's membership is composed of 40 human rights, environmental, labor, and development organizations.

The Service Employees International Union (SEIU) is a labor union of more than two million men and women who work in healthcare, property service,

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Consent letters have been filed with the Court by the parties.

and public service employment in the United States, Canada, and Puerto Rico. SEIU members are united by their belief in the dignity and worth of workers and the services they provide, as well as their dedication to improving the lives of workers and their families and creating a more just and humane society.

It is the position of *amici curiae* that when corporations have harmed the public, as is alleged in this case, victims must have access to a remedy. For this reason, *amici* respectfully request that this Court find that the ATS does not foreclose corporate liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Given the increased role and power of corporations in modern society, clear rules for their behavior, including their behavior abroad in countries that lack functioning judiciaries, must be established and enforced. Corporate liability under the ATS not only reflects Congressional intent but is also in the best interests of both the public and investors.

It is a foundational principle of corporate law – familiar and well-accepted by the framers who enacted the ATS – that corporations have responsibilities tied to the rights that stem from their existence: "Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of

corporate personhood."[2] Moreover, corporations are "presumed to be incorporated" in the public interest.[3] Thus, corporate liability is inherent in the recognition of corporate rights as a matter of public benefit. It is also central to longstanding principles of agency.

Apart from these principles of corporate law, corporate liability under the ATS is required to ensure access to remedy for victims of violations of customary international law and to ensure that corporations respect those international standards. In particular, corporate liability under the ATS is necessary to encourage good corporate behavior and to protect individuals located in countries where domestic law may be fragile or where the capacity of the judiciary, law enforcement institutions, and other actors may be weak or under threat. Denying liability not only leaves a vacuum in which corporations can act to breach international legal standards, but it also creates perverse incentives, including encouraging the creation of corporate entities to minimize or evade liabilities. Furthermore, a rule foreclosing corporate liability under the ATS while permitting suits against individuals within corporations would fail to account for the ways that the corporate entity itself may be involved in abuse, would likely result in insufficient compensation

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[2] *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

[3] *Hale v. Henkel*, 201 U.S. 43, 74 (1906), *overruled in part by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

for victims, and would fail to encourage corporations to comply with the law.

Corporate liability under the ATS is also vital to protecting investors from the legal, reputational, and operational risks stemming from corporate complicity in violations of customary international law. The ATS acts as a safeguard to ensure that customary international law is reflected in market analysis and capital allocation. Corporate liability under the ATS incentivizes corporations to conduct due diligence and implement compliance policies such that investors are less exposed to risk across their investment portfolios.

Given that most corporations comply with the law, foreclosing liability under the ATS would permit bad corporate actors to take advantage of their law-abiding competitors by violating customary international law with little up-front risk, giving these bad actors an advantage when competing with compliant enterprises for investment funds. At the same time, unknowing investors would be left exposed to the financial harm that can follow when misconduct by a portfolio corporation eventually and unexpectedly comes to light.

Members of this Court, concurring in *Kiobel v. Royal Dutch Petroleum Co.*, acknowledged that the purpose of the ATS included "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[4] If this Court

[4] *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

forecloses corporate liability under the ATS, that is exactly what the United States will be: an attractive place to evade liability for anyone and everyone who files some papers and pays a small incorporation fee. For these reasons, it is imperative that this Court recognize that corporations can be held liable under the ATS.

ARGUMENT

1. Holding Corporations Liable Under the ATS Is in the Public's Interest

Corporate liability under the ATS is a matter of public interest. It reflects the intent of those elected to govern and ensures that corporate rights are not divorced from their corresponding responsibilities. A rule that forecloses corporate liability while allowing claims against individuals within corporations would create perverse incentives and lead to unjust consequences. It conflicts with the principles of agency, providing a special carve-out to *respondeat superior* for egregious violations of human rights. Finally, such a rule would also undermine the dual purposes of tort law, compensation and deterrence, and generate a situation in which incorporation becomes an organizational defense in its own right.

a. Corporate Liability Is Necessary to Carry Out Congressional Intent

The ATS came into force in 1789 when "[t]he notion that corporations could be held liable for their torts . . . would not have been surprising to . . . Congress."[5] By passing the statute, Congress sought to provide a remedy for violations of the law of nations and chose not to exempt any class of defendant from liability. The text of the ATS is clear: "the phrase 'any civil action' is inclusive and unrestricted."[6] In fact, this "Court has observed that the ATS 'by its terms does not distinguish among classes of defendants.' "[7]

For decades, courts have held corporations liable under the ATS for violations of international legal standards, including human rights, "without any indication that the issue was in controversy, whether in ruling that ATS cases could proceed"[8] or that they "could not on other grounds."[9] Furthermore, when this

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[5] *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 48 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

[6] *Id.* at 43.

