NO. 15-20225

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAMCHANDRA ADHIKARI; DEVAKA ADHIKARI; JIT BAHDUR KHADKA; RADHIKA KHADKA; BINDESHORE SINGH KOIRI; PUKARI DEVI KOIRI; CHITTIJ LIMBU; KAMALA THAPA MAGAR; MAYA THAPA MAGAR; BHAKTI MAYA THAPA MAGAR; TARA SHRESTHA; NISCHAL SHRESTHA; DIL BAHADUR SHRESTHA; GANGA MAYA SHRESTHA; SATYA NARAYAN SHAH; RAM NARYAN THAKUR; SAMUNDRI DEVI THAKUR; JITINI DEVI THAKUR; BHIM BAHADUR THAPA; BISHNU MAYA THAPA; BHUJI THAPA; KUL PRASAD THAPA; BUDDI PRASAD GURUNG,

Plaintiffs – Appellants

v.

KELLOGG BROWN & ROOT, INCORPORATED; KELLOGG BROWN & ROOT SERVICES, INCORPORATED; KBR, INCORPORATED; KBR HOLDINGS, L.L.C.; KELLOGG BROWN & ROOT L.L.C.; KBR TECHNICAL SERVICES, INCORPORATED; KELLOGG BROWN & ROOT INTERNATIONAL, INCORPORATED; SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED; OVERSEAS EMPLOYMENT ADMINISTRATION; OVERSEAS ADMINISTRATION SERVICES,

Defendants – Appellees

On Appeal from the U.S. District Court for the Southern District of Texas
Civil Action No. 4:09-cv-01237, Hon. Keith P. Ellison

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Ramchandra Adhikari; Devaka Adhikari; Jit Bahdur Khadka; Radhika Khadka; Bindeshore Singh Koiri; Pukari Devi Koiri; Chittij Limbu; Kamala Thapa Magar; Maya Thapa Magar; Bhakti Maya Thapa Magar; Tara Shrestha; Nischal Shrestha; Dil Bahadur Shrestha; Ganga Maya Shrestha; Satya Narayan Shah; Ram Naryan Thakur; Samundri Devi Thakur; Jitini Devi Thakur; Bhim Bahadur Thapa; Bishnu Maya Thapa; Bhuji Thapa; Kul Prasad Thapa; and Buddi Prasad Gurung

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Defendants-Appellees

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STATEMENT REGARDING ORAL ARGUMENT

The district court's grant of summary judgment on Plaintiffs' claim under the Trafficking Victims Protection Reauthorization Act is fully supported by authoritative decisions, as is the court's dismissal of Plaintiffs' negligence claim as untimely. The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), squarely forecloses Plaintiffs' claim under the Alien Tort Statute. Because this appeal presents some issues of first impression for this Court, however, KBR believes that oral argument may assist the Court's decisional process.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes

Rules

Congressional and Executive Materials

Page(s)

International Materials

Other Authorities

ISSUES PRESENTED

1. Whether well-established anti-retroactivity principles bar Plaintiffs' claims for extraterritorial conduct under the Trafficking Victims Protection Reauthorization Act ("TVPRA") that were not actionable under the TVPRA at the time of the alleged events.

2. Whether the district court correctly granted summary judgment on Plaintiffs' claim under the Alien Tort Statute ("ATS"), when:

   a. *Kiobel* bars ATS claims when, as here, all the relevant conduct occurred abroad and insufficient domestic conduct "touches and concerns" the territory of the United States to rebut the presumption against extraterritoriality;

   b. Plaintiffs' request for leave to amend their complaint in light of *Kiobel* was unjustifiably delayed and futile;

   c. The TVPRA displaces federal common-law ATS claims for foreign trafficking and forced labor;

   d. ATS claims are not cognizable against corporations; and

   e. There are no allegations of state action, which is required under the ATS.

3. Whether Plaintiffs' negligence claims were barred by limitations when Plaintiffs consented to application of a two-year statute of limitations under state law and failed to show any basis for equitable tolling.

STATEMENT OF THE CASE

An Iraqi insurgent group kidnapped and murdered twelve Nepali men as they traveled through Iraq to a U.S. military base to work for Daoud & Partners, a Jordanian company that had a subcontract with KBR. The families of eleven of the victims, and one Daoud employee, settled with Daoud, and now seek to hold KBR liable for violations of the TVPRA, the ATS, and state law.

Before dismissing the lawsuit, (ROA.25232), the district court considered the summary judgment evidence and (initially) pared the dispute to a single claim alleging that KBR should be held vicariously liable under the TVPRA for trafficking allegations lodged against foreign companies unrelated to KBR. (ROA.46883). The alleged misconduct occurred, if at all, in Nepal, India, Jordan, and Iraq against citizens of Nepal. (ROA.501; ROA.510; ROA.524).

A. *Statement Of Facts.*

Of the 23 Plaintiffs, 22 are family members of eleven Nepali men ("Decedents") kidnapped and killed in 2004 by the Ansar al-Sunna Army, an Iraqi insurgent group. (ROA.502-06; ROA.523-24; ROA.24530). The other Plaintiff, Buddi Prasad Gurung, is a former Daoud employee who worked in a warehouse at a U.S. military air base at Al Asad in Iraq. (ROA.506-07).

1. The Eleven Nepali Decedents.

Labor migration is common in Nepal. Many Nepali youth—like the Decedents—leave because employment outside Nepal can earn them far more money in a few months than they can make in a year in Nepal. (ROA.517-18; ROA.43114-16).

The Decedents contacted various Nepali individuals and companies and engaged a Nepali employment agency, Moonlight Consultant Pvt., Ltd. ("Moonlight"), to arrange their travel to Iraq via Jordan, where Jordanian companies Daoud or Morning Star for Recruitment and Manpower Supply ("Morning Star") arranged their housing. (ROA.511-12; ROA.518). Neither Moonlight nor Morning Star have any connection to KBR.

The Decedents' family members testified they never spoke to anyone from KBR and do not know of any KBR involvement in Decedents' recruitment or transportation. (ROA.42343-44; ROA.42888; ROA.44110-11; ROA.41963; ROA.41853). Plaintiffs alleged that Daoud or Morning Star—not KBR—housed the Decedents in Jordan and transported them into Iraq, (ROA.520-21), and alleged the Decedents traveled to Iraq to work for Daoud, which KBR subcontracted to staff facilities and help operate life-support functions on U.S. military bases. (ROA.516-17).

Plaintiffs initially targeted Daoud in this litigation, and settled with Daoud for a confidential amount. (ROA.500; ROA.24975). Seventeen Plaintiffs also received a total of $1,203,068.92 in workers compensation awards ($58,465.90–$236,957.94 per family) from the U.S. Department of Labor as compensation under the Defense Base Act.[1] (ROA.23360-61). Plaintiffs also received one million rupees each from the government of Nepal. (ROA.48423; ROA.48427).

The evidence shows that Decedents and Gurung were not confined in harsh conditions in Jordan or forcibly transported to Iraq as alleged. While in Jordan, Decedent Prakash Adhikari wrote to his family and described his living conditions and eagerness to work in Iraq that was shared by his fellow Nepalis. (ROA.22853; ROA.22865 n.3; ROA.40144-47). Adhikari wrote that he and over a dozen Nepali 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." (ROA.22865 n.3; ROA.40144).

Plaintiffs say that Decedents "were transported by KBR's agents against their will to a U.S. military base in Iraq." Plaintiffs.Br.2. Adhikari's four-page letter negates this assertion of coercion, trickery, or any type of threat because

[1] According to Plaintiffs, "$3,500 is more than a decade's worth of earnings for many Nepalis." (ROA.520).

Adhikari told his parents he was headed to work at a U.S. military facility in Iraq, reassuring them "[d]on't worry," he had heard "that the conditions in the American Camps in Iraq is very good." (ROA.22853; ROA.40144). Adhikari sent his regards to his family, adding that he was in a foreign country because of their encouragement. (ROA.40144).

Additional documents show that Decedents knowingly sought work in Iraq, and were not lured by promises of employment in Jordan, the U.S., or elsewhere. (ROA.43115-16).

The Decedents never arrived at the U.S. base at Al Asad because the Ansar al-Sunna Army abducted them as they traveled through the war zone, (ROA.522-23), videotaped the Decedents holding their passports and denouncing Western governments, and videotaped their executions, (ROA.521; ROA.523; ROA.34870-84). The Decedents never had contact with anyone from KBR.

2. Buddi Gurung.

Plaintiff allege the Decedents and Buddi Gurung were trafficked to Iraq in a common "scheme." Plaintiffs.Br.2. Unlike Decedents, [redacted] (ROA.30263). [redacted] (ROA.30261-63), [redacted] (ROA.30263). [redacted] (ROA.30277). [redacted]

[redacted] (ROA.40003). Like Decedents, Gurung had no contact with anyone from KBR.

While in Nepal, Gurung contacted a trusted individual who put him in touch with another Nepali, Shiva Karki, in Delhi, India. (ROA.22953; ROA.30266; ROA.30274; ROA.30276). [redacted] (ROA.30275; ROA.30277). [redacted] (ROA.30278-79; ROA.30286). [redacted] (ROA.30288).

