No. 16-1461

In The
Supreme Court of the United States

RAMCHANDRA ADHIKARI, *et al.*,
Petitioners,

v.

KELLOGG BROWN & ROOT, INCORPORATED, *et al.*,
Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), this Court held that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, does not confer jurisdiction over suits where the "relevant conduct" occurred outside the United States. The Court elaborated in *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2100-01 (2016), that for statutes like the ATS, a claim is impermissibly extraterritorial if the conduct relevant to the statute's focus occurred on foreign soil, regardless of any other conduct in U.S. territory.

Petitioners alleged that Respondents (collectively, "KBR") were vicariously responsible for the conduct of non-party foreign companies that recruited, detained, and transported a group of Nepalese workers in Nepal, India, Jordan, and Iraq. The Fifth Circuit applied *RJR Nabisco* and upheld summary judgment in KBR's favor, ruling that the relevant ATS conduct alleged was *foreign* trafficking and forced labor, and that there was no evidence of tortious conduct in U.S. territory.

The question presented is:

Whether the ATS allows the foreign citizens here to sue in U.S. court to allege wrongdoing in foreign countries, even where all the conduct relevant to establishing recovery occurred abroad, Congress has provided express statutory remedies for the same alleged conduct (and displaced common-law claims in the process), and the lack of an international norm imposing liability against the corporate defendants further forecloses any ATS claim.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents certify that KBR, Incorporated has no parent company, and no entity has a 10% or more ownership interest in KBR, Incorporated.

KBR, Incorporated is the ultimate parent company of Kellogg Brown & Root, Incorporated, Kellogg Brown & Root Services, Incorporated, KBR Holdings, L.L.C., KBR Technical Services, Incorporated, Kellogg Brown & Root L.L.C., Kellogg Brown & Root International, Incorporated, Overseas Administration Services, Overseas Employment Administration, and Service Employees International, Incorporated.

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INTRODUCTION

This suit, filed nearly a decade ago, alleges that a group of Nepalese workers were victimized by foreign companies that trafficked the workers through Nepal, India, Jordan, and Iraq. Petitioners claim that this was done as part of obtaining labor to further KBR's military support services in Iraq, and that one Petitioner worked at a temporary U.S. military airbase at which KBR provided services. Petitioners resolved their claims against a Jordanian company (KBR's subcontractor) accused of trafficking and detaining the workers. Petitioners also asserted a claim against KBR under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, based on the theory that the subcontractor's tortious conduct in foreign countries could be imputed to KBR.

In seeking review of the Fifth Circuit's holding that the ATS claim is impermissibly extraterritorial, Petitioners allege a circuit split over the standard for overcoming the presumption against extraterritoriality under *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Tellingly, however, Petitioners ignore *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), in which this Court clarified the framework for addressing extraterritoriality questions under *all* statutes, including the ATS, and thus resolved or mooted any then-existing conflicts over ATS extraterritoriality. The Fifth Circuit is the *only* circuit to interpret and apply *RJR Nabisco* to the ATS. There is no split meriting review; at minimum, further percolation is warranted after *RJR Nabisco*.

In *RJR Nabisco*, this Court unanimously held that for statutes like the ATS which do not rebut the

presumption against extraterritoriality, the analysis hinges on the "focus" of the statute. 136 S. Ct. at 2101. To distinguish extraterritorial from domestic claims, courts must consider only where the "conduct relevant to the focus" occurred. *Ibid.* "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*

RJR Nabisco's express direction to apply the focus test for ATS claims abrogates or at least calls into question the earlier circuit decisions, comprising Petitioners' alleged split, that rejected or failed to squarely apply this test. See *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); see also *Doe* v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016). One circuit had correctly anticipated that the focus test controls (as the Fifth Circuit has now held), see *Mastafa* v. *Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014), and contrary to Petitioners' contentions, the Second Circuit's rejection of claims for tortious conduct in foreign countries is consistent with the Fifth Circuit's approach, see Pet.App.14a, 18a-20a. In fact, the lack of any actionable domestic wrongdoing in this case forecloses Petitioners' claim under *every* circuit's iteration of the extraterritoriality test. There is no conflict, but regardless, the Court should allow more percolation on *RJR Nabisco*'s impact on ATS extraterritoriality, and also should await a case in which the issue is outcome-determinative, before granting review.

Petitioners contend that U.S. policy favors review, Pet.3, 32-36, but this Court already resolved

those contentions when applying the presumption against extraterritoriality to the ATS in the first place. The presumption's purpose is to avoid "judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court...." *Morrison* v. *Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 261 (2010). Consistent with this principle, *Kiobel* and *RJR Nabisco* applied the presumption to ATS claims regardless of any actual conflict with international law.

Petitioners' policy arguments also ignore that Congress already effectuated U.S. interests years ago by enacting legislation—the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. §§ 1581-97—that reaches trafficking and forced labor by U.S. citizens abroad. Petitioners pursued a TVPRA claim, but no longer challenge its dismissal. This express statutory remedy should at least preclude courts from relying on policy views to defeat the presumption against extraterritoriality. Regardless, Petitioners' policy contentions provide no basis for granting review, certainly not on an extraterritoriality issue that few courts have addressed since *RJR Nabisco*.

ADDITIONAL STATUTES INVOLVED

The current versions of relevant provisions of the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1581-97, are included in the appendix.

STATEMENT OF THE CASE

I. Factual Background

1. Of the 23 Petitioners, all but one are family members of Nepalese men ("Decedents") kidnapped and killed in 2004 by an Iraqi insurgent group.

CA.502-07, 523-24. The other Petitioner, Buddi Gurung, was an employee of a Jordanian company, Daoud & Partners ("Daoud"), and worked in a warehouse at Al Asad, a U.S. military airbase in Iraq.

Petitioners' allegations about fraudulent employment recruiting practices and trafficking hinge on actions of foreign companies and individuals. Decedents were recruited by a Nepalese employment agency, and their travel and housing in Jordan was arranged by a Jordanian company. Pet.App.4a. Petitioner Gurung relied on a trusted individual who put him in touch with another Nepali in India. CA.22953, 30274-76. Gurung traveled to and spent weeks in India before another individual arranged his travel to Jordan and, ultimately, Iraq. CA.22924-28, 30093-94, 30275, 30277-79.

Decedents had no contact with anyone from KBR. They never arrived at Al Asad because Iraqi insurgents abducted them, videotaped them holding their supposedly confiscated passports, and videotaped their executions. CA.520-23, 34870-84.

Gurung arrived at Al Asad by airplane and was greeted by a manager for Daoud, the company that hired him. CA.22928, 22933-34, 30107-08. Far from substantiating any mistreatment, Gurung testified that he lived in a bunkhouse, ate the same food at the same facility as U.S. military personnel, used an on-site entertainment facility, and visited an onsite Subway sandwich shop. CA.22936-39, 30109-11.