[7] *Id.* (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989)).

[8] *Id.* at 57 (citing *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1091-1100 (N.D. Cal. 2008); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1004-24 (S.D. Ind. 2007)).

[9] *Id.* (citing *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1090-96 (D.C. Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009); *Vietnam Ass'n for*

Court was first asked to consider the issue of corporate liability under the ATS, the Solicitor General filed an *amicus* brief in support of the position advanced by the Petitioners here.[10]

Since 1789, Congress has never moved to limit, narrow, or amend the ATS, despite having ample opportunity to do so. If Congress intended to exclude a particular class of defendants from the ATS, namely corporations, it would have explicitly done so, either at the time of drafting or through an amendment. Ultimately, between "Supreme Court precedent that the ATS does not distinguish between classes of defendants, the failure of Congress to amend the statute," and the statute's failure "to explicitly exclude corporations, there is a complete absence of any indication that the intent of the drafters was to exclude corporate liability."[11]

Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999)).

[10] Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel v. Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659 (2013) (No. 10-1491).

[11] Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT'L & COMP. L. 175, 196 (2011), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1022&context=gjicl.

b. Corporations Cannot Have Rights Without Liabilities

The role of corporations in society has become more prominent than ever. Corporate expansion has been driven by globalization, the liberalization of markets, and technology, which permit corporations to operate across borders and markets with ease, granting them significant power. As corporate influence grows, clear rules for corporations' behavior must be established, including liability for their wrongs: "Corporate liability is ever more sensible today. Corporations wield enormous power in our globalized, free enterprise-oriented world. 'The "Corporation" assumes a central position in modern economic life. This is due mainly to the fact that major portions of our economic activities are performed by corporations.' "[12]

Over time, corporations have been held to have all manner of rights that enable them to operate effectively as citizens. The judicial recognition of corporate rights began as early as 1844, when corporations were permitted to sue and be sued efficiently in federal court.[13] In 1886, corporations were protected from unlawful appropriation of their property,[14] and in 1898, from deprivations of property without due

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[12] *Id.* (citing Zohar Goshen, *Controlling Corporate Agency Costs: A United States-Israeli Comparative View*, 6 CARDOZO J. INT'L & COMP. L. 99, 99 (1998)).

[13] *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497, 558-59 (1844).

[14] *R.R. Comm'n Cases*, 116 U.S. 307, 331 (1886).

process of law.[15] This protection was extended to foreign corporations in 1931.[16] Of particular relevance to this case is the finding in 1898 that corporations themselves can sue under the ATS.[17] Fourth Amendment privacy interests were recognized in 1906,[18] while protection against double jeopardy was granted in 1977.[19]

In 2010, this Court recognized that for-profit corporations have the right to engage in political speech.[20] This Court held that political speech is indispensable, whether from an individual or corporation, and that any restriction on "the speech of some elements of our society in order to enhance the relative voice of others" was unknown to the First Amendment.[21]

More recently, in *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014), this Court recognized the right of closely held for-profit corporations to freedom of religion. The Court explained that "[w]hile it is certainly true that a central objective of for-profit

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[15] *Smyth v. Ames*, 169 U.S. 466, 522-24 (1898).

[16] *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931).

[17] *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106 (1898).

[18] *Hale v. Henkel*, 201 U.S. 43, 76 (1906), *overruled in part by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

[19] *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977).

[20] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349-50 (2010) (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978), *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), *United States v. Auto. Workers*, 352 U.S. 567, 597 (1957) (Douglas, J., dissenting)).

[21] *Id.* (quoting *Buckley*, 424 U.S. at 48-49).

corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[22] The Court noted that corporations often donate to charity, provide employee benefits, and engage in environmental causes that exceed legal requirements, explaining that "[i]f for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well."[23]

As corporations are recognized to hold many of the same rights as individual citizens, so too must they bear the same responsibilities. Rights without such responsibilities would lead to significant unfairness, permitting corporations (unlike individuals) to pursue their goals even at the expense of fellow citizens' rights and other general societal interests.[24]

Not only is this a matter of fairness, but it is also in the public's best interests. As "a creature of the state," a corporation is "presumed to be incorporated for the benefit of the public. It receives certain special

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[22] *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751, 2771 (2014).