While Plaintiffs allege that KBR—through unspecified "agents"—kept Gurung and the Decedents captive in squalid conditions, Gurung testified [redacted] (ROA.30082). [redacted] (ROA.30083; ROA.30091). [redacted] (ROA.30089-90).

Plaintiffs allege that Gurung survived a harrowing, unprotected caravan ride through an Iraqi war zone like the Decedents. (ROA.524). [redacted] (ROA.30093-95; ROA.30100). They [redacted] took a bus to the Baghdad airport, and flew to Al Asad. (ROA.22924-28; ROA.30100-06). Gurung then met [redacted] for Daoud, the company that hired him. (ROA.22933-34; ROA.30107-08). Before arriving at Al Asad, Gurung never met or spoke with anyone from KBR. (ROA.22952; ROA.40003).

Plaintiffs allege that KBR ran Al Asad like a slave labor camp and that its treatment of Gurung violated forced-labor standards. (ROA.552). Gurung's testimony, though, was that Gurung lived in a bunkhouse with a dozen other Daoud employees, and—in favorable contrast to Gurung's home in Nepal—had a shared bathroom nearby with hot-water showers, toilets, and sinks. (*Compare* ROA.22934-35; ROA.30108-09, *with* ROA.22969; ROA.40022). At Al Asad, Gurung and the other workers had three meals a day, [redacted] (ROA.22936-37; ROA.30109-10). Gurung and the others had access to an onsite entertainment facility where they played ping-pong and bought chips, cigarettes, and other personal items. (ROA.22937-39; ROA.30110-11). They had access to an onsite Subway sandwich

shop where Gurung occasionally ate, including with people who worked for KBR. (ROA.22938-39; ROA.30111).

[redacted] (ROA.30114). Gurung never told anyone from KBR that he had been trafficked into Iraq and wanted to leave. [redacted] (ROA.30113).

Gurung voluntarily chose to stay and work at Al Asad. In December 2004, after nearly five months at Al Asad, Gurung signed a new employment agreement with Daoud providing him a monthly salary of $330, far more per month than Gurung had ever earned. (ROA.22945; ROA.30117; ROA.30328). In August 2005, Gurung renewed his employment agreement, [redacted] (ROA.22853-54; ROA.30117; ROA.30261-63). Gurung viewed the salary as "fair." (ROA.22946; ROA.30117).

Plaintiffs allege that "[a]fter fifteen...months [at Al Asad], Plaintiff Gurung was permitted to return to Nepal." (ROA.525). In his sworn testimony, however, Gurung explained that he was fired from his job after the Army found contraband alcohol in his bed. (ROA.22943; ROA.30115). Gurung's employer, Daoud, arranged and paid for Gurung's flight home. (ROA.22947; ROA.30118).

In their amended complaint, Plaintiffs alleged that Gurung "desperately wanted to return home to Nepal," (ROA.521), despite his termination, despite [redacted] (ROA.30266). [redacted] (ROA.30253-56). While U.S. law authorizes immigration benefits and services to a trafficking victim, *see* § 107(b)(1) of the 2003 TVPRA, Gurung did not apply for asylum based on trafficking-victim status. (ROA.25712; ROA.30250). [redacted] (ROA.30250).

B. *Procedural History.*

In 2009, the district court granted KBR's motion to dismiss Plaintiffs' state-law negligence claims. (ROA.2334-35). In 2012, KBR moved for summary judgment. (ROA.30527-73). The Supreme Court later issued its landmark *Kiobel* decision, which the parties fully briefed, (ROA.18873-900; ROA.46677-738; ROA.20596-626), and the district court granted summary judgment on Plaintiffs' ATS claim.[2] (ROA.22069-91).

[2] Many of Plaintiffs' claimed "Relevant Facts" at 2-4 are not supported by their record citations. For example, Plaintiffs' first sentence asserts that the district court found that "sufficient evidence" supported the allegation that KBR perpetrated a taxpayer-funded "scheme" to deceive laborers into working at Al

The district court noted that KBR may be "very far removed from the deaths" that led to this suit. (ROA.25602). Despite initially denying summary judgment on Plaintiffs' vicarious liability claim under the TVPRA, (ROA.46883), the court noted that "the connection with [KBR]...is yet still conjectural." (ROA.49416).

In January 2014, the district court reconsidered its TVPRA ruling, granted summary judgment for KBR, and later rejected Plaintiffs' attempts to resurrect both their ATS and TVPRA claims. (ROA.23705-18; ROA.25205-22). The court explained that "the perpetrators of the subject crimes are not before the Court, and the relief that Plaintiffs seek is not appropriate as to those who are before the Court." (ROA.25222). Plaintiffs' own lead counsel admitted that "[w]e're not alleging that they're [KBR] culpable in the murders of the men." (ROA.25602).

SUMMARY OF THE ARGUMENT

Plaintiffs' allegations focus on conduct in foreign countries by foreign companies years before this suit was filed, which Plaintiffs attempt to impute to KBR. The district court correctly applied controlling legal principles and properly rejected Plaintiffs' claims.

Asad. Actually, Plaintiffs voluntarily dismissed their direct RICO claims against KBR, (ROA.11857), and in August 2013 the district court granted summary judgment against Plaintiffs on their remaining RICO and conspiracy claims, (ROA.46883).

First, Plaintiffs' TVPRA claims are barred as a matter of law. These claims arise out of alleged events in 2004. Over four years later, in December 2008, Congress enacted 18 U.S.C. § 1596, substantively expanded the TVPRA to reach violations committed abroad, and, thus, created a new cause of action for extraterritorial conduct and broadened the range of possible claimants and the potentially-implicated conduct. To retroactively apply 2008's section 1596 to alleged 2004 conduct would attach new disabilities and obligations by eliminating an extraterritoriality defense that KBR previously could have asserted. Section 1596's substantive expansion of the TVPRA cannot apply retroactively to KBR.

The district court properly rejected Plaintiffs' attempt to rely, alternatively, on the Military Extraterritorial Jurisdiction Act ("MEJA") as a basis for jurisdiction for TVPRA civil claims. MEJA is purely a criminal statute that created new criminal offenses and has no connection with the TVPRA's later-enacted civil-remedies provision.

Second, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* forecloses Plaintiffs' ATS claim that alleges conduct in Nepal, Jordan, and Iraq, and does not sufficiently "touch and concern" U.S. territory to overcome the presumption against extraterritoriality. This Court should follow the Second and Eleventh Circuits and adhere to *Kiobel*'s instruction that the foreign location of the relevant conduct is dispositive, regardless of the defendant's U.S. citizenship or the

purported U.S. interests involved. The tangential relevance of a foreign U.S. military base to Plaintiffs' claim cannot avoid *Kiobel*'s presumption because the temporary U.S. presence at that base does not transform it into U.S. territory.

Plaintiffs' proposed case-by-case approach to the presumption relies on a Fourth Circuit decision that contravenes *Kiobel* and is inapposite because there was far more extensive domestic conduct in that case than what Plaintiffs showed here. *Kiobel* applies the presumption against extraterritoriality to *all* ATS claims and refutes the fact-specific inquiries that Plaintiffs propose—like the type of international "norm" at issue or purported policy concerns. Plaintiffs invite this Court to intrude on the province of the political branches' province to determine whether to reach conduct occurring abroad—an approach *Kiobel* rejects. The district court correctly applied *Kiobel*, granted summary judgment on Plaintiffs' ATS claims, and rejected Plaintiffs' belated and futile request for leave to amend.

Plaintiffs' ATS claims also fail as a matter of law because Congress's comprehensive scheme governing trafficking and forced labor in the TVPRA preempts Plaintiffs' common-law ATS claims for the same alleged conduct, and because Plaintiffs' claims are not actionable against corporations and in the absence of state action.

Third, Plaintiffs cannot revive their state-law negligence claims by invoking Iraq's statute of limitations for the first time on appeal. Plaintiffs waived reliance

on Iraq law, and the district court properly rejected Plaintiffs' conclusory arguments for tolling the limitations period. This Court should affirm.

ARGUMENT

I. The District Court Correctly Rejected Plaintiffs' TVPRA Claims Because The New Provision Expanding The TVPRA To Reach Extraterritorial Conduct Cannot Apply Retroactively.

Plaintiffs' arguments for resurrecting their TVPRA claims rest on a misinterpretation of longstanding Supreme Court precedents. The district court correctly applied these precedents and rejected Plaintiffs' TVRPA claims. (ROA.23705-18).

A. *Absent clear intent, a statute that attaches new legal consequences for past transactions cannot apply retroactively.*

In *Landgraf v. USI Film Products*, 511 U.S. 244, 265-66 (1994), the Supreme Court held that "the presumption against retroactive legislation is deeply rooted in our jurisprudence" and embodies the principle "that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." (Internal quotation omitted).

"When determining whether a new statute operates retroactively, it is not enough to attach a label...to the statute." *Martin v. Hadix*, 527 U.S. 343, 359 (1999); *see also Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997). Rather, the inquiry "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed

before its enactment.'" *Martin*, 527 U.S. at 357-58 (quoting *Landgraf*, 511 U.S. at 270). A statute can operate retroactively only with "clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280.