Gurung also never told anyone from KBR that he had been trafficked to Iraq and wanted to leave. Instead, he called KBR employees his friends, and voluntarily chose to stay and work at Al Asad for fifteen months, receiving regular raises, and leaving only

after he was fired because the U.S. Army found contraband alcohol in his bed. CA. 22943-46, 30117-18.

Although not resolved on summary judgment, ample evidence undermined Petitioners' claim that Decedents had been forcibly detained in Jordan and transported unwillingly to Iraq. While in Jordan, one Decedent wrote to his family and described his living conditions and eagerness to work in Iraq. CA.22856 n.3, 40144-47. He wrote that he and over a dozen Nepalese friends "are going together to Bag[h]dad," and that "[w]e are comfortably having fish, meat, eggs and new types of vegetables. There is nothing to worry, but I am feeling bad that I have to stay in Jordan for a month without a job." *Ibid.* News reports also showed that Decedents were not lured by promises of employment elsewhere, but instead knowingly sought work in Iraq. CA.43115-16.

2. Petitioners initially targeted Daoud in this litigation before ultimately settling with Daoud for a confidential amount, CA.500, 24975, but their allegations against KBR also hinged on Daoud's conduct. Petitioners claimed that KBR was *vicariously* liable (under an agency theory) for Daoud's alleged foreign trafficking and recruitment practices. Petitioners based their theory on KBR's alleged control over certain aspects of Daoud's work—like KBR's inspection of dining-facility utensils—that were unrelated to any claimed trafficking or foreign-worker mistreatment. See Pet.App.121a.

Contrary to their misportrayal, Pet.11, Petitioners' supposed evidence that KBR was aware of trafficking or worker mistreatment is unrelated to allegations concerning Decedents or Gurung, and relates solely to KBR's operations overseas, Pet.App.136a.

Despite maintaining that KBR's U.S. managers "covered up" wrongdoing, Petitioners have no evidence that complaints about Daoud's trafficking or worker mistreatment were communicated to KBR's U.S. personnel, instead relying on evidence like a discrete complaint that KBR investigated and found was refuted by timekeeping records and eyewitness reports. See Pet.App.137a n.4; CA.33743-49.

Petitioners insinuate that government investigations uncovered wrongdoing by KBR, but official reports refute this. The Department of Defense Inspector General inquired into the events surrounding Decedents' deaths and concluded there were no potential criminal violations warranting further investigation. CA.22734-35. The report concluded that there were no allegations "against U.S. persons or U.S. contractors," and "no clauses in contracts between KBR/Halliburton that make them responsible for labor fraudulently procured by independent contractors or subcontractors." CA.22735. Rather, it was up to other countries to hold foreign companies or citizens accountable for trafficking offenses within their borders. *Ibid.*

II. Procedural Background

1. In 2008, Petitioners filed suit against Daoud and KBR, asserting federal claims under the TVPRA, the Racketeer Influenced and Corrupt Organization Statute ("RICO"), and the ATS, plus a state-law negligence claim that was dismissed as time-barred. Pet.App.67a-68a, 96a-98a. Petitioners later voluntarily dismissed their direct RICO claim against KBR, CA.11857, and the other RICO and conspiracy claims were dismissed on summary judgment, CA.46883.

After this Court held in *Kiobel* that the ATS does not reach extraterritorial claims, the district court granted summary judgment on the ATS claim. Pet.App.110a-112a. As the court concluded, Petitioners' ATS claim is "precisely what *Kiobel* seeks to bar" because "[t]he conduct underlying [the] ATS claim is entirely foreign." Pet.App.111a.

Petitioners shifted focus to their TVPRA claim, which, unlike the ATS, includes a statutory provision, 18 U.S.C. § 1596(a)(1), that expressly provides for extraterritorial jurisdiction "if an alleged offender is a national of the United States...." The district court initially allowed Petitioners to invoke Section 1596, notwithstanding that it was adopted in 2008 and Petitioners seek relief for conduct occurring in 2004. Pet.App.70a-74a. But the district court later reconsidered its decision and dismissed the TVPRA claim, holding that Section 1596 could not apply retroactively. Pet.App.138a-142a.

Also, the district court declined to reconsider its dismissal of the ATS claim. Pet.App.130a-138a. Quoting *Morrison*, it explained that courts facing extraterritoriality questions must consider whether the claimed domestic conduct "coincides with the 'focus' of congressional concern," Pet.App.131a-132a, which, for the ATS, "is the 'tort...committed in violation of the law of nations...,'" Pet.App.132a (quoting 28 U.S.C. § 1350). The court deemed Petitioners' ATS claim impermissibly extraterritorial because the activities constituting trafficking "unquestionably occurred on foreign soil." Pet.App.132a.

The district court emphasized that its prior summary-judgment decision on the ATS hinged on evidence, not mere allegations. Pet.App.131a. No

evidence substantiated Petitioners' allegations of domestic wrongdoing. Pet.App.136a-137a. Without resolving whether the Al Asad airbase qualifies as U.S. territory, the court discounted its relevance because the base is "not at the heart" of Petitioners' allegations that Decedents were trafficked abroad. Pet.App.135a & n.3. Evidence that KBR supposedly knew of alleged mistreatment of *different* foreign workers at *different* bases all "stem[med] from KBR's overseas operations." Pet.App.136a. None of the evidence pertaining to KBR's *U.S.-based* employees indicated that they "understood the circumstances surrounding Daoud's 'recruitment' and 'supply' of third-country nationals like [Petitioners]," or that they "worked to prevent those circumstances from coming to light or Daoud's practices from being discontinued." Pet.App.137a.

2. After Petitioners appealed, this Court held in *RJR Nabisco* that, for statutes like the ATS, a claim is extraterritorial if the conduct relevant to the statute's focus occurred abroad. 136 S. Ct. at 2100-01. Relying on *RJR Nabisco*, the Fifth Circuit panel majority held that Petitioners' ATS claims were impermissibly extraterritorial. Pet.App.7a-24a. The panel unanimously upheld the dismissal of the TVPRA and state-law claims. Pet.App.24a-40a.

Addressing the ATS, the panel majority rejected Petitioners' claims that "*Kiobel* provided an ATS-specific test that largely supplants" the extraterritoriality inquiry in *Morrison*, which hinges on the focus of the statute. Pet.App.10a-11a. The court concluded that *RJR Nabisco* requires courts to "look[] to the ATS's focus, which resolves whether the claims 'touch and concern' the United States territory with 'sufficient force' such that the presumption against

extraterritoriality is displaced." Pet.App.12a (quoting *Kiobel*, 133 S. Ct. at 1669). Here, "none of [the] overseas conduct relevant to [Petitioners'] trafficking claim—even assuming without deciding that it can be imputed to KBR—could support the conclusion that [Petitioners] [s]eek to apply the ATS domestically." Pet.App.14a.