[23] *Id.*

[24] *See*, *e.g.*, Slawotsky, *supra* note 11, at 210 ("[W]ith rights come obligations. To confer rights on corporations without the associated obligations is not reasonable. Vesting corporations with rights, such as the right to file claims, while simultaneously exonerating them for tort damage created by violating international law, does not make sense and, moreover, encourages violation of international law.").

privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter."[25] Corporate liability is required to ensure that corporate activities are in fact conducted in accordance with the law. When a harm occurs, corporations must be held accountable, or they will otherwise be left "free to run their operations without fear of liability for the harm they cause to consumers, employees and people injured by their products."[26]

This Court must not then limit the capacity of the public to hold corporations accountable by foreclosing corporate liability under the ATS. A regime of corporate rights without liabilities tips the scales of justice so in favor of corporations as to undermine the very notion of justice itself.

c. Recognizing Individual Liability Without Corporate Liability Fails to Create the Necessary Incentives and Leads to Unjust Consequences

Corporate liability for the torts (and authorized actions) of officers, directors, and employees is a consequence of the principal-agent relationship at the core of organizational law. Agents act for the benefit of, and subject to the control of, the principal, and, as a result,

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[25] *Hale v. Henkel*, 201 U.S. 43, 74 (1906), *overruled in part by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

[26] Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013, http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html.

the principal is responsible for torts committed within the scope of the agency relationship.[27] Agency theory applies within every form of for-profit organization, from partnerships to limited liability partnerships, limited liability companies, and private and publicly held corporations, whether local or global. While participants within an organization can contract to vary their internal framework of indemnification and contribution, subject to certain limits, relationships between the entity and third parties harmed by torts committed by officers, directors, or employees are structured pursuant to the concept of *respondeat superior*: the superior responds for the torts of those who act for it within the scope of their employment relationship.[28]

These principles extend to torts resulting from violations of customary international law.[29] As noted by the Court in *Exxon Mobil Corp.*:

> The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal systems throughout the world. Given that the law of every jurisdiction in the United States and of every civilized nation, and the law of

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[27] RESTATEMENT (THIRD) OF AGENCY LAW § 1.01 (AM. LAW INST. 2006).

[28] WILLIAM LLOYD PROSSER & W. PAGE KEETON, PROSSER & KEETON ON TORTS § 69 (5th ed. 1984).

[29] *The Mary Ford*, 3 U.S. 188, 190 (1796).

> numerous international treaties, provide that corporations are responsible for their torts, it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for "shockingly egregious violations of universally recognized principles of international law."[30]

While the reasons for the agency principle are numerous, two bear special mention. The first is that it is necessary to ensure that victims receive adequate compensation. Individual as opposed to entity liability fails to account for the seriousness of corporate breaches of international legal standards. These violations can lead to harms that require extensive compensation to remedy. In most cases, individuals within corporations will not have sufficient resources to provide adequate reparation.[31]

The second reason for the importance of the agency relationship in the corporate liability context is a matter of creating the right incentives. Holding entities liable for the wrongs of the individuals within them incentivizes organizations to choose their directors, management, and employees carefully, train them well, and monitor and oversee their actions.

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[30] *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) (citing *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983)).

[31] *See, e.g., Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1019 (7th Cir. 2011) (declaring that "board members . . . might not have the resources to compensate the victims of the corporation's violation of international customary law, let alone pay punitive damages as well").

Agency liability also creates a general top-down culture of compliance. Directors and officers have authority to create entity-wide policies. If these policies are insufficient and allow for violations of *jus cogens* human rights norms, it is the entity and its directors and officers that should be liable in tort.[32]

By contrast, a rule that forecloses corporate liability while leaving individuals open to claims is unfair and illogical. Where corporate abuse leads to profits, those profits flow largely to the corporation, not its agents. Corporate immunity under the ATS would not only result in corporations profiting from violations of customary international law, but would enable them to keep the rewards of doing so.

Forcing victims to sue individuals within corporations as opposed to the corporations themselves may also result in an inefficient use of judicial resources. Plaintiffs would be required to sue hundreds of defendants rather than the one entity. Moreover, the large-scale abuses that are typically raised in ATS litigation often involve complex behavior by many actors within a corporation. It can be unduly difficult to assess which individuals to sue, placing too great of an investigatory burden on plaintiffs, and potentially limiting any compensatory redress to which they might be entitled.

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[32] *See*, *e.g.*, *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. 2006); *In re Caremark Int'l Inc.*, 698 A.2d 959, 967-68 (Del. Ch. 1996).