B. *Anti-retroactivity principles prohibit applying section 1596 to penalize alleged pre-enactment conduct.*

Section 1596 of the TVPRA does not state that it applies retroactively, and applying section 1596 to pre-enactment conduct would have an impermissible retroactive effect. *See Landgraf*, 511 U.S. at 280. Plaintiffs point to section 1596's "Additional jurisdiction" title and say it merely enlarges jurisdiction. But Plaintiffs ignore section 1596's substantive impact and bypass the foundational question of whether section 1596's enactment is *properly characterized* as "merely" jurisdictional. *See* Plaintiffs.Br.10-18.

1. The TVPRA did not apply to extraterritorial conduct before Congress enacted section 1596 in 2008.

It is a "longstanding principle of American law" that federal statutes are intended "to apply only within the territorial jurisdiction of the United States." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (internal quotation omitted). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010); *see also Kiobel v. Royal Dutch Petroleum Co.*, 133 S.

Ct. 1659, 1665-66, 1669 (2013) (ATS does not apply extraterritorially despite addressing uniquely international concerns).

Morrison and *Kiobel* confirm that the TVPRA did not apply extraterritorially as of 2004. In 2000, Congress adopted sections 1589 and 1590, the 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. In 2003, Congress adopted section 1595 to create a civil cause of action. TVPRA of 2003, Pub. L. 108-193, 117 Stat. 2875. These provisions do not contain an "affirmative indication" that they apply extraterritorially. *See Morrison*, 561 U.S. at 265. As the district court noted, the lack of *any* indication of extraterritoriality in these provisions contrasts markedly with other parts of the TVPRA addressing "overtly international endeavors," which reinforces that sections 1589, 1590, and 1595 lack the clear indication of extraterritorial application necessary to overcome the presumption against extraterritoriality. (ROA.23711-72); *see Kiobel*, 133 S. Ct. at 1667; *Morrison*, 561 U.S. at 265. As of 2004, the TVPRA was limited to trafficking of persons *into* or forced labor *in* the United States.

Congress's enactment of section 1596 in 2008—years after the events at issue, and months after Plaintiffs filed suit, (ROA.136; ROA.182)—fundamentally changed the TVPRA's scope by expanding its reach to foreign conduct if the

defendant resides in or is present in the United States. William Wilberforce TVPRA of 2008, Pub. L. 110-457, Title II, § 2223(a), 122 Stat. 5044 (eff. Dec. 23, 2008). Section 1596 itself defeats Plaintiffs' newest assertion—for the first time on appeal—that section 1596 was just a "clarifying amendment." Plaintiffs.Br.18. This characterization "conflicts with the court's obligation to weigh the various [anti-retroactivity] factors described in *Landgraf*" and should be rejected. *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1363 (Fed. Cir. 2005). Section 1596 does not say it was a mere clarification, as it provides for new and additional "extra-territorial jurisdiction over any offense" expressly "[i]n addition to" existing law. Every court that analyzed the pre-2008 version of the TVPRA concluded its civil-remedies provision did not apply extraterritorially. *See Nattah v. Bush*, 541 F. Supp. 2d 223, 234-35 (D.D.C. 2008), *aff'd in part, rev'd in part on other grounds*, 605 F.3d 1052 (D.C. Cir. 2010); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 999-1004 (S.D. Ind. 2007).

On this point, Plaintiffs cite inapposite, non-TVPRA cases that address clarifications of ambiguous statutory language that courts and agencies had construed in conflicting ways. *See Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 889-90 (1st Cir. 1992); *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 615 (7th Cir. 1982). By contrast, courts presume that Congress legislates with an expectation that its statutes will be read in conformity with court precedent, so

statutes like the pre-2008 TVPRA that lack a clear indication of extraterritoriality have no extraterritorial reach. *See Clay v. United States*, 537 U.S. 522, 527 (2003); *Aramco*, 499 U.S. at 248. Congress's decision in 2008 to expand the TVPRA by enacting section 1596 substantively altered the TVPRA's scope.

2. Under *Hughes Aircraft*, section 1596 cannot be applied retroactively to eliminate KBR's extraterritoriality defense and create a new cause of action for extraterritorial conduct.

Plaintiffs barely address and cannot distinguish the Supreme Court's decision in *Hughes Aircraft*, 520 U.S. at 945-52. The district court correctly concluded that *Hughes Aircraft* defeats Plaintiffs' attempts to apply section 1596 retroactively to pre-enactment conduct. (ROA.23714-17; ROA.25216-18).

In *Hughes Aircraft*, the Court confronted an amendment to the False Claims Act authorizing *qui tam* suits by private parties based on information already in the Government's possession, and held it could not apply retroactively. 520 U.S. at 945-52. The amendment did not change the defendant's potential liability, but it "eliminate[d] a defense to a *qui tam* suit—prior disclosure to the Government" and therefore "'attach[ed] a new disability, in respect to transactions or considerations already past.'" *Id.* at 948 (quoting *Landgraf*, 511 U.S. at 269). The amendment "essentially create[d] a new cause of action" by allowing such suits to be brought by a new class of plaintiffs—private parties. *Id.* at 950.

Hughes Aircraft is on point. Applying section 1596 here would "change[] the substance" of a TVPRA civil action by "attaching a new disability, in respect to transactions...already past." *Id.* at 948 (internal quotation omitted). Extraterritorial conduct was not actionable under the TVPRA until Congress adopted section 1596 in 2008. *See supra* Part.I.B.1. Applying section 1596 thus has an impermissible retroactive effect by "eliminat[ing] a defense" of extraterritoriality that previously existed and creating "a new cause of action" under the TVPRA for which private suits were not available when the alleged conduct occurred. *Hughes Aircraft*, 520 U.S. at 948, 950. Section 1596's retroactive impact would be like applying the TVPRA's civil-remedies provision (section 1595) to increase a party's liability for prior conduct—which courts have refused to do. *See Velez v. Sanchez*, 693 F.3d 308, 325 (2d Cir. 2012); *Doe v. Siddig*, 810 F. Supp. 2d 127, 135 (D.D.C. 2011).

Hughes Aircraft also refutes Plaintiffs' reliance on section 1596's "jurisdictional" label. Plaintiffs.Br.11-18. True jurisdictional statutes "affect only *where* a suit may be brought, not *whether* it may be brought at all." *Hughes Aircraft*, 520 U.S. at 951. The FCA amendment did not meet this test because it "does not merely allocate jurisdiction among forums." *Id.* Because the amendment "*creates* jurisdiction where none previously existed[,] it...speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* Plaintiffs miss the point of *Hughes Aircraft* by identifying a different

FCA provision that they claim is "jurisdictional" and by citing inapposite cases that do not address retroactivity principles.[3] Plaintiffs.Br.14-15.

Plaintiffs' focus on section 1596's jurisdictional label begs the question of "whether the statute *operates* retroactively," by "attach[ing] new legal consequences to events completed before its enactment." *Martin*, 527 U.S. at 357-59 (emphasis added, internal quotation omitted); *see also, e.g.*, *Elbert v. True Value Co.*, 550 F.3d 690, 692-93 (8th Cir. 2008). Like the FCA amendment in *Hughes Aircraft*, section 1596 does more than "affect...*where* a suit may be brought"—it affects "*whether* it may be brought at all." 520 U.S. at 951.

Before section 1596, extraterritorial conduct was not actionable under the TVPRA. Section 1596 changed that, "*creat[ing]* jurisdiction" under the TVPRA over extraterritorial conduct "where none previously existed." *See id.*; *cf. Mathews v. Kidder, Peabody & Co.*, 161 F.3d 156, 164-66 (3d Cir. 1998). This change differs materially from Plaintiffs' cited authorities.[4] *See* Plaintiffs.Br.11-13, 21.

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[3] Plaintiffs incorrectly say 31 U.S.C. § 3732 provides the basis for federal jurisdiction over FCA claims. Section 3732(a) is a federal court *venue* provision. *See U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861, 865-66 (2d Cir. 1997). Only section 3732(b) addresses jurisdiction, and even then, only over related *state-law* claims. 31 U.S.C. § 3732(b).

[4] Plaintiffs improperly focus on quintessentially-jurisdictional or procedural statutes that establish the proper decision-maker to resolve a claim or impose conditions to suit, without expanding potential liability for past conduct or creating new causes of action. *See, e.g., Andrus v. Charlestone Stone Prods. Co.*, 436 U.S.

3. Plaintiffs' reliance on *Altmann* is misplaced.

Plaintiffs cite *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004), but they cannot reconcile their position with *Altmann* and *Hughes Aircraft*. *See* Plaintiffs.Br.14, 16 n.3, 21. *Altmann* has questionable relevance given the Court's repeated indications that its retroactivity analysis is confined to the Foreign Sovereign Immunities Act's "*sui generis*" context—a statute that "defies...categorization" as substantive or procedural. 541 U.S. at 694, 696, 700. *Altmann* also emphasized that "*Landgraf*'s antiretroactivity presumption" was "most helpful" in "cases involving private rights"—like here. *Id.* at 696.