The court rejected Petitioners' attempts to treat the Al Asad airbase as U.S. territory. Pet.App.15a-18a. It recognized that *Kiobel*'s exclusion of ATS claims for conduct "in the territory of a *foreign sovereign*" suggests that Iraq's undisputed retention of *de jure* sovereignty over Al Asad could, alone, foreclose classifying it as U.S. territory. Pet.App.15a-16a. Consistent with other federal courts, the court ultimately concluded that the U.S. Government's temporary presence at Al Asad was insufficient to render it *de facto* U.S. territory. Pet.App.16a-18a.

Applying *RJR Nabisco*, the court rejected Petitioners' claim that KBR's U.S.-based conduct was sufficient to overcome the presumption against extraterritoriality. Pet.App.18a-20a. It agreed with the district court that "the [ATS's] focus is conduct that violates international law, which the ATS '[s]eeks to regulate' by giving federal courts jurisdiction over such claims." Pet.App.19a (quoting *Morrison*, 561 U.S. at 267). Petitioners "failed to connect" KBR's domestic transfer of payments to Daoud through U.S. banks to any claimed violations of international law, and failed to demonstrate how the payments themselves could show that KBR's U.S. employees trafficked or forced anyone to work. Pet.App.19a-20a. Petitioners also had no evidence that any U.S.-based KBR employee understood or concealed Daoud's practices. Pet.App.20a.

The court rejected Petitioners' case-specific policy pleas for overcoming the presumption, based on *RJR Nabisco*, *Kiobel*, and *Morrison*. Pet.App.21a-22a. "The foreign-policy consequences and the international norms underlying the claim are immaterial to our analysis" because "the canon against extraterritorial application is a presumption about a *statute's meaning*," Pet.App.21a (quotation marks omitted), whose "applicability does not depend on 'whether we think Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court,'" Pet.App.21a (quoting *RJR Nabisco*, 136 S. Ct. at 2100 (additional quotation marks omitted)). *Kiobel*'s holding that the presumption applies to the ATS is binding "in *all* cases, preserving a stable background against which Congress can legislate with predictable effects." Pet.App.22a (quoting *Morrison*, 561 U.S. at 261).

3. The dissent in the Fifth Circuit disagreed solely on the ATS claim, though it had "no issue" with the majority's holding that "the ATS focus analysis involves examining the conduct alleged to constitute violations of the law of nations, and the location of that conduct." Pet.App.43a (quotation marks omitted). The dissent acknowledged that "the 'focus' inquiry centers on the *conduct* that constitutes the alleged law of nations violation." Pet.App.44a. But it refused to conclude the ATS has no extraterritorial reach, Pet.App.42a, emphasized non-conduct-related considerations, like KBR's domestic incorporation and general foreign policy concerns, Pet.App.44a-49a, and relied on media reports and complaints unrelated to the workers in this case to conclude that some KBR U.S. employees were aware of issues with Daoud, Pet.App.51a-54a.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Warranting Review, And Further Percolation After *RJR Nabisco* v. *European Community* Is Appropriate.

A. The alleged splits pre-date *RJR Nabisco*, which clarified the framework for ATS extraterritoriality issues and resolved or mooted any conflicts.

Petitioners' request for review is premised on the claim that the circuits have divided over when an ATS claim sufficiently "touches and concerns" U.S. territory, under *Kiobel*, to displace the presumption against extraterritoriality. But Petitioners largely ignore *RJR Nabisco*, in which the Court resolved the threshold question of *how* courts determine if the presumption against extraterritoriality is displaced. As *RJR Nabisco* makes clear, the answer turns on the ATS's "focus." 136 S. Ct. at 2101.

Only the Fifth Circuit—in the opinion below—has considered *RJR Nabisco*'s impact on ATS extraterritoriality questions, and its decision is consistent with the only circuit precedent that squarely applied the focus test to ATS claims. See *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014).[1] Because the other circuit decisions comprising the purported splits pre-date and are contrary to *RJR Nabisco*, this Court should allow lower courts an opportunity to reconsider their approaches to ATS extraterritoriality in light of *RJR Nabisco*.

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[1] The Eleventh Circuit discussed the focus test, but did not clearly apply it. See *infra* at 15-16.

1. In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS, and...nothing in the statute rebuts that presumption." 133 S. Ct. at 1669. If "all...relevant conduct took place outside the United States," the claims fall beyond the statute's reach. *Ibid.* *Kiobel* also explained that the presumption against extraterritoriality is not rebutted even if some domestic conduct is alleged unless "the claims touch and concern the territory of the United States...with sufficient force to displace the presumption," and "mere corporate presence" is not enough. *Ibid.*

The Court indicated that whether ATS claims sufficiently "touch and concern" U.S. territory should be governed by the test in *Morrison*, which analyzed the territorial reach of Section 10(b) of the Securities and Exchange Act of 1934. See *Kiobel*, 133 S. Ct. at 1669. In *Morrison*, the Court explained that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. To determine if the claims involved a foreign or domestic application of the statute, *Morrison* examined the "'focus' of congressional concern" in enacting the statute. *Ibid.* If conduct that is the focus of the statute occurred abroad, then the presumption against extraterritoriality bars the claim even if the defendants are domestic entities and allegations of domestic conduct are "significant." *Id.* at 266, 270. Concluding that the Exchange Act focuses on domestic securities transactions, rather than the place where the deception originated, the Court held that plaintiffs' allegations were extraterritorial because the transactions occurred on foreign exchanges. *Id.* at 266-70.

Although *Kiobel* cited *Morrison*'s discussion and application of the "focus" test, the Court did not explain the ATS's "focus" and simply declared that ATS claims must "touch and concern the territory of the United States" with "sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. 1669 (citing *Morrison*, 561 U.S. at 266-73). As a result, before *RJR Nabisco*, the circuits debated whether *Morrison*'s focus test applies when analyzing ATS extraterritoriality issues. See *infra* Part I.A.3.

2. While this case was pending in the Fifth Circuit, the Court decided *RJR Nabisco*, 136 S. Ct. at 2100-01, which forecloses any dispute over the relevance of *Morrison*'s focus test to ATS claims. The Court unanimously held that whether ATS claims sufficiently "touch and concern" U.S. territory turns on the ATS's "focus." *Ibid.* The Court emphasized and distilled both *Morrison* and *Kiobel* into "a two-step framework for analyzing" *all* extraterritoriality questions, *ibid.*, before addressing the extraterritorial reach of RICO, *id.* at 2101-11.