Having set out the reasons why this Court should not upend centuries of legal tradition, it is worth noting that there is also no persuasive reason for a rule of corporate immunity:

> Where a corporation earns profits by exploiting slave labor, or by causing or soliciting a genocide in order to reduce its operating costs, what objective would the nations of the world seek by a rule that subjects the foot soldiers of the enterprise to compensatory liability to the victims but holds that the corporation has committed no offense and is free to retain its profits, shielded from the claims of those it has abused?
>
> Where the legal systems of the world encourage the establishment of juridical entities, endowing them with legal status by giving them authorization to own property, make contracts, employ labor, and bring suits, treating them as exempt from the law's commands and immune from suit would serve no rational purpose. In fact, nowhere are they so immunized. *E.g.*, Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. J. Int'l Human Rights 304, 322 (2008) ("I am not aware of any legal system in which corporations cannot be sued for damages when they commit legal wrongs that would be actionable if committed by an individual.").[33]

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[33] *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 159-60 (2d Cir. 2010) (Leval, J., concurring).

A rule that allows individual liability while foreclosing corporate liability will lead to unjust consequences and undermine the need for corporations to create a culture of compliance. Such a rule will also rob victims of adequate compensation and serves no meaningful objective.

d. Foreclosing Corporate Liability under the ATS Undermines the Dual Purposes of Tort Law: Compensation and Deterrence

Corporations have always been subject to the kinds of accountability mechanisms and incentives that tort law generally produces, providing victims with compensation and deterring future abuses. In most parts of the world, there exist some corporations committing harms. These harms include the use of child labor, crimes against humanity, environmental degradation, forced evictions, forced labor, breaches of health and safety obligations, general human and labor rights violations, human trafficking, and slavery. Liability in tort is needed to compensate for these harms and to deter them to the extent possible.[34]

[34] *Legal Case Map*, BUSINESS-HUMANRIGHTS.ORG, https://business-humanrights.org/en/corporate-legal-accountability/case-profiles/legal-case-map (last visited June 13, 2017).

i. Compensation – Where There's a Wrong There Must Be a Remedy

An approach that fails to hold corporations liable for violations of customary international law conflicts with one of the primary purposes of tort law: compensation. Victims of corporate abuse must be allowed to sue the actors that caused them harm in order to be made whole.

Leaving victims without a remedy contravenes both international and domestic legal principles. Internationally, the right to a remedy stems from a decision of the Permanent Court of International Justice, which held that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[35] The principle has now been codified in numerous treaties, including Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR), to which the United States is a party. In its interpretation of the Covenant, the Human Rights Committee criticized remedies that were set out on paper, but not in practice, emphasizing that reparations must be "accessible and effective."[36] Domestically, several statutes

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[35] 1928 P.C.I.J. (ser. A) No. 17, at 29.

[36] U.N. Human Rights Comm'n, Gen. Cmt. No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (Mar. 29, 2004).

recognize that "[f]or every wrong, there is a remedy."[37] The principle is also recognized in legal scholarship.[38]

Ultimately, where courts fail to hold corporations accountable for violations of customary international law, they create an unjust situation in which corporations have an unfair advantage, privileging profits over the individuals whose rights have been abused. This result also exposes non-consenting third parties to serious harms and denies them the opportunity to obtain an effective remedy.

ii. Deterrence – Corporations Need the Threat of Liability to Comply with the Law

In addition to compensation, tort law's other primary goal is deterrence.[39] Corporations must be held accountable for breaches of international law if they are to be deterred from violating the law of nations.

The ATS is an important and necessary tool to ensure that overseas operations do not lead to the evasion of responsibilities in countries with weak political and judicial systems. There are many familiar incentives for corporations domiciled in the United States or

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[37] CAL. CIV. CODE § 3523 (1872). *See also* 42 U.S.C. § 1983 (1996).

[38] *See* DAN B. DOBBS ET AL., THE LAW OF TORTS § 1 (2d ed. 2017); 1A C.J.S. *Actions* § 31 (2017); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1311 (2013).

[39] *Tort – Overview*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/tort (last visited June 13, 2017).

Europe to move part or all of their operations abroad, including access to cheap labor, natural resources, low taxes, and minimal regulation. Many of the countries with these features lack an independent judiciary and/or strong rule of law, leaving citizens without protection of their human rights.