Altmann's discussion of *Hughes Aircraft* reinforces that section 1596 is not merely jurisdictional. *Altmann* explained that the FCA amendment in *Hughes Aircraft* "was attached to the statute that created the cause of action" and

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604, 605-08 & n.6 (1978) (amendment to federal-question jurisdiction statute authorized court to hear challenge premised on pre-existing federal law); *United States v. Alabama*, 362 U.S. 602, 604 n.3 (1960) (per curiam) (statute allowed federal courts to exercise jurisdiction over states for violating pre-existing civil rights); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221, 224 (1957) (new long-arm statute conferred personal jurisdiction to enforce pre-existing rights); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (statute provided that challenge must be resolved by agency rather than in court); *Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579, 585-86 (5th Cir. 2013) (pre-suit notice was jurisdictional prerequisite for bringing statutory claim); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 301-02 (5th Cir. 2002) (statute directing immigration officer, not judge, to make findings for reinstating deportation order); *Mendez-Rosas v. I.N.S.*, 87 F.3d 672, 675-76 (5th Cir. 1996) (per curiam) (statute making BIA deportation orders final and non-reviewable in court).

"prescribed a limitation that any court entertaining the cause of action was bound to apply." 541 U.S. at 695 n.15. "When a 'jurisdictional' limitation adheres to the cause of action in this fashion—when it applies by its terms regardless of where the claim is brought—the limitation is essentially substantive." *Id.*

Altmann's characterization of *Hughes Aircraft* fits section 1596, showing that it is "essentially substantive" and not "merely" jurisdictional. By granting extraterritorial jurisdiction to "courts of the United States" without excluding state courts from resolving such claims, section 1596 presumptively authorizes federal *and* state courts to resolve claims that previously were beyond the TVPRA's territorial reach. *See, e.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 460-61, 467 (1990). Section 1596 thus applies "regardless of where the [TVPRA] claim is brought," bringing it squarely within *Altmann*'s characterization of a substantive change.

Altmann does not support Plaintiffs' argument that section 1596 is merely jurisdictional just because it does not list the elements of the underlying offenses. Plaintiffs.Br.17. Section 1596 "adheres to the cause of action" because it attaches to and expands the scope of the TVPRA's other provisions by authorizing claims for extraterritorial conduct. *See Altmann*, 541 U.S. at 695 n.15.

The *Altmann* statute also differs from section 1596 because the FSIA "does not create or modify any causes of action," which in *Altmann* were based on state law. *Id.* That is not true of section 1596, which created a civil claim for

extraterritorial TVPRA violations that previously did not exist. Applying section 1596 to pre-enactment conduct would "subject[] [KBR] to previously foreclosed...litigation," *Hughes Aircraft*, 520 U.S. at 950, distinguishing it from cases Plaintiffs cite which did not expand a party's liability for, or otherwise change the legal consequences of, prior transactions.[5] Plaintiffs.Br.21. The district court correctly interpreted *Hughes Aircraft* and *Altmann* to foreclose Plaintiffs' TVPRA claim.

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[5] *See, e.g.*, *Mtoched v. Lynch*, 786 F.3d 1210, 1215 (9th Cir. 2015) (new law did not detrimentally change level of discretion over deportation decisions); *Cruz v. Maypa*, 773 F.3d 138, 145 (4th Cir. 2014) (new statute of limitations applied to unexpired claims "because the party already faced liability under the [previous] shorter limitations period"); *Gordon v. Pete's Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 459-60 (4th Cir. 2011) (federal statute providing right to challenge foreclosure did not "alter the scope" of prior substantive rights because previous statute contemplated right to challenge foreclosure under state law); *Silva Rosa v. Gonzales*, 490 F.3d 403, 407, 409 (5th Cir. 2007) (right to adjust immigration status had not accrued before new statute was enacted; statute did not "attach new consequences" to past illegal reentry but merely "change[d] the legal regime for an alien's ongoing violation"); *BellSouth Telecomms., Inc. v. Se. Tel., Inc.*, 462 F.3d 650, 658-62 (6th Cir. 2006) (rule change merely affected availability of prospective relief already subject to challenge under prior rule); *Sw. Ctr. of Biological Diversity v. U.S.D.A.*, 314 F.3d 1060, 1062 & n.1 (9th Cir. 2002) (provision exempted certain items from FOIA before plaintiffs established entitlement to disclosure); *Ojeda-Terrazas*, 290 F.3d at 301 (statute changed forum and decisionmaker for reinstating deportation order). Plaintiffs also cite *United States v. Certain Funds Contained in Accounts Located at the HSBC*, 96 F.3d 20, 24 (2d Cir. 1996), involving a forfeiture statute reaching assets overseas, but it pre-dates *Hughes Aircraft* and *Altmann* and is unpersuasive. Plaintiffs' reference to *Greenberg v. Comptroller of the Currency*, 938 F.2d 8, 10-11 (2d Cir. 1991), is inapposite because, unlike section 1596, the statute there expressly applied retroactively.

4. *Morrison* reinforces that section 1596 effected a substantive change to the TVPRA that cannot apply retroactively.

The Supreme Court's *Morrison* decision underscores that Plaintiffs are wrong to insist that section 1596 is merely jurisdictional. *See* Plaintiffs'Br.25-27. *Morrison* held that whether a statute applies extraterritorially is not a jurisdiction question: "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." 561 U.S. at 254. By contrast, subject-matter jurisdiction issues address a court's power to hear a case, which is "separate from the question whether the [plaintiff's] allegations...entitle him to relief." *Id.*

Congress's addition of section 1596 does more than speak "to the power of the court" or the "identity of the tribunals" to hear the case.[6] Plaintiffs.Br.15, 28. As in *Morrison*, claims for pre-2008 overseas trafficking and forced labor would have been dismissed *on the merits*—not for lack of jurisdiction. *See* 561 U.S. at 254. Section 1596's territorial expansion of the TVPRA thus impermissibly alters the legal consequences of KBR's alleged prior conduct by subjecting it to new potential liability. *See, e.g., Quantum Entm't Ltd. v. U.S. Dep't of the Interior*, 714 F.3d 1338, 1341, 1345 (D.C. Cir. 2013); *Ward v. Dixie Nat'l Life Ins. Co.*, 595

[6] Indeed, courts already had jurisdiction under 28 U.S.C. § 1331 to resolve TVPRA claims, which explains why Plaintiffs never pleaded section 1596 as a jurisdictional basis. (ROA.501-02).

F.3d 164, 170, 173-74 (4th Cir. 2010). The district court's anti-retroactivity analysis was true to *Morrison*. (ROA.23714-17; ROA.25216-18).

C. *Plaintiffs' attempts to alter settled anti-retroactivity principles are unavailing.*

1. Section 1596 cannot apply retroactively regardless whether other extraneous law regulated the same conduct.

By pointing to sources *other than* the TVPRA's civil-remedies provision, Plaintiffs erroneously argue that newly-enacted statutes do not pose retroactivity concerns if the conduct was already subject to penalty under other, prior law. *See* Plaintiffs.Br.19-20, 22-25, 28-29. Plaintiffs' argument contradicts *Landgraf*, *Hughes Aicraft*, and decisions of this and other courts.

Landgraf considered Title VII's new compensatory-damages provision as applied to discriminatory conduct that "ha[d] been unlawful for more than a generation," and *still* barred the provision's retroactive application: "a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." 511 U.S. at 281-82 & n.35.

Landgraf distinguished *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), on which Plaintiffs rely. Plaintiffs.Br.19-20. *Landgraf* explained that the statute in *Bradley* authorizing recovery of attorneys' fees did not impose an additional obligation because attorneys'-fees issues "are collateral" to the cause of action. 511 U.S. at 276-78 (internal quotation omitted). Section 1596 is not

"collateral" to the TVPRA; it expands the TVPRA to reach extraterritorial conduct previously beyond its scope. Section 1596's creation of an "additional burden[] based on conduct that occurred in the past" is impermissible. *Landgraf*, 511 U.S. at 282 n.35.

Hughes Aircraft echoed *Landgraf* in rejecting Plaintiffs' argument that conduct's prior unlawfulness eliminates retroactivity concerns. 520 U.S. at 947. The FCA amendment did not change a defendant's liability exposure "by even a single penny" because the government could have pursued the penalties. *Id.* at 948-50. Yet the Court still held the amendment created a new cause of action by opening an "expanded universe of plaintiffs with different incentives" than the government, while also attaching new disabilities for past conduct by eliminating a prior defense. *Id.* at 950.

Landgraf and *Hughes Aircraft* confirm that pre-existing unlawfulness of the defendant's conduct and unaltered pre-existing liability exposure do not overcome the well-established presumption against retroactivity. These decisions are controlling here. *See, e.g.*, *Margolies v. Deason*, 464 F.3d 547, 550-54 (5th Cir. 2006) (anti-retroactivity principles barred applying new extended limitations period for federal claims, even though state-law claims remained viable). TVPRA section 1596 created a new, enlarged private cause of action for damages that "increases a party's liability for previously occurring conduct," *see Velez*, 693 F.3d

at 325, a fact that Plaintiffs cannot avoid by saying KBR could have been subject to substantively different criminal liability. Plaintiffs.Br.22-23. Expanding the universe of potential claimants creates precisely the type of new disability for past conduct that *Hughes Aircraft* forbids. *See* 520 U.S. at 950; *see also Organizacion Jd Ltda. v. U.S. Dep't of Justice*, 124 F.3d 354, 358 (2d Cir. 1997).