Under *RJR Nabisco*, the first step of the inquiry asks "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* at 2101. *Kiobel* already resolved this step for the ATS when holding that it "lacks any clear indication that it extended to the foreign violations in that case." *Ibid.*

For statutes like the ATS that are not extraterritorial, *RJR Nabisco* instructs that the inquiry must proceed to the second step and apply *Morrison*'s "focus" test: "[W]e determine whether the case involves

a domestic application of the statute, and we do this by looking to the statute's 'focus.'" *Ibid.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.* Neither *RJR Nabisco* nor *Kiobel*, however, discussed or analyzed the "focus" of the ATS.

3. Despite *RJR Nabisco*, Petitioners allege conflicts among the circuits over how to "determin[e] when an ATS claim sufficiently touches and concerns U.S. territory," Pet.20, divergences that all stem from an asserted split between the Ninth and Fourth Circuits on the one hand, and the Second, Fifth, and Eleventh Circuits on the other, over whether to apply the "focus" test to ATS claims.[2] Pet.20-28. Petitioners' claim of conflict is misguided.

As Petitioners acknowledge, Pet.26, the Ninth Circuit expressly refused to apply the focus test, concluding that *Kiobel* "did not incorporate" it. *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016). In fact, the *Nestle* court concluded—directly contrary to *RJR Nabisco*—that the focus test "cannot sensibly be applied to ATS claims." *Ibid.*

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[2] Petitioners group the Eleventh Circuit with the Fourth and Ninth Circuits for some of their holdings, see Pet.1-2, 24-28, but on the threshold question whether the focus test even applies to ATS claims, construe the Eleventh Circuit as siding with the Second and Fifth Circuits, see Pet.25-26.

Petitioners also admit the Fourth Circuit failed to apply the focus test. Pet.27. In *Al Shimari* v. *CACI Premier Technology, Inc.*, 758 F.3d 516, 529-31 (4th Cir. 2014), the court neither discussed nor analyzed the ATS's focus, and considered all claimed "touches" between the claims and the United States, *regardless* of whether those "touches" are relevant to the ATS's focus. See also *Warfaa* v. *Ali*, 811 F.3d 653, 661 n.11 (4th Cir. 2016) (ATS can apply "to conduct solely outside the United States" based on "extensive and direct 'touches' involving the United States").

These circuits' holdings are directly contrary to, and thus are abrogated by, *RJR Nabisco*. This Court has already resolved the core asserted conflict.

Petitioners state that the Eleventh Circuit has applied the focus test, Pet.24, but in fact, that court's analysis is unclear; the better reading of its precedent is that it did *not* apply *Morrison*'s test, which means *RJR Nabisco* also negates its precedent. In *Baloco* v. *Drummond Co.*, 767 F.3d 1229, 1237 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015), the court discussed, but appeared to distinguish, the focus test upon finding the ATS "does not itself focus on transactions which occur in any pre-identified type of location." That court later indicated that its analysis "amalgamates *Kiobel*'s standards with *Morrison*'s focus test," rather than treating the ATS's focus as the governing test. *Doe* v. *Drummond*, 782 F.3d 576, 590 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016). Thus, the court's standard considers *both* "whether *'the claim' and* 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction." *Ibid.* (emphasis added). Given *RJR Nabisco*'s instruction

that the extraterritoriality test depends *solely* on the location of conduct relevant to the statute's focus, the Eleventh Circuit will have to revisit its approach.[3]

Petitioners correctly observe that the Second Circuit held (even before *RJR Nabisco*)—consistent with the Fifth Circuit—that the extraterritoriality inquiry depends entirely on the ATS's focus. See *Mastafa*, 770 F.3d at 183-85. As the Second Circuit explained, whether ATS claims touch and concern U.S. territory to support jurisdiction depends on the "territorial event[s]" or "relationship[s]" that are the ATS's focus. *Id.* at 184 (quoting *Morrison*, 561 U.S. at 266).

After *RJR Nabisco*, there is no conflict: ATS extraterritoriality is determined based on the ATS's focus. Prior decisions refusing or failing to apply the focus test are immaterial and cannot form a conflict. The circuits should now have an opportunity to address ATS extraterritoriality issues based on *RJR Nabisco*'s instruction that courts must apply the focus test, just as the Fifth Circuit did.

4. Petitioners also allege secondary conflicts emanating from the Fourth, Ninth, and Eleventh Circuits regarding what factors to consider—like a defendant's domestic citizenship—when determining if an ATS claim is extraterritorial. Pet.24-28. For example, Petitioners emphasize that whereas the Second and Fifth Circuits (which applied the focus test) hold a defendant's domestic incorporation is ir-

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[3] At minimum, the Eleventh Circuit's unclear precedent cannot be taken as a considered application of the focus test to ATS claims, as contemplated by *RJR Nabisco*, in a manner that conflicts with the Second Circuit's or Fifth Circuit's rulings. See *infra* Part I.B.

relevant to the analysis, see Pet.App.13a-14a; *Mastafa*, 770 F.3d at 189, the Fourth, Ninth, and Eleventh Circuits have previously deemed this fact as relevant, though not alone sufficient, to whether ATS jurisdiction is proper, *Doe*, 782 F.3d at 595; *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 594 & n.9 (9th Cir. 2014); *Al Shimari*, 758 F.3d at 530-51.

Any such conflict, however, is moot because it necessarily flowed from these circuits' differing views on whether to apply the focus test in the first place. Because *RJR Nabisco* conclusively resolved that threshold question by holding that the focus test controls, the Fourth, Ninth, and Eleventh Circuits will have to—and should be the first to—consider how to evaluate ATS extraterritoriality issues after *RJR Nabisco*. The Court should allow further percolation in light of *RJR Nabisco*.

B. There is no split on the ATS's "focus," and review on that issue is premature.

After *RJR Nabisco*, the courts must address what the focus of the ATS actually is. See 136 S. Ct. at 2101 (noting that *Kiobel* did not resolve this question). Only two circuits have squarely addressed this issue—the Fifth Circuit here, Pet.App.19a, and the Second Circuit pre-*RJR Nabisco*, see *Mastafa*, 770 F.3d at 185. Both circuits concluded that by giving federal courts jurisdiction to adjudicate violations of the law of nations, the ATS focuses on conduct that violates international law. Thus, both circuits agree that an ATS claim is impermissibly extraterritorial unless the tortious conduct occurred in U.S. territory. Because these decisions agree on the statute's focus and, hence, the conduct that is relevant to re-

solving extraterritoriality questions, there is no basis for review.