While it is never in the long-term interests of shareholders for management to violate the law, in the short term, "[s]ometimes it's in the interest of a corporation's shareholders for management to violate the law . . . including norms of customary international law."[40] Foreclosing corporate liability for such violations permits corporations to favor short-term profits over long-term value, ultimately harming shareholders. It also favors bad corporate actors over good ones, providing insufficient deterrence to ensure that corporations comply with the law. Although corporate wrongdoers may in some cases face crippling reputational damage, the possibility of such damage is often too uncertain to provide sufficient deterrence.[41] This lack of accountability unfairly places rights-respecting corporations and their investors at an economic disadvantage.

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[40] *Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1018 (7th Cir. 2011).

[41] *See* INT'L CORP. ACCOUNTABILITY ROUNDTABLE, "KNOWING AND SHOWING": USING U.S. SECURITIES LAWS TO COMPEL HUMAN RIGHTS DISCLOSURE 5-6, 30-31 (2013), https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657a0ef5e23172079532f9/1483045394268/ICAR-Knowing-and-Showing-Report5.pdf [hereinafter "KNOWING AND SHOWING"].

For abuses that occur in weak governance zones, the threat of suit under the ATS may prove to be the only reliable means of deterring transnational corporations from violating customary international law. The existence of corporate liability under the ATS encourages the development and implementation of due diligence systems that ensure compliance with customary international law. By contrast, foreclosing corporate liability under the ATS gives corporations carte blanche to violate international standards, including human rights, in jurisdictions where domestic protections are weak or not enforced.

Hard law deterrence, such as that provided under the ATS, is also key to ensuring that corporations continue to propose, promote, and abide by the soft law initiatives that have formed part of the corporate social responsibility (CSR) and business and human rights movements. Corporations are more likely to support and engage in soft law initiatives if they face the threat of liability under hard law accountability mechanisms:

> The particular problem for the promotion of CSR is the shrinking of the shadow of the law. As we have documented elsewhere, CSR participants and stakeholders cite many possible motivations for CSR activity. They range from a good-faith belief in improving the world to a more cynical concern about image management. But many people in the field put primary emphasis on another motive: preempting "hard" regulation. That is, companies engage in often-elaborate "soft"

> self-regulatory activities in order to head off demands for national and international law makers to impose traditional legal controls. In this important sense, companies pursue CSR in the shadow of the law, both current and prospective.
>
> . . . .
>
> Good-faith belief in CSR and the need to manage a company's image are constants, motives that will exist (or not) regardless of external influences like legal policy. But corporate executives and boards will pursue soft-law CSR solutions to preempt hard law only if the threat of hard law is real. If, on the contrary, the Supreme Court takes away a historically significant means of enforcing responsibility for human rights violations, then a potentially important motivation for voluntary CSR activities will have been undermined.[42]

Ultimately, corporate liability under the ATS acts as a backstop for the most egregious violations of human rights. Its removal would send a dangerous signal to those corporations inclined to engage in these kinds of activities, particularly those operating in conflict zones. While there are soft law initiatives, such as the Conflict Risk Network, that aim to discourage such corporate behavior, by, for instance, investing in such a

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[42] Cynthia A. Williams & John M. Conley, *Trends in the Social [Ir]responsibility of American Multinational Corporations: Increased Power, Diminished Accountability?*, 25 FORDHAM ENVTL. L. REV. 46, 82-83 (2013).

way as "to mitigate conflict risk and increase responsible foreign investment,"[43] the threat of hard law is required. Corporate liability under the ATS will help ensure that corporations do not violate customary international law and encourage them to take active steps to abide by international legal standards.

e. Incorporation Must not Be an Organizational Defense in Its Own Right

In addition to the reasons already provided, a rule foreclosing corporate liability under the ATS should be avoided because it values juridical actors over others, placing them above the rule of law. Most problematically, it creates a system in which, partially due to the limitations of suing individuals within corporations, anyone can evade full liability for violations of international law simply by incorporating, resulting in corporate immunity.

However, incorporation should not be an organizational defense in its own right. Such an approach would be arbitrary – in this case, permitting human rights violations through the corporate form. Judge Leval, concurring in *Kiobel I*, described the innumerable issues with this exemption:

> Adoption of the corporate form has always offered important benefits and protections to

[43] *Conflict Risk Network*, SRI-CONNECT.COM, http://www.sri-connect.com/index.php?option=com_comprofiler&task=userProfile&user=1079880&Itemid=4 (last visited June 20, 2017).