Plaintiffs cite cases applying the civil-remedies provision of the Torture Victims Protection Act ("TVPA") retroactively, *see Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (per curiam); *Alvarez-Machain v. United States*, 107 F.3d 696, 702-03 (9th Cir. 1996), *abrogated on other grounds, as recognized by N. Am. Broad., LLC v. United States*, 306 F. App'x 371, 373 (9th Cir. 2008); Plaintiffs.Br.20. But Plaintiffs do not square these TVPA cases with cases refusing to apply the *TVPRA*'s civil-remedies provision retroactively. *See, e.g.*, *Velez*, 693 F.3d at 325.

Plaintiffs' TVPA cases also do not apply because they assume the existence of alternative avenues of recovery that are unavailable here. *Kiobel* rejects *Cabello*'s premise that the same extraterritorial conduct expressly covered by the TVPA (or here, the TVPRA) was actionable under the ATS. *Compare Kiobel*, 133 S. Ct. at 1669, *with Cabello*, 402 F.3d at 1154; *see also infra* Part.II. *Alvarez-Machain* assumes foreign law supported the same recovery as the TVPA, 107 F.3d at 703, whereas here, Plaintiffs conceded that "contractors [like KBR] were

immune from Iraqi law," (ROA.20492; ROA.20507); *see also* CPA Order No. 17 § 4(2) & (3) (2004). The TVPRA's remedies are also different because Plaintiffs seek punitive damages, which Iraq law forbids. *See Harris v. Kellogg, Brown & Root Servs., Inc.*, 796 F. Supp. 2d 642, 666 (W.D. Pa. 2011).

Plaintiffs also attempt to rely on theoretical "domestic tort law" remedies. Plaintiffs.Br.23-24. Plaintiffs' state-law claims were time-barred even if they were relevant. *See infra* Part.III; (ROA.2334-35). Allowing Plaintiffs to pursue a TVPRA claim imposes additional burdens.

No matter what other remedies Plaintiffs suggest may have existed at the time of the alleged events, allowing Plaintiffs retroactively to bring a new TVPRA claim that penalizes pre-enactment conduct would impermissibly create an "additional burden[]" with new legal consequences for past transactions.

2. The presumption against retroactivity does not require actual reliance, loss of "vested rights," or disruption of "settled expectations."

Plaintiffs' remaining arguments rely on variants of an anti-retroactivity test that do not control. Plaintiffs' formulaic approach contravenes the "commonsense, functional judgment" the retroactivity test requires. *Martin*, 527 U.S. at 357-58.

In *Vartelas v. Holder*, 132 S. Ct. 1479, 1490-91 (2012), the Court rejected Plaintiffs' assertion that a party must demonstrate it relied on prior substantive law to invoke a retroactivity bar. Plaintiffs.Br.20-22, 24. *Vartelas* explained that an

actual-reliance test makes little sense because the presumption against retroactivity focuses on *Congress*'s presumed intent to "govern prospectively only." 132 S. Ct. at 1490-91. The "essential inquiry...is 'whether the new provision attaches new legal consequences to events completed before its enactment'"—as section 1596 does. *See id.* at 1491 (quoting *Landgraf*, 511 U.S. at 269-70).

The Supreme Court has also rejected Plaintiffs' argument (Plaintiffs.Br.21) about KBR's supposed lack of "vested rights" under prior law. *Landgraf* held the presumption against retroactivity is not limited to cases involving "vested rights," 511 U.S. at 275 n.29, and *Hughes Aircraft* agreed, 520 U.S. at 947.

Plaintiffs' non-TVPRA cases reflect different, fact-specific applications of the general retroactivity inquiry, which requires a functional analysis of the *impact* of a new enactment. Congress's December 2008 enactment of section 1596 expanded the substantive scope of the TVPRA's civil-remedies statute to reach extraterritorial conduct, which created new liability and additional burdens for past transactions. *Hughes Aircraft*, 520 U.S. at 948. Congress did not clearly (or at all) provide for retroactive application of section 1596's extraterritorial reach, so the provision's retroactive application is barred by the presumption against retroactivity.

D. *MEJA's criminal jurisdiction does not provide a basis for Plaintiffs' private claims for money damages under the TVPRA.*

Plaintiffs say that even if section 1596 cannot apply retroactively, the MEJA—an exclusively-criminal statute enacted in 2000, 18 U.S.C. § 3261—somehow provides a jurisdictional basis for civil claims under the separate and later-enacted TVPRA. Plaintiffs.Br.30-33. Plaintiffs' exclusive reliance on MEJA criminal prosecutions highlights that MEJA's sole purpose was to create new criminal offenses, not just provide a basis for jurisdiction, and certainly not for separate civil claims under the TVPRA. The district court correctly concluded that MEJA cannot provide an extraterritorial-jurisdiction bootstrap for Plaintiffs' civil TVPRA claim. (ROA.23713; ROA.25218-20).

MEJA's text belies Plaintiffs' attempt to render it a purely jurisdictional statute. MEJA defines a crime, stating that "[w]hoever engages in conduct outside the United States"—defined with reference to pre-existing federal offenses—"shall be punished as provided for th[ose] offense[s]." 18 U.S.C. § 3261(a). MEJA's legislative history confirms: "This section [3261] establishes a new Federal crime...." H.R. Rep. No. 106-778, Part 1 at 14 (2000); *see also id.* at 5, 10-11.

Plaintiffs themselves recognize that MEJA does more than confer jurisdiction. They describe MEJA as incorporating an underlying felony as "one of the *elements* of MEJA," and citing indictments that charge violations of "*both* MEJA and the underlying substantive offense." Plaintiffs.Br.31-32 n.7 (emphasis

added). MEJA created a criminal offense for extraterritorial conduct that violates other federal statutes.

Even if MEJA were merely jurisdictional—it is not—nothing in MEJA's text or legislative history connects it to TVPRA civil actions. Indeed, civil liability under the TVPRA did not even exist until section 1595's 2003 adoption, three years *after* MEJA, and section 1595 does not list MEJA as a predicate offense for a TVPRA civil action.

Statutory construction principles also defeat Plaintiffs' misinterpretation. If MEJA already supplied extraterritorial jurisdiction for the TVPRA's civil-remedies provision, there would be no need for section 1596. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *United States v. Robinson*, 468 F.2d 189, 191-92 (5th Cir. 1972). Plaintiffs' attempt to turn MEJA into a basis for extraterritorial jurisdiction for civil TVPRA claims would transform section 1596 into surplusage.

Plaintiffs' misinterpretation of MEJA also ignores the U.S. Department of Defense Inspector General's official investigation into the August 2004 incident concluding that "there are no clauses in contracts between KBR/Halliburton that make them responsible for labor fraudulently procured by independent contractors or subcontractors," and "there are no potential criminal violations to be investigated...." (ROA.22735). The official determination that there were "no

potential criminal violations to be investigated" reinforces that MEJA does not apply here. The TVPRA claim was properly dismissed.

II. The District Court Correctly Granted Summary Judgment On Plaintiffs' Alien Tort Statute Claims.

Even before *Kiobel* was decided, Plaintiffs' counsel downplayed their ATS claims, admitting they "kind of wish we had never pled that" and saying "I don't think it really adds too much to the case...." (ROA.49261). For several reasons, plaintiffs were right.

First, *Kiobel* confirms that Plaintiffs' allegations of misconduct in foreign countries are not actionable under the ATS, and Plaintiffs' request for leave to amend was unjustifiably delayed and futile. Second, even absent *Kiobel*, the TVPRA preempts ATS claims for trafficking or forced labor. Third, corporate defendants like KBR cannot be held liable under the ATS. Fourth, Plaintiffs must, but cannot, allege state action.

A. Kiobel *bars Plaintiffs' extraterritorial ATS claims.*

1. Under *Kiobel*, ATS claims focusing on foreign conduct do not sufficiently "touch and concern" U.S. territory to rebut the presumption against extraterritoriality.

In *Kiobel*, the Supreme Court held: "the presumption against extraterritoriality applies to claims under the ATS." 133 S. Ct. at 1669. Where "all the relevant conduct took place outside the United States," the Court concluded that "nothing in the statute rebuts that presumption." *Id.* The Court

framed the issue in terms of where the conduct occurred. *Id.* at 1662-69. The Court made clear the presumption 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." *Id.* at 1669. "[M]ere corporate presence" is not enough. *Id.*

The Court's previous instruction in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004), to exercise caution in construing the ATS's jurisdictional scope guided this conclusion. *Kiobel* stressed that courts must tread particularly cautiously "when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." 133 S. Ct. at 1665 (discussing *Sosa*, 542 U.S. at 727-28). Under *Kiobel*, the location of actionable conduct thus is central to the ATS's jurisdictional inquiry; if that location is foreign, the claims are extraterritorial and cannot proceed. *See id.*

Kiobel relied heavily on *Morrison*, in which the Court held that if the conduct that was the "'focus' of congressional concern" in enacting the statute occurred abroad, then the presumption bars the claim even if defendants are domestic entities and allegations of domestic conduct are "significant." 561 U.S. at 264-73. *Morrison* emphasized the need for restraint: "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." *Id.* at 266.