1. Even before *RJR Nabisco*, the Second Circuit applied the focus test to ATS claims. See *Mastafa*, 770 F.3d at 195; *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015) ("*Balintulo II*"), *cert. denied*, 136 S. Ct. 2485 (2016). Examining *Morrison*, *Kiobel*, and prior circuit precedent, that court held "the 'focus' of the ATS—and thus, the focus of the jurisdictional inquiry—is the conduct alleged to violate the law of nations..., and where that conduct occurred." *Mastafa*, 770 F.3d at 195.

The Second Circuit implemented the ATS's focus on the location of the tortious conduct by adopting a two-step process for determining if a claim is domestic or extraterritorial. The first step asks if the conduct alleged to "constitute[] a violation of the law of nations or aiding and abetting such a violation...sufficiently 'touches and concerns' the territory of the United States so as to displace the presumption against extraterritoriality." *Id.* at 186. If so, the court must then decide if the same conduct, "upon preliminary examination, states a claim for violation of the law of nations or aiding and abetting another's violation of the law of nations." *Id.* at 186-87. If the domestic conduct fails to satisfy "a preliminary assessment of the merits, the court may not rely on that conduct for its extraterritoriality analysis." *Id.* at 186.

Under this inquiry, ATS claims cannot proceed where they are premised on foreign conduct and their only alleged domestic conduct fails to constitute a violation of the law of nations. And, because "the

full 'focus' of the ATS [is] on conduct," any claimed domestic contacts that are collateral to the tortious conduct, like a defendant's U.S. citizenship or other case-specific policy concerns, are irrelevant. See *id.* at 189-90; see also *Balintulo* v. *Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013) ("*Balintulo I*") ("American interests in supporting the struggle against apartheid in South Africa" could not justify permitting ATS claim for foreign conduct).

2. Contrary to Petitioners' assertions, Pet.2, 22-24, 28, the Fifth Circuit's extraterritoriality analysis comports with the Second Circuit's approach. Like the Second Circuit, the Fifth Circuit agreed—consistent with *RJR Nabisco*—that the extraterritoriality analysis is governed by *Morrison*'s focus test, such that "[o]nly conduct relevant to the [ATS's] focus determines domestic application of the statute." Pet.App.11a-12a. Also like the Second Circuit, the Fifth Circuit held that the ATS's focus "is conduct that violates international law, which the ATS 'seeks to regulate' by giving federal courts jurisdiction over such claims." Pet.App.19a (quoting *Morrison*, 561 U.S. at 267). As a result, the Fifth Circuit agreed with the Second Circuit that "case-specific policy arguments" cannot overcome the presumption against extraterritoriality. Pet.App.21a (quoting *Balintulo I*, 727 F.3d at 191).

Petitioners' attempt to find division between the Second and Fifth Circuits, and their assertion that their claim "would have been able to proceed in the Second Circuit," fundamentally misinterprets *Mastafa*. *Compare* Pet.22-24, *with Mastafa*, 770 F.3d at 190-94. Petitioners cite *Mastafa*'s analysis of defendants' domestic financial conduct that allegedly

aided and abetted the violations of international law, irrespective of any foreign conduct. 770 F.3d at 190-91. But here, Petitioners have not asserted an aiding-and-abetting claim; rather, they alleged KBR is *directly responsible* (by imputation) for trafficking and forced labor committed abroad. Under *Mastafa*, KBR's domestic payments and profits cannot possibly displace the presumption against extraterritoriality because those payments did not amount to trafficking or forced labor. See *id.* at 186 (requiring domestic conduct alone to "constitute[] a violation of the law of nations"). That is precisely what the Fifth Circuit concluded here: Petitioners "failed to show how KBR's financial transactions" through U.S. banks "permit a domestic application of the ATS," when nothing showed that those payments were connected to or constituted violations of international law. Pet.App.19a-20a.

Petitioners also ignore the *second* step of the Second Circuit's analysis, which ultimately held the defendants' domestic financial transactions were insufficient to establish jurisdiction because they did not state a cognizable ATS claim. See 770 F.3d at 191-93 (plaintiffs failed to adequately plead the *mens rea* required for aiding-and-abetting claim). Under both the Second Circuit's and Fifth Circuit's tests, Petitioners' claim is extraterritorial because the alleged conduct comprising the ATS violations occurred abroad.

3. The Eleventh Circuit has not squarely embraced the focus test for ATS claims, instead using a hybrid version of the test. See *supra* at 15-16. Regardless, that court's analysis pre-dated *RJR Nabisco* and—unlike the Second and Fifth Circuits—

certainly cannot be read as a definitive attempt to ascertain the ATS's focus. The Eleventh Circuit's rulings provide no basis for review, particularly given the lack of clarity in its positions and the recency of *RJR Nabisco*.

Ultimately, however, the Eleventh Circuit's approach is not materially different than the Second Circuit's or Fifth Circuit's tests. The key consideration, which "carries significant weight," is "the domestic or extraterritorial location where the defendant is alleged to engage in conduct that directly or secondarily results in violations of international law...." *Doe*, 782 F.3d at 592. This emphasis on the location of the tortious conduct is effectively dispositive, as shown by the repeated dismissals of suits against U.S. corporations accused of foreign wrongdoing even when some conduct allegedly occurred within the United States.[4]

4. Because there are no meaningful differences between the circuit decisions applying the focus test to the ATS, there is no split worthy of review. At a minimum, given how recently the Court clarified the threshold issue and how few circuits have applied the focus test to the ATS, the Court should await a clear conflict of authority and allow more circuits to weigh in on the issue.

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[4] See *Doe*, 782 F.3d at 598, 601; *Baloco*, 767 F.3d at 1238; see also *Cardona* v. *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1187, 1191 (11th Cir. 2014) (reversing denial of motion to dismiss ATS claims against U.S. defendant for torture in Columbia), *cert. denied*, 135 S. Ct. 1842 (2015).

II. Review Also Should Be Denied Because Of Serious Vehicle Problems And Because Congress Has Provided Other Remedies.

This case is a poor vehicle for resolving the standard for distinguishing extraterritorial from domestic ATS claims because it would not affect the outcome here; Petitioners' claim is extraterritorial under any standard and also fails on other grounds. Further, Congress's creation of statutory remedies diminishes the importance of the ATS question presented for other cases.

A. Petitioners' claim is extraterritorial under every circuit's approach.

In addition to misconstruing the Second Circuit, see *supra* Part I.B.2, Petitioners are wrong that they "would easily have satisfied" the extraterritoriality tests in the Ninth, Eleventh, and Fourth Circuits. See Pet.28. Their foreign-focused claim is impermissibly extraterritorial no matter the test.

The Ninth Circuit suggested (in dicta) that a defendant's U.S. citizenship "may well be" one factor in determining if the presumption against extraterritoriality is displaced, but the court has not resolved the extent of U.S. conduct necessary to permit an ATS claim. *Mujica*, 771 F.3d at 594; see also *Nestle USA, Inc.*, 766 F.3d at 1028. Nothing in these decisions suggests that Petitioners' allegations of foreign trafficking and forced labor possess the requisite nexus with the United States.