> business – foremost among them the limitation of liability to the assets of the business, without recourse to the assets of its shareholders. The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy – all without civil liability to victims. By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims. By protecting profits earned through abuse of fundamental human rights protected by international law, the rule my colleagues have created operates in opposition to the objective of international law to protect those rights.[44]

Legal scholars have echoed Judge Leval's sentiments, noting that the finding of the *Kiobel I* majority permits corporations to "conduct business any way they deem proper without concern of liability under the statute. . . . '[T]he decision create[d] unprecedented opportunities for corporate actors to shield

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[44] *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring).

themselves from liability for clear abuses of international law through incorporation.' "[45]

The absence of corporate liability could even allow States to evade their responsibilities to their citizens. If corporations are immune, governments will have an incentive "to abdicate [their] duties to corporations because incorporation may effectively insulate all parties – states, armed groups, and corporations – from liability."[46] In other words, denying corporate liability under the ATS may indirectly limit the ability to hold accountable governments that outsource and contract with private actors to conduct state functions. Citizens of democratic nations expect that they will be able to hold their governments responsible for violations that occur in the delivery of public services. Limiting corporate liability under the ATS could make it more difficult to do so.

In sum, corporations must be held liable for their violations of customary international law. For this Court to find otherwise would lead to injustice and potentially permit any actor to shield its wrongful actions

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[45] Slawotsky, *supra* note 11, at 179-80 (quoting Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How* Kiobel *Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119 (2010)).

[46] Tyler Giannini & Susan Farbstein, *Corporate Accountability in Conflict Zones: How* Kiobel *Undermines the Nuremberg Legacy and Modern Human Rights*, 52 HARV. INT'L L.J. 119, 123 (2010), http://www.harvardilj.org/2010/11/online_52_giannini_farbstein/.

through the corporate form. It would construct "a tragically ironic jurisprudence that ignores the corporate entity in the context of international accountability but recognizes it for every other purpose, from limiting liability to tax avoidance to exercising broad political rights."[47] This would lead to a system that is both unjust and unfair, with individuals being held to one set of standards, and corporations to another.

2. Liability Under the ATS Is Required to Protect Investors

Foreclosing corporate liability is highly detrimental to investors concerned about long-term value over short-term gain. Where investors have chosen to factor in a corporation's human rights performance, courts must not undermine these efforts by tilting the playing field in favor of corporations who make profits through violations of international law. Liability under the ATS is also required to protect investors from providing capital to corporations that are involved in violations of customary international law. Liability encourages corporations to adopt compliance mechanisms that reduce the risks of both legal and reputational damage, thereby serving the interests of investors. Not only does liability encourage corporations to adopt a culture of compliance, but the information that becomes publicly available through legal proceedings can assist investors in making informed decisions, enabling them to value risk more effectively.

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[47] Williams & Conley, *supra* note 42, at 80.

Finally, liability under the ATS is necessary to bring about an even playing field for investors.

a. The Growth of Responsible Investing

Many investors care about the behavior of the corporations in which they purchase stock. This Court must not foreclose corporate liability under the ATS as doing so would violate the interests of these investors.

Over the last two decades, the global economy has seen a marked increase in investors concerned about environmental, social, and governance (ESG) issues:[48]

> [I]nvestors are adopting socially responsible policies to guide their decisions and are expecting valuable returns on their outlays as a product of doing so, as indicated by the rising asset values of socially responsible investment funds in the United States over the past two decades (from $639 billion in 1995 to $3.74 trillion in 2012). Mainstream institutional investors, including institutional mutual and equity funds, have also signed

[48] OECD, INVESTMENT GOVERNANCE AND THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS (2017), http://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf?utm_source=Adestra&utm_medium=email&utm_content=Investment%20governance%20and%20the%20integration%20of%20environment%2C%20social%20and%20governance%20factors&utm_campaign=Finance%20and%20Investment%20News%20-%20May%202017&utm_term=demo.

> onto international principled investing standards.[49]

One such initiative is the United Nations Principles for Responsible Investment (PRI), which was launched in 2006. Since that time, the PRI has grown from 100 to 1,600 signatories, increasing from around five trillion U.S. dollars in assets under management to more than 60 trillion.[50] Investors increasingly care about ESG factors, and about human rights in particular:[51]

> Businesses, traditional financial accounting firms, and marketplace analyst research services have recognized that human rights-related matters are material to investors. Businesses have demonstrated this through voluntary disclosures in securities reports and participation in social sustainability reporting systems or social auditing frameworks. Over the past few years, financial accounting firms have expressed the materiality of human rights to investors in several reports from Deloitte, Ernst & Young, and others that have engaged in research collaborations with business schools and institutional investor groups. Finally, market analysts and research companies have developed indices for measuring social impacts, including human rights risks and impacts, of business

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[49] "KNOWING AND SHOWING," *supra* note 41, at 5.