The Second and Eleventh Circuits have heeded that instruction and construed the ATS to not reach claims against U.S. defendants based on foreign conduct—even where some domestic conduct is alleged. In *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014), the court evaluated whether the ATS extended jurisdiction to an aiding-and-abetting claim against defendants who allegedly made unlawful payments to Saddam Hussein's regime. *Id.* at 175. Echoing *Kiobel*, the court held that *Morrison* provides the appropriate framework and identified a two-step inquiry:

> [T]o displace the presumption against extraterritoriality..., the complaint must plead: (1) conduct of the defendant that "touched and concerned" the United States with sufficient force to displace the presumption..., *and* (2) that the *same conduct*...states a claim for a violation of the law of nations or aiding and abetting another's violation....

Id. at 187. The Second Circuit explained that "a defendant's U.S. citizenship has [no] relevance to the jurisdictional analysis" because under *Kiobel*, "the full 'focus' of the ATS was on conduct." *Id.* at 189 (citing *Balintulo v. Daimler AG*, 727 F.3d 174, 190-91 & n.24 (2d Cir. 2013) ("*Balintulo I*")). Applying this test, the Second Circuit found the domestic conduct, however compelling, was jurisdictionally immaterial because it was itself insufficient to establish an aiding-and-abetting claim, and concluded the district court had no ATS jurisdiction. *Id.* at 185, 191-94.

In *Doe v. Drummond Co.*, 782 F.3d 576, 592 (11th Cir. 2015), the court similarly emphasized that "the site of the conduct alleged is relevant and carries significant weight." The defendants allegedly were responsible for atrocities committed by a U.S.-designated terrorist group in Columbia (the "AUC"). *Id.* at 580-81, 596. Defendants' domestic conduct included "making decisions to engage with" and "agreeing to fund" the AUC, plus allegedly knowing about and agreeing to murders in Colombia. *Id.* at 598-99. *Drummond* held this U.S. conduct, U.S. interests, and defendants' status as U.S. corporations were insufficient to displace the presumption against extraterritoriality because the killings and alleged collaboration "all took place in Colombia." *Id.* at 598-600. Claims will sufficiently "touch and concern" U.S. territory only "if *enough* relevant conduct occurred within the United States." *Id.* at 597, 600.

These decisions confirm that the ATS does not reach Plaintiffs' attempt to hold KBR vicariously liable for foreign third parties' underlying acts of trafficking and forced labor abroad. (ROA.511-12; ROA.518-21). Under the Second Circuit's formulation, KBR can be vicariously liable only if the underlying alleged conduct occurred within the U.S. *Mastafa*, 770 F.3d at 187; *Balintulo I*, 727 F.3d at 192. Here, all conduct for which KBR is allegedly vicariously liable occurred abroad—in Nepal, India, Jordan, and Iraq. KBR's actions in the U.S. therefore are jurisdictionally immaterial and insufficiently forceful. *See Mastafa*, 770 F.3d at

192-94. KBR's domestic payments to subcontractor Daoud that hired foreign labor have no relevance to whether KBR actually trafficked or forced anyone to work—the only claim Plaintiffs alleged. KBR's payments to Daoud do not establish a violation of any claimed international norm. *See id.*; *see also Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169-71 (2d Cir. 2015) ("*Balintulo II*").

Plaintiffs' scant allegations of domestic conduct also do not satisfy the Eleventh Circuit's test. Under *Drummond*, Plaintiffs' assertions about KBR's domestic funding of foreign labor and purported knowledge of foreign trafficking activities cannot overcome the presumption against extraterritoriality because the actual wrongdoing "all took place" in foreign countries. 782 F.3d at 598. The absence of sufficient relevant conduct within the U.S. forecloses Plaintiffs' ATS claims.

2. Even the Fourth Circuit's flawed approach does not extend ATS jurisdiction to Plaintiffs' claims.

Plaintiffs criticize the district court's application of *Kiobel* and urge adoption of the Fourth Circuit's flawed approach as the *only* appellate court not to give controlling weight to where the wrongful conduct occurred.[7]

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[7] Plaintiffs note that the Ninth Circuit's majority in *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) viewed *Morrison*'s focus test as "informative precedent" for *Kiobel*'s "touch and concern" standard, but held *Kiobel* did not incorporate *Morrison*'s test. *Id.* at 1028. Judge Rawlinson decried that view: "Why else would the Supreme Court direct us to *Morrison* precisely when it was

In *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516, 527 (4th Cir. 2014), the court extended ATS jurisdiction to a corporate defendant's direct acts of torture at Abu Ghraib prison in Iraq, viewing *Kiobel* as containing "broad terminology" that requires courts to examine "all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.* This expansive interpretation of ATS jurisdiction, however, disregards *Kiobel*'s emphasis on the location of the actionable conduct; *Kiobel*'s repeated references to *Morrison*, which also centered on the location of the actionable conduct; the Supreme Court's instruction in *Sosa* and *Kiobel* to exercise extreme caution in expanding ATS jurisdiction; and *Morrison*'s similar instruction to exercise caution in applying federal statutes extraterritorially. *See supra* Part.II.A.1. The district court correctly determined that many facts the *Al Shimari* court considered—location of the government's contract, activity inside a U.S. military base, policy concerns, and the defendant's citizenship—are jurisdictionally irrelevant. (ROA.25214-16); *see infra* Parts.II.A.3–7.

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discussing claims that allegedly 'touch and concern' the United States?" *Id.* at 1035 (Rawlinson, J., dissenting). Eight judges dissented from denial of rehearing en banc and criticized the majority's refusal to follow *Morrison* for ATS claims. *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 952-53 (9th Cir. 2015) (Bea, J., dissenting). Because the *Nestle* panel remanded the case, however, the court never resolved what nexus with domestic conduct is necessary to rebut the presumption against extraterritoriality. *See* 766 F.3d at 1028. Nestle's petition for writ of certiorari is pending. No. 15-349 (U.S. Sept. 18, 2015).

Even under *Al Shimari*'s overly-broad framework, there is no ATS jurisdiction over Plaintiffs' claims. The allegations of domestic conduct in *Al Shimari* were far more extensive than Plaintiffs' evidence here. *Al Shimari* focused on allegations that the defendant's U.S. managers 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 529, 531. In contrast, while Plaintiffs insist that KBR's U.S. employees were "aware" of trafficking allegations *unrelated to those lodged by actual plaintiffs in this case*, Plaintiffs.Br.51 n.8, they present no *evidence* supporting even this allegation. Plaintiffs did not cite any evidence that KBR's U.S. managers encouraged trafficking or forced labor generally or specifically.

Plaintiffs attempt to boost their factual shortcomings with two declarations they say show that KBR's U.S. managers "covered up" wrongdoing. Plaintiffs.Br.51 & n.8. One declaration never mentions communicating complaints to KBR's U.S. personnel. (ROA.40855-57). The other identifies claims of wrongdoing that (as the district court noted, (ROA.25215 n.8)) KBR investigated and found were refuted by timekeeping records and eyewitness accounts. (*See* ROA.33743-49; *see also* ROA.48133-36). Jurisdiction cannot hinge on a complaint that never reached KBR's U.S. managers or baseless assertions of wrongdoing.

Even if *Al Shimari* has persuasive value, the record confirms that Plaintiffs did not produce any evidence of sufficient domestic conduct. The ATS cannot provide jurisdiction here.[8]

3. The Al Asad airbase was not U.S. territory and is tangential to Plaintiffs' claims.

Plaintiffs cannot avoid *Kiobel* by mischaracterizing the Al Asad airbase in Iraq as U.S. territory.[9] Plaintiffs.Br.38-41. The U.S.'s temporary "jurisdiction and control" at Al Asad before turning it over to Iraq does not transform the base into

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[8] Plaintiffs' district-court cases found particular ATS claims were actionable only when there was significant tortious conduct within or otherwise directed toward the U.S. *See* Plaintiffs.Br.37; *Doe v. Exxon Mobil Corp.*, 2015 WL 5042118, at *8, *13-14 (D.D.C. July 6, 2015) ("primary inquiry" involves "location of the conduct"; defendant allegedly aided and abetted human rights abuses at facility in Indonesia because defendant's U.S. executives "planned and authorized the deployment" of the personnel that committed the abuses); *Mwani v. Bin Laden*, 2013 WL 2325166, at *4 (D.D.C. May 29, 2013) (ATS claims involving attack on U.S. embassy in Kenya "were directed at the United States government," were intended to "cause pain and sow terror in...the United States," and "overt acts in furtherance of [the] conspiracy took place within the United States") (internal quotation omitted).

[9] Plaintiffs also suggest in passing that their mischaracterization of the Al Asad base as U.S. territory can salvage their TVPRA claim. *See* Plaintiffs.Br.41. That is a new argument that lacks merit and this Court should decline to address for the first time on appeal.