The Eleventh Circuit's analysis supports dismissal here. In *Doe* v. *Drummond*, the court emphasized "the site of the conduct" and gave it "significant

weight." 782 F.3d at 592. The defendants there allegedly aided and abetted atrocities by a U.S.-designated terrorist group in Columbia. *Id.* at 580-81. The plaintiffs contended the defendants engaged in domestic conduct, including "making decisions to engage with" and "agreeing to fund" the terrorists, plus allegedly knowing about and agreeing to the terrorists' committing murders in Columbia. *Id.* at 598. Yet this U.S. conduct, U.S. interests, and the defendants' status as U.S. corporations were deemed insufficient to displace the presumption against extraterritoriality because the killings and collaboration "all took place in Columbia." *Ibid.* Same here: KBR's domestic payments and claimed awareness of human trafficking at foreign worksites, even if considered alongside the U.S. interests and KBR's status as a U.S. corporation, do not sufficiently touch and concern U.S. territory when the claimed trafficking and forced labor all took place abroad.

The Fourth Circuit's case-specific inquiry also would likely not extend ATS jurisdiction to Petitioners' claim because the domestic allegations there were far more extensive than Petitioners' evidence. In *Al Shimari*, not only was the defendant a U.S. corporation providing services at a U.S. military base in Iraq, but the defendant's U.S. managers allegedly gave "tacit approval to the acts of torture" at Abu Ghraib, "attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it." 758 F.3d at 530-31. In contrast, Petitioners presented *no* evidence that KBR's U.S. employees were aware of, much less covered up, trafficking. Pet.App.20a. The *only* evidence involving KBR's U.S. employees confirms that KBR investigated and concluded that spe-

cific allegations of wrongdoing were baseless. See CA.33743-49; see also CA.48133-36. Jurisdiction cannot rest on complaints that never reached KBR's U.S. managers or unsubstantiated allegations.

Accordingly, any differences between the circuits' tests for ATS extraterritoriality are immaterial to the outcome here. None of these approaches would save Petitioners' ATS claim.

B. Petitioners' claim fails on independent grounds.

Another reason to deny review is that Petitioners' ATS claim suffers from other legal defects that obviate the need to reach the extraterritoriality issue, or at least undermine its significance here.

1. The district court failed to recognize that the TVPRA—a comprehensive statutory framework that defines actionable trafficking and forced labor, and provides civil and criminal remedies—displaces *common-law* ATS claims for the same conduct. Pet.App.81a-82a. In all instances "[w]hen Congress addresses a question previously governed by a decision rested on federal common law, ...the need for such an unusual exercise of law-making by federal courts disappears." *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 423 (2011) (quotation marks omitted). No "evidence of a clear and manifest [congressional] purpose" is necessary for a statute to displace federal common law. *Ibid.* (quotation marks omitted). Rather, a statute displaces federal common law simply if it "speak[s] directly to [the] question at issue." *Id.* at 424 (quotation marks omitted).

Congress spoke "directly to" the question of trafficking and forced labor in the TVPRA. Congress

first enacted substantive criminal statutes that prohibit forced labor and trafficking. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (codified at 18 U.S.C. §§ 1589, 1590). Congress later expanded the remedies to include a civil right of action. TVPRA of 2003, Pub. L. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595(a)). Thus, the TVPRA expressly defines: (1) the conduct constituting actionable forced labor and trafficking, 18 U.S.C. §§ 1589, 1590; (2) the standard for civil (and criminal) liability, *id.* §§ 1589, 1590, 1595(a); (3) the available remedies, including private claims for damages, *id.* § 1595(a); and (4) the otherwise applicable statutes of limitations, *id.* § 1595(c). Importantly, Congress expanded the TVPRA's scope in 2008 to reach extraterritorial offenses by U.S. nationals, U.S. residents, and defendants otherwise present in the United States. *Id.* § 1596(a)(1)-(2).

By contrast, the ATS "create[s] no new causes of action"; it just "underwrite[s] litigation of a narrow set of common law actions derived from the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 721, 724 (2004). Congress can "shut the door to the law of nations...at any time (explicitly, or implicitly by treaties or statutes that occupy the field)." *Id.* at 731. That is what Congress did with the TVPRA's detailed framework covering civil liability for forced labor and trafficking. The TVPRA therefore excludes federal common-law claims for the same conduct under the ATS. See *Am. Elec. Power*, 564 U.S. at 424; *cf. Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (noting certain abuses "have been addressed by Congress in statutes such as the [Torture

Victims Protection Act]...and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted.").[5]

Under these precedents, Petitioners' trafficking and forced-labor allegations can only be brought under the TVPRA. Yet Petitioners no longer challenge the dismissal of their TVPRA claim, so they have no cognizable claim against KBR. This independent ground negates any reason to review Petitioners' ATS extraterritoriality question presented.

2. Another alternative ground for affirmance, counseling against review of the question presented, is that if the Court holds that corporate liability is not available under the ATS in *Jesner* v. *Arab Bank, PLC*, 137 S. Ct. 1432 (2017) (granting certiorari), that ruling would independently defeat Petitioners' claim. Like the respondent in *Jesner*, KBR has argued that the lack of any universal international norm of corporate liability defeats recovery under the ATS. In fact, international tribunals have declined to hold corporations liable for violations of customary international law and rejected proposals to grant jurisdiction over corporations. *Kiobel* v.

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[5] KBR is not aware of other decisions addressing the TVPRA's displacement of ATS trafficking or forced-labor claims. Prior to the Court's decision in *American Electric Power*, 564 U.S. at 423-24, a few courts disagreed as to whether the Torture Victims Protection Act displaces common-law claims under the ATS. *Compare Enahoro* v. *Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005) (TVPA provides exclusive remedy for torture claims), *with Kadic* v. *Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *and Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005) (per curiam) (contrary conclusion). These decisions are questionable in light of *American Electric Power*.

Royal Dutch Petroleum Co., 621 F.3d 111, 132-37 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013); see also *Sosa*, 542 U.S. at 732 & n.20.

In any event, there is no reason to delay denying this petition while resolving *Jesner* because a decision there allowing corporations to be sued for ATS claims would not impact this case, given the numerous other reasons (discussed above and below) warranting denial of review or affirmance here. But a holding that corporations like KBR are exempt from ATS liability would conclusively defeat Petitioners' claim, thereby mooting the extraterritoriality issue.