[50] *About the PRI*, UNPRI.ORG, https://www.unpri.org/about (last visited June 13, 2017).

[51] "KNOWING AND SHOWING," *supra* note 41, at 5.

> activities and offer these for investors who are seeking to apply the information in their decisions.[52]

The last decade has brought with it important investor initiatives geared towards ensuring that corporations respect and promote human rights. Examples of leadership by investor groups include the Uzbek Cotton campaign,[53] Global Network Initiative,[54] Bangladesh Investor Initiative,[55] Dodd-Frank Wall Street Reform and Consumer Protection Act[56] coalitions,[57] and investor support for the United Nations Guiding Principles Reporting Framework.[58] At the core of this growing trend is the understanding that it is in the best interests of investors that corporations be held accountable for human rights abuses and other violations of customary international law. Courts should protect the interests of responsible investors in seeing corporations uphold human rights by not undermining

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[52] *Id.* at 29-30.

[53] COTTON CAMPAIGN, http://www.cottoncampaign.org/ (last visited June 20, 2017).

[54] GLOBAL NETWORK INITIATIVE, https://www.globalnetworkinitiative.org/ (last visited June 20, 2017).

[55] *ICCR's Bangladesh Initiative*, ICCR.ORG, http://www.iccr.org/our-issues/human-rights/iccrs-bangladesh-initiative (last visited June 20, 2017).

[56] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1502, 1504, 124 Stat. 1376 (2010).

[57] *Investor Letter in Support of Dodd-Frank Act*, ICCR.ORG, http://www.iccr.org/investor-letter-support-dodd-frank (last visited June 21, 2017).

[58] UN GUIDING PRINCIPLES REPORTING FRAMEWORK, http://www.ungpreporting.org/ (last visited June 21, 2017).

the tools for doing so. For this reason, this Court must not preference those corporations that violate customary international law by foreclosing corporate liability under the ATS.

b. The Corporate Response to Reputational Risk Is Insufficient to Protect Investors

When investors purchase stock in a particular corporation, they expect that corporation to abide by the law, whether international or domestic. A corporation that engages in unlawful behavior creates significant financial risk for itself and its investors. In addition to legal liability, these corporations may suffer reputational damage, which constitutes a significant risk for investors as it can lead to a decrease in share value. Moreover, such risk is inherently less predictable than legal liability and therefore more difficult for corporations and their investors to assess.

Recent events in countries with weak liability regimes demonstrate the effects of reputational damage:

> [T]he garment industry has received widespread and largely negative attention after multiple deadly factory disasters in Bangladesh, including the Tazreen Fashions fire that killed 114 workers in Dhaka on November 24, 2012 and the Rana Plaza factory collapse on April 24, 2013 that left more than 1100 workers dead. In addition, the information and communications technology industry has struggled to effectively self-regulate and

> monitor labor standards in its supply chains, as demonstrated by the frequent publicity surrounding the harsh conditions facing workers at the FoxConn factory complex in China. The extractives industry has similarly faced scrutiny for adverse working conditions, human rights abuses by security personnel at mines, forced labor and other modern forms of slavery, and the contamination of ground water supplies. In response to these types of incidents, consumers have increasingly taken direct action to boycott and encourage divestment from socially irresponsible companies.
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> . . . .
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> A company's reputational risk – the material damage to a company's reputation as a result of social missteps – can therefore result in significant business costs. As has been shown in a multitude of instances, consumer and client preferences can change dramatically upon the discovery of human rights risks.[59]

The economic costs of reputational risk have been recognized by the financial industry, which has noted that "stakeholder actions related to reported information regarding topics such as human rights risks and impacts – including boycott, activism, divestiture, seeking employment, or changing purchasing habits – yield potential impacts for company valuations."[60] Corporations themselves also recognize these risks. In its

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[59] "KNOWING AND SHOWING," *supra* note 41, at 5-6.

[60] *Id.* at 30-31.