U.S. territory. Plaintiffs' mischaracterization of Al Asad conflicts with many decisions refusing to extend federal claims to military bases abroad.[10]

Plaintiffs improperly invoke inapposite habeas-corpus cases involving the U.S. Naval Station at Guantanamo Bay ("GTMO"). *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004). These cases involved the "unique status" of GTMO—where the U.S. "has maintained complete and uninterrupted control...for over 100 years"—which is categorically unlike the U.S. military's temporary operation at Al Asad. *Boumediene*, 553 U.S. at 752, 764; *see also id.* 768-69 (distinguishing GTMO from installations where U.S. "did not intend to govern indefinitely"). The United States' use of the Al Asad airbase was transient, as it operated the base for just a few years (2003–2011) before handing it over to the Iraqi government.[11] That is nothing like the U.S.'s 100-plus-years of

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[10] *See, e.g.*, *Marshall v. Exelis Sys. Corp.*, 2014 WL 1213473, at *8-9 (D. Colo. Mar. 24, 2014) (42 U.S.C. § 1981 inapplicable to Bagram airfield in Afghanistan); *Collins v. CSA, Ltd.*, 2012 WL 1059025, at *2-4 (N.D. Tex. Mar. 27, 2012) (same, U.S. base in Kuwait); *Arc Ecology v. U.S. Dep't of Air Force*, 294 F. Supp. 2d 1152, 1156-59 (N.D. Cal. 2003) (CERCLA inapplicable to U.S. overseas base); *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 466-67 (D.D.C. 1993) (NEPA inapplicable to U.S. military installations in Japan).

[11] *See* Agreement Between U.S. and Republic of Iraq On the Withdrawal of U.S. Forces from Iraq, art. 24(1) (Nov. 17, 2008), *available at* http://www.state.gov/documents/organization/122074.pdf; Mohammed Jalil, *Handover Ceremony of al-Asad Airbase in Anbar Province*, European Press Agency (Dec. 7, 2011).

control of GTMO—a distinction courts have stressed when refusing to extend *Boumediene* to bases (like Al Asad) in theaters of war.[12] *See Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (Bagram airbase in Afghanistan).

More fundamentally, the *Boumediene* Court was driven by separation-of-powers concerns that have no traction here. 553 U.S. at 765-66. Whereas the U.S. would "govern without legal constraint" at GTMO unless the right to habeas applied, *see id.*, Congress remains free to expand the ATS or other federal claims to foreign military bases anywhere in the world. *See, e.g.*, 42 U.S.C. § 1651 (extending LHWCA to employees at military bases); 29 U.S.C. § 630(f) (extending the ADEA to U.S. citizens employed in foreign countries). To have that scope, however, "a statute more specific than the ATS would be required." *Kiobel*, 133 S. Ct. at 1669. Congress has not done so.

Given the temporary U.S. presence at Al Asad and the lack of separation-of-powers concerns, Iraq's retention of *de jure* sovereignty over Al Asad defeats characterizing it as U.S. territory. *See* U.N. Security Council Resolution 1546, art. 9 (June 8, 2004) ("the presence of the multinational force in Iraq" was "at the request of the incoming Interim Government of Iraq"); CPA Regulation No. 1

[12] The same is true of the U.S. Naval base in Bermuda addressed in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948), to which the Court extended the Fair Labor Standards Act. The U.S. government has a 99-year lease for that base. *See* 55 Stat. 1560, 1572, 1577 (1941).

(May 16, 2003) (Iraqi laws continued to apply if they did not conflict with CPA orders or regulations).

Regardless of Al Asad's characterization, the district court correctly found Plaintiffs "exaggerate[] the importance of the Al Asad base in the circumstances of the case." (ROA.25214 & n.3). For Decedents, Plaintiffs' claims pertain to their *trafficking* in Nepal, Jordan, and Iraq; they never arrived at Al Asad.[13] (ROA.501; ROA.510; ROA.524). Decedents were allegedly transported, transferred, harbored, obtained, or received *by foreign companies*, whose conduct Plaintiffs attempt to impute to KBR. (ROA.511-12; ROA.518-21); Plaintiffs.Br.42. None of this conduct occurred at Al Asad, which underscores why it "is not at the heart of Plaintiffs' ATS claim." (ROA.25214 n.3).

Only one Plaintiff, Buddi Gurung, worked at Al Asad, and his claim is separate from those of the Decedents' families. (ROA.30635-36; ROA.31059-60). Like Decedents, Gurung's trafficking allegations focus on his alleged transportation through several foreign countries outside of U.S. territory. (ROA.506; ROA.524; ROA.25214). And Gurung's alleged forced-labor at Al

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[13] Plaintiffs suggest *attempted* trafficking and forced labor are actionable under the ATS, Plaintiffs.Br.42, but those claims are distinct from actual trafficking and forced labor, which are the only claims they pleaded. (ROA.527-28; ROA.552-53). The conduct allegedly amounting to attempted trafficking or forced labor likewise occurred in Nepal, Jordan, and Iraq.

Asad does not "touch and concern" U.S. territory because Al Asad is not U.S. territory. *See supra* at 38-41.

4. The presumption against extraterritoriality does not depend on the type of "norm" Plaintiffs wish to enforce.

Plaintiffs seek to escape *Kiobel* by arguing that the international "norm" underlying their ATS claim "involves extraterritorial conduct." Plaintiffs.Br.43-46. That flouts *Kiobel*'s categorical holding that the presumption against extraterritoriality applies to the *statute*, which leaves no room for Plaintiffs' norm-by-norm approach. 133 S. Ct. at 1669. *Kiobel* reached this conclusion even though *every* ATS-cognizable norm is international-in-nature. *Id.* at 1665-66, 1669. The extraterritorial focus of a particular "norm" is irrelevant because *Kiobel* holds the ATS does not reach extraterritorial conduct, period.

5. Plaintiffs' allegations of trafficking within the territory of several nations are not akin to piracy on the high seas.

Plaintiffs cannot salvage their claims by analogizing to piracy acts supposedly exempt from the presumption against extraterritoriality. Plaintiffs.Br.44-46. *Kiobel* mentioned piracy as an example of an historically-cognizable ATS claim that takes place outside of U.S. territory, but nonetheless held the ATS has no extraterritorial application. 133 S. Ct. at 1667. *Kiobel* explained that "pirates may well be a category unto themselves" because of where

they operate—"on the high seas, *beyond the territorial jurisdiction of the United States or any other country*." *Id.* (emphasis added).

Plaintiffs do not address the obvious distinction between their claims and piracy. The alleged trafficking took place in the territory of other sovereigns—Nepal, Jordan, and Iraq—not on the high seas. (ROA.501; ROA.510; ROA.524).

6. KBR's nationality is irrelevant or at least insufficient to overcome the presumption against extraterritoriality.

Plaintiffs' emphasis on KBR's domestic incorporation (Plaintiffs.Br.36, 46-48) cannot displace the presumption against extraterritoriality because all the alleged wrongdoing occurred abroad. The district court correctly applied *Kiobel*'s holding that "mere corporate presence" in the U.S. is insufficient to overcome the presumption. 133 S. Ct. at 1669; (ROA.46873). *Every court* that has analyzed the presumption has refused to give a defendant's U.S. citizenship dispositive effect, and the better view holds that a defendant's citizenship is irrelevant.[14]

The Second Circuit has persuasively explained why a defendant's domestic citizenship has no bearing on the presumption against extraterritoriality. *See Balintulo I*, 727 F.3d at 180-90. The court stressed that *Kiobel*'s emphasis on *where* the relevant conduct occurred leaves lower courts "without authority to

[14] Absent support from any court, Plaintiffs invoke Justice Breyer's concurrence, which the *Kiobel* majority rejected. 133 S. Ct. at 1671 (Breyer, J., concurring); Plaintiffs.Br.46.

'reinterpret' the Court's binding precedent in light of irrelevant factual distinctions, such as the citizenship of the defendants." *Id.* at 190. That approach honors *Kiobel*'s driving concern about applying U.S. law to another sovereign state's territory. 133 S. Ct. at 1664. This concern exists regardless of whether those involved are U.S. nationals whose alleged conduct occurs within another sovereign's territory. That all the alleged relevant conduct here occurred in foreign countries should be "the end of the matter under *Kiobel*." *Balintulo I*, 727 F.3d at 190.

Plaintiffs also overstate the relevance of a defendant's citizenship in decisions from the Ninth and Eleventh Circuits. Plaintiffs.Br.47-48. The Ninth Circuit has not settled on a test, *see supra* at 35 n.7, but made clear in *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014), that a defendant's U.S. citizenship "is not enough to establish that the ATS claims here 'touch and concern' the United States with sufficient force." The Eleventh Circuit held that ATS claims, even those alleging some domestic conduct, did not sufficiently "touch and concern" the U.S. regardless of the defendants' U.S. citizenship.[15] *Drummond*, 782 F.3d at 597-600; *Baloco v. Drummond Co.*, 767 F.3d 1229, 1236-39 (11th Cir.

[15] Plaintiffs' assertion that *Drummond* "superseded" *Cardona* is inaccurate. Plaintiffs.Br.48. *Drummond* expressly "adhere[d] to the results" in both *Cardona* and *Baloco*. 782 F.3d at 600.

2014); *Cardona v. Chiquita Brands Int'l*, 760 F.3d 1185, 1189 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015).