C. The ATS question presented has diminishing significance to cases like this.

Congress's expansion of the TVPRA to reach foreign trafficking and forced labor not only offers an alternative ground for affirmance, see *supra* Part II.B.1, it renders the question presented here of little significance to the policy concerns that Petitioners raise, see Pet.32-36. The longstanding availability of statutory remedies makes it unlikely that parties will rely on the ATS in this context, which in turn diminishes the importance of any purported split on the scope of the ATS. Petitioners chose not to continue challenging the dismissal of their TVPRA claim, but that does not lessen the TVPRA's significance to other parties seeking relief. The availability of alternative statutory remedies for extraterritorial trafficking and forced labor renders an ATS claim unnecessary in other cases.

The TVPRA also affects Petitioners' arguments on the ATS. Petitioners claim that U.S. foreign policy interests favor providing an ATS remedy for traf-

ficking and forced labor by U.S. companies abroad. Pet.32-36. But Congress *already* addressed those interests by enacting the TVPRA, which is "a statute more specific than the ATS" that reaches foreign conduct by U.S. defendants. See *Kiobel*, 133 S. Ct. at 1669. Congress's adoption of a separate and explicit statutory remedy undercuts Petitioners' contention that courts should expand the ATS to reach the same conduct encompassed by the TVPRA. See, *e.g.*, *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

D. This Court has repeatedly denied certiorari on the same question.

Even before *RJR Nabisco*, the Court repeatedly declined to review cases where parties posed the same underlying question regarding the standard for determining if an ATS claim is extraterritorial. There is no reason for a different result here.

The Court's denials of review involve the same cases and circuits that Petitioners raise:

- in *Ntsebeza* v. *Ford Motor Co.*, No. 15-1020, the plaintiff sought review of the Second Circuit's decision in *Balintulo II*, addressed above, (pet. filed Feb. 10, 2016, cert. denied, 136 S. Ct. 2485 (2016));
- in *Doe* v. *Drummond Co.*, No. 15-707, the plaintiff sought review of the Eleventh Circuit decision discussed above, (pet. filed Nov. 25, 2015, cert. denied, 136 S. Ct. 1168 (2016));
- in *Baloco* v. *Drummond Co.*, No. 15-263, the plaintiff sought review of another Eleventh Cir-

cuit decision discussed above, (pet. filed Aug. 24, 2015, cert. denied, 136 S. Ct. 410 (2015));[6] and

- in *Nestle USA, Inc.* v. *Doe*, No. 15-349, the defendant sought review of the Ninth Circuit's decision addressed above, (pet. filed Sept. 18, 2015, cert. denied, 136 S. Ct. 798 (2016)).

There is no meaningful difference between Petitioners' challenge here and these prior petitions that were denied. And there is even *less* reason to review the ATS extraterritoriality question now, right after *RJR Nabisco*—which only the Fifth Circuit has applied. Any review of the standard for displacing the presumption against extraterritoriality should await further development and a case untainted by the multiple vehicle problems present here.

III. The Fifth Circuit's Ruling Is Correct.

RJR Nabisco clarified that the ATS extraterritoriality analysis requires determining the statute's focus and then examining where the conduct relevant to that focus occurred. 136 S. Ct. at 2101. The Fifth Circuit applied that framework here and correctly: (1) concluded the ATS focuses on the conduct that violates international law; and (2) determined that all the alleged conduct comprising the violation here occurred abroad. Pet.App.18a-19a. The Fifth Circuit also correctly rejected Petitioners' "case-specific policy arguments" for allowing their claim as an attempted end-run around the presumption against extraterritoriality. Pet.App.21a.

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[6] See also Pet. for Cert. at i, *Chiquita* v. *Cardona*, No. 14-777 (filed Dec. 30, 2014), *cert. denied*, 135 S. Ct. 1842 (2015).

A. As relevant to the ATS's focus, Petitioners' claim alleges only foreign conduct.

1. The Fifth Circuit's proper starting point for determining if Petitioners' claim is domestic or extraterritorial was to resolve the "focus of congressional concern" for the ATS. Pet.App.18a (quoting *Morrison*, 561 U.S. at 266). By its terms, the ATS gives federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The language targeting "tort[s]...in violation of the law of nations" or U.S. treaties confirms that the ATS's focus is on conduct that violates international law. See Pet.App.19a.

Petitioners incorrectly assert that the ATS has no focus of congressional concern because the statute is cast in jurisdictional terms. Pet.30. This Court, in *Kiobel* and again in *RJR Nabisco*, rejected the notion that the ATS's jurisdictional nature warrants a different extraterritoriality analysis than other statutes. See *RJR Nabisco*, 136 S. Ct. at 2100; *Kiobel*, 133 S. Ct. at 1664. In the ATS, Congress sought to make specific conduct actionable by conferring federal courts with jurisdiction over "a very limited category" of claims "defined by the law of nations and recognized at common law." See *Sosa*, 542 U.S. at 712. The ATS thus reflects Congress's intent to regulate violations of the law of nations, even if indirectly, by "allow[ing] federal courts to recognize certain causes of action based on sufficiently definite norms of international law." See *Kiobel*, 133 S. Ct. at 1664; see also *Morrison*, 561 U.S. at 267.

2. Because the ATS focuses on the violation of the law of nations, the Fifth Circuit was right that

the location of the conduct alleged to constitute a violation determines if Petitioners' claim is domestic or extraterritorial. Pet.App.12a. There is no dispute that Decedents' and Gurung's alleged recruitment, transportation, and detention occurred in Nepal, Jordan, India, and Iraq. Pet.App.14a. This alone establishes that Petitioners' claim is impermissibly extraterritorial.

The *only* conduct that allegedly occurred within the United States was irrelevant to the purported violation which is the focus of the ATS. Pet.App.18a-20a. Petitioners' only pleaded claim was for direct (vicarious) liability for trafficking or forced labor, but the fact that KBR made domestic payments to a foreign subcontractor and earned profits within the United States is irrelevant to whether KBR trafficked or forced anyone to work. Pet.App.19a-20a. Moreover, Petitioners have no evidence that any KBR U.S.-based employee knew about the subcontractor's recruitment and treatment of third-country nationals, and no evidence that KBR concealed any wrongdoing, Pet.App.19a-20a. Petitioners' failure to show any actionable domestic conduct confirms that their ATS claim was properly dismissed.

3. The Fifth Circuit also correctly rejected Petitioners' attempt to manufacture domestic conduct by mischaracterizing the Al Asad airbase in Iraq as U.S. territory. Pet.App.15a-18a. As the court aptly noted, Petitioners' flawed view would extend *all* U.S. laws to all operations at Al Asad, Pet.App.15a n.4, and would improperly do so for *all* temporary U.S. military installations abroad.