2012 annual report, Coca-Cola outlined how allegations of human rights abuses could impact its brand and reputation, causing its business to suffer.[61] Furthermore, recognizing the potential detrimental impact reputational damage can have on a corporation's share price "traditional accounting firms are finding that non-financial information, such as human rights risks and impacts, may be material to investors as they impact corporate performance financially or, in the alternative, lead to intangible advantages to reputation and image."[62]

Yet reputational damage, despite the effects it can have on a corporation's bottom line, is ultimately only a limited disincentive for corporate malfeasance. Although a corporation's misconduct may eventually enter the public view even absent legal liability – with disastrous consequences for investors – the presence of such revelations can be ad-hoc, such that corporations cannot adequately prepare for the resulting fallout. Legal liability for violations of customary international law is therefore required to protect investors.

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[61] COCA-COLA CO., ANNUAL REPORT (FORM 10-K) 17-18 (2012), http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2013/03/2012-annual-report-on-form-10-k.pdf.

[62] "KNOWING AND SHOWING," *supra* note 41, at 31.

c. Legal Liability Is Required to Protect Investors

Legal liability drives corporations to implement due diligence measures that identify, prevent, mitigate, and account for human rights harms and impacts. These due diligence processes and compliance systems better enable corporations to respond to public allegations of misconduct, curtailing any consequences, including loss of shareholder value, that might result. Ultimately, legal liability encourages compliance with the law, minimizing negative legal and reputational risks and externalities for investors.

In addition, the information that becomes publicly available through legal proceedings can assist investors in making informed decisions about their capital and effectively analyzing risks. Corporate liability under the ATS helps to publicize material, non-financial information so that investors may make educated decisions, and, at the same time, provides a critical compliance incentive that ultimately protects shareholder value.

When legal safeguards are removed, investors bear the risk. This is because illegal activity undermines competition, preventing markets from functioning properly, and resulting in price distortions.[63] Markets cannot adequately mitigate these harms by

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[63] Francis Weyzig, *Political and Economic Arguments for Corporate Social Responsibility: Analysis and a Proposition Regarding the CSR Agenda*, 86 J. BUS. ETHICS 417, 425 (2009) (citing J.R. BOATRIGHT, ETHICS AND THE CONDUCT OF BUSINESS (3d ed. 2000)).

pricing them because, without an effective and public liability regime, the likely harm and its costs are largely unknown to the investment community. For instance, at the first ever World Forum on Governance, held in 2012, parties highlighted the connection between failures in governance and the 2008 financial crisis, finding that both public and corporate governance would need to be improved to address the challenges that led to the crisis.[64] Governance, including public, civil, legal liability regimes, leads to more accurate pricing of corporate violations of customary international law, creating a more even playing field for investors.

Corporate liability under the ATS is required to bring about this level playing field for corporations and their investors. Wrongdoer corporations, "producing illusory value, based on illegal activity," can take unfair advantage of their honest competitors "who may be better able to deliver sustainable value over the long-term."[65] Ultimately, an uneven playing field disproportionately affects American corporations, and often, American investors. This is because corporations incorporated in the United States often face greater public exposure for violations of customary international law

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[64] THOMAS MANN ET AL., PRAGUE DECLARATION ON GOVERNANCE AND ANTI-CORRUPTION (2012), https://www.brookings.edu/wp-content/uploads/2016/06/Prague-Declaration-2.pdf.

[65] *Investor Statement in Support of the U.S. Foreign Corrupt Practices Act*, USSIF.ORG, http://www.ussif.org/files/Public_Policy/Comment_Letters/FCPA_Investor_Statement.pdf (last visited June 22, 2017).

under tort law, particularly as litigants turn to state common law, than foreign firms that merely do business in the U.S.[66] However, when the United States creates legal incentives for good corporate behavior around the globe, all compliant multinational corporations, and, by extension, their investors, can reap economic benefits.[67]

CONCLUSION

Amici curiae have explained why corporate rights must come with responsibility and why liability under the ATS is in the best interests of the public and of investors. The law cannot pick and choose which actors it applies to. The legal system must not privilege nor immunize corporations. Fairness and justice, along with this Court's "distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind,"[68] dictate that corporations be held liable under the ATS.

Without that potential liability, we will be left with a system in which "the existing mechanisms for corporations to exercise political power . . . are varied and

[66] Brief for Joseph E. Stiglitz as *Amicus Curiae* Supporting Petitioners at 6, 16-17, *Kiobel v. Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659 (2013) (No. 10-1491).

[67] John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 231 n.2 (2007).

[68] *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

extremely robust, while the mechanisms for imposing accountability – certainly accountability for international human rights violations – are attenuated and insufficient."[69] Such a system was not what was envisioned by the Founding Fathers, nor is it in the best interests of the public and investors.

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[69] Williams & Conley, *supra* note 42, at 80-81.

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