First, the U.S. military presence at Al Asad was temporary, from 2003-11, Pet.App.17a-18a, and did

not change Iraq's *de jure* sovereignty over Al Asad, see Coalition Provisional Authority Order No. 17 (Revised) § 9 (June 2004) (premises operated by Multinational Forces in Iraq "remain Iraqi territory"). Because the ATS requires the relevant conduct to occur "in the United States," *RJR Nabisco*, 136 S. Ct. at 2101, Iraq's retention of legal sovereignty at Al Asad forecloses Petitioners' reliance on conduct at that airbase to displace the presumption against extraterritoriality.

Second, the transient U.S. presence at Al Asad also means that the base was not *de facto* U.S. territory. The Fifth Circuit correctly rejected reliance on habeas cases involving the "unique status" of the U.S. Naval Station at Guantanamo Bay, where the United States "has maintained complete and uninterrupted control...for over 100 years." *Boumediene* v. *Bush*, 553 U.S. 723, 752, 764 (2008); see also *Rasul* v. *Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (emphasizing the United States' "unchallenged and indefinite control" at Guantanamo); Pet.App.17a-18a. Guantanamo is categorically unlike the temporary U.S. military operation at Al Asad, which is why federal courts have refused to extend federal laws to similar U.S. bases abroad. See, *e.g.*, *Al Maqaleh* v. *Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (U.S. airbase in Afghanistan not *de facto* U.S. territory; "no indication of any intent to occupy the base with permanence").

The United States' lack of *de jure* or *de facto* sovereignty at Al Asad supports the Fifth Circuit's conclusion that it was not U.S. territory. KBR's actions at Al Asad in Iraq thus "cannot constitute domestic conduct relevant to their ATS claim[]." Pet.App.18a.

As the Fifth Circuit correctly held, Petitioners' ATS claim is impermissibly extraterritorial under *Kiobel* and *RJR Nabisco*.

B. Petitioners' policy-based arguments are contrary to *Kiobel* and *RJR Nabisco*.

1. Petitioners object to the Fifth Circuit's decision on various policy grounds, but these are arguments against applying the presumption against extraterritoriality to the ATS in the first instance—a position that *Kiobel* and *RJR Nabisco* rejected. See Pet.30-32. This Court emphasized that the mere *potential* for conflict—and the need for a clear and definite rule, rather than case-specific inquiries—justifies applying the presumption against extraterritoriality to *all* ATS claims. So it is no answer to debate whether allowing an ATS claim on these facts would create a conflict with international law, whether another country could provide relief, or whether the particular U.S. interests here would support recovery. Petitioners simply fail to accept what *Kiobel* and *RJR Nabisco* have already decided.

For instance, Petitioners contend that the focus test should not bar their claim because allowing a claim premised on international law would not conflict with foreign law. Pet.30. But *Kiobel* applied the presumption against extraterritoriality to the ATS *despite* acknowledging the ATS incorporates international law. 133 S. Ct. at 1665. That presumption applies "across the board" to *all* ATS claims, "regardless of whether there is a risk of conflict between the American statute and a foreign law." *RJR Nabisco*, 136 S. Ct. at 2100 (quoting *Morrison*, 561 U.S. at 255).

2. Petitioners also misplace reliance on *Sosa*'s pre-*Kiobel* references to two lower-court decisions addressing ATS violations abroad by individuals who were later present in the United States. Pet.31-32 (discussing *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994)). But *Sosa* did not address the presumption against extraterritoriality; the issue was whether the alleged conduct violated a sufficiently specific and universally-recognized norm such that it could be actionable under the ATS. 452 U.S. at 724-25 (citing *Filartiga*); see also *id.* at 731-33. Petitioners cannot credibly claim that *Sosa*'s citations to *Filartiga* and *Marcos* for an unrelated proposition supports extending the ATS to claims that focus on foreign conduct.

Kiobel forecloses any such suggestion, including by noting that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." 133 S. Ct. at 1669. *Kiobel* also emphasized that the key is where the "relevant *conduct* took place." *Ibid.* (emphasis added); see also *RJR Nabisco*, 136 S. Ct. at 2101. Unsurprisingly, every circuit has thus agreed that a defendant's U.S. citizenship is irrelevant, or at least insufficient, to displace the presumption against extraterritoriality. See, *e.g.*, *Doe*, 782 F.3d at 596; *Mujica*, 771 F.3d at 594; *Mastafa*, 770 F.3d at 187.

3. Petitioners' rhetoric about U.S. foreign policy interests, Pet.32-36, ignores the fundamental purpose of the presumption against extraterritoriality and this Court's reasons for applying it to the ATS. The presumption's "wisdom" is to avoid "[t]he results of judicial-speculation-made-law—divining what

Congress would have wanted if it had thought of the situation before the court...." *Morrison*, 561 U.S. at 261. "Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Ibid*. *Kiobel* therefore held that the presumption applies to *all* ATS suits, where "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified" and the need for "judicial caution" is great. 133 S. Ct. at 1664. *Kiobel* implemented this principle by requiring ATS claims to "touch and concern" U.S. *territory*—not just U.S. interests—and do so with "sufficient force to displace the presumption." *Id.* at 1669; see also *RJR Nabisco*, 136 S. Ct. at 2101 (location of "conduct relevant to the focus" of the ATS controls).

Petitioners' attempts to inject case-specific policy considerations thus invite "judicial-speculation-made-law" that the presumption against extraterritoriality is designed to prevent. See *Morrison*, 561 U.S. at 261. Rather than ask whether "Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court," *RJR Nabisco*, 136 S. Ct. at 2100 (quotation marks omitted), courts should leave that judgment to Congress, which is free to address particular concerns by enacting "a statute more specific than the ATS," *Kiobel*, 133 S. Ct. at 1669.

Petitioners and their International Law Scholars amici emphasize trafficking, but they largely ignore that Congress has already responded by adopting criminal statutes penalizing trafficking and forced labor, adding a civil remedies provision to the TVPRA, and expanding it to reach foreign violations by U.S. defendants. See *supra* Parts II.B.1, II.C.

Petitioners and their *amici* appear to want a special extraterritoriality principle for trafficking, but *Morrison*, *Kiobel*, and *RJR Nabisco* reject that approach.

Congress's decision to police human trafficking by enacting "a statute more specific than the ATS," see *Kiobel*, 133 S. Ct. at 1669, underscores that the decision of how to address those concerns should lie with Congress. Whatever the foreign policy interests may be, they provide no basis for overcoming the presumption against extraterritoriality for the ATS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

18 U.S.C. § 1589

Forced labor

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,

shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of

a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 1590

Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).

18 U.S.C. § 1595

Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than the later of—

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

18 U.S.C. § 1596

Additional jurisdiction in certain trafficking offenses

(a) In general.—In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—

(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

(2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

(b) Limitation on Prosecutions of Offenses Prosecuted in Other Countries.—No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.