Plaintiffs fail to point to any relevant U.S. conduct that is sufficient to rebut the presumption. *See supra* Part.II.A.2. Under these courts' views, Plaintiffs' ATS claims must be dismissed.

Plaintiffs' reliance on the outlier *Al Shimari* decision does not help them. The defendant's U.S. citizenship in *Al Shimari* was not dispositive there, either, as evidenced by the court's emphasis on allegations of domestic conduct that were far more extensive than here.[16] *See* 758 F.3d at 528-29; *see also supra* Part.II.A.2. To treat a defendant's U.S. citizenship as the basis for extraterritorially applying the ATS would conflict with Supreme Court decisions refusing to do the same for other federal statutes. *See, e.g.*¸ *Aramco*, 499 U.S. at 246-47 (Title VII suit against U.S. corporation); *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949) (FLSA). Under any view, KBR's U.S. incorporation is irrelevant or at least inadequate to rebut the presumption when all the relevant conduct occurred abroad.

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[16] The only other cases Plaintiffs cite are district court decisions. In one, the court had already ruled "the presumption against extraterritoriality is not displaced by a defendant's U.S. citizenship alone," *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 95 (D.D.C. 2014), and the allegations of domestic conduct were far more extensive than here. *See supra* at 38 n.8. The other is an outlier whose exclusive reliance on a defendant's U.S. citizenship is contrary to every court of appeals' approach. *Ahmed v. Magan*, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013).

7. Judicial speculation about policy interests cannot override the presumption.

Plaintiffs urge the "need to enforce" anti-trafficking norms against U.S. defendants and argue U.S. foreign policy favors permitting their ATS claims. Plaintiffs.Br.45-46, 48-50. Plaintiffs' argument mirrors Justice Breyer's interest-specific approach that the *Kiobel* majority rejected. *See* 133 S. Ct. at 1674 (Breyer, J., concurring).

Plaintiffs' incorrect policy-based rationale ignores the purpose of the presumption against extraterritoriality, which addresses "a statute's meaning." *Morrison*, 561 U.S. at 255. Its "wisdom" is to prevent the type of "judicial-speculation-made-law" that Plaintiffs invite. *See id.* 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." *Id.*

Kiobel prevents courts from having to "guess anew in each" ATS case by holding that the statute does not recognize claims based on foreign conduct. *Kiobel* reiterated the presumption's purpose to ensure that policy-making decisions rest with the political branches, particularly in the ATS context 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. These concerns "are implicated in any case arising under the ATS," especially one involving "conduct within the territory of another sovereign." *Id.* at 1665; *see also*

Balintulo I, 727 F.3d at 192. That is why ATS claims must "touch and concern" the *territory* of the United States—not just U.S. interests—and do so "with sufficient force to displace the presumption." *See Kiobel*, 133 S. Ct. at 1669; *Baloco*, 767 F.3d at 1236.

At best, Plaintiffs' arguments underscore the distinct role the political branches serve in determining whether and how to implement U.S. policy by enacting legislation targeting conduct abroad. That is what Congress did by adopting TVPRA section 1596 for trafficking and forced labor after 2008 and other expressly extraterritorial statutes Plaintiffs cite. Plaintiffs.Br.49. But "a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should." *Balintulo I*, 727 F.3d at 192. If Congress wants the ATS to reach transnational trafficking abroad, "a statute more specific more than the ATS would be required." *Kiobel*, 133 S. Ct. at 1669. Even "noble goals cannot expand the jurisdiction of the court granted by statute." *Cardona*, 760 F.3d at 1192.

8. The district court properly denied Plaintiffs' years-belated and futile request for leave to amend.

Plaintiffs' alternative request for leave to amend in light of *Kiobel* came years too late and was properly denied. Plaintiffs.Br.53-54; (ROA.25216 & n.5). A district court has "sound discretion" to determine when justice requires permitting a party leave to amend. *See Chitimacha Tribe of La. v. Harry L. Laws*

Co., 690 F.2d 1157, 1163 (5th Cir. 1982); FED. R. CIV. P. 15. "While leave to amend must be freely given, that generous standard is tempered by the necessary power of a district court to manage a case." *Shivangi v. Dean Witter Reynolds, Inc.*, 825 F.2d 885, 891 (5th Cir. 1987). This standard supports the district court's denial of leave to amend.

Plaintiffs failed to request leave to amend until eighteen months after the Supreme Court decided *Kiobel*, and nearly a year after the district court dismissed their ATS claims. (ROA.46872-73; ROA.47823). Plaintiffs have no excuse for waiting that long. *Their own counsel argued Kiobel*, yet even after KBR raised *Kiobel* in a supplement to its motion for summary judgment, (ROA.18873-901), Plaintiffs still did not seek leave to amend, arguing instead that their claims *as-then-pleaded* satisfied *Kiobel*'s "touch and concern" language, (ROA.46689).

Even after the district court dismissed their ATS claim, (ROA.46872-73), Plaintiffs waited another year before seeking leave to amend, (ROA.47823). Plaintiffs' delay is considerably longer than what this Court has construed as an undue delay. *See Whitaker v. City of Houston*, 963 F.2d 831, 836-37 (5th Cir. 1992); *Shivangi*, 825 F.2d at 890. "This is not a case in which the parties have had no opportunity to respond to an intervening change in Supreme Court law." *Mujica*, 771 F.3d at 593.

Plaintiffs also failed to explain or justify their delay, as was their burden to do. *See Nilsen v. Moss Point*, 621 F.3d 117, 122 (5th Cir. 1980). At this juncture, the "concerns of finality in litigation become more compelling" because "the trial court has disposed of the case on the merits." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 n.2 (5th Cir. 1981).

Plaintiffs say the district court never considered their request to add an aiding-and-abetting claim, Plaintiffs.Br.54, but they never tried to bring one. Plaintiffs tried to *analogize* their direct-liability claims to aiding-and-abetting cases, (ROA.25180-82), but they stressed that their "proposed amendment does not change the claims" of *direct liability* they had pleaded and the district court dismissed, (ROA.24304). There is no justification for allowing Plaintiffs to bring a claim they expressly chose to forgo.

The district court also correctly found that amendment would be futile. (ROA.25216 n.5). *See Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 379 (5th Cir. 2014). Unlike in the cases Plaintiffs cite (Plaintiffs.Br.53-54), the district court examined Plaintiffs' claimed *evidence*—not just allegations—of domestic conduct. (ROA.25210-16). This evidence encompassed the same inadequate allegations of knowledge and involvement of KBR's U.S. managers and KBR's payments from domestic accounts that Plaintiffs seek to plead and are insufficient to overcome *Kiobel*'s presumption against extraterritoriality. *Compare supra*

Part.II.A.2, *with* Plaintiffs.Br.52. Adding an aiding-and-abetting claim would be pointless when this same evidence was insufficient to establish such a claim. *Mastafa*, 770 F.3d at 192-94; *see supra* Part.II.A.1. The district court did not abuse its discretion by denying leave to amend.

B. *The TVPRA separately preempts Plaintiffs' ATS claims.*

The district court's ATS dismissal should be affirmed for the additional and independent reason that Plaintiffs' ATS claims premised on trafficking and forced labor are preempted or displaced by the TVPRA, contrary to the district court's ruling. (ROA.1111-12; ROA.2321-22). The TVPRA provides a comprehensive statutory framework that defines actionable trafficking and forced labor, and specifies civil and criminal remedies for victims. Through the TVPRA, Congress has occupied the field and has displaced common-law trafficking and forced labor claims that otherwise might be available under the ATS.

First, ATS claims are common-law claims. The ATS does not create or define any cause of action; it is "strictly jurisdictional" and "was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations." *Sosa*, 542 U.S. at 713, 721; *see also id.* at 724.

Second, statutes like the TVRPA that address a particular subject matter displace federal common-law claims on that subject. This is because federal common law "is resorted to" only in the "absence of an applicable Act of

Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). A statute displaces federal common law if the legislative scheme "addresses the problem formerly governed by federal common law." *Id.* at 315 n.8. Unlike preemption of state law, "no evidence of clear and manifest congressional purpose to displace need be found" for a federal statute to displace federal common law. *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420, 425 n.7 (5th Cir. 2014) (internal quotation omitted).

In *American Commercial Lines*, this Court addressed displacement in an Oil Pollution Act ("OPA") case, and held that OPA's rules regarding oil spill cleanup costs displaced federal common law and maritime claims. *Id.* at 424. This Court disagreed with appellant's argument that OPA did not displace common-law claims because the Act "does not explicitly do so," and explained that "federal common law has been preempted as to every question to which the legislative scheme spoke directly, and every problem that Congress has addressed." *Id.* (internal quotations omitted); *see also Resolution Trust Corp. v. Miramon*, 22 F.3d 1357, 1359-60 (5th Cir. 1994) (holding FIRREA displaces federal common law claims based on simple negligence).

In the TVPRA, Congress spoke directly to the standards governing civil liability for forced labor and trafficking claims.[17] Sections 1589 and 1590 describe in detail what constitutes actionable forced labor and trafficking; section 1595 defines the standard for civil liability and provides civil remedies for victims. Congress's comprehensive TVPRA legislation displaces common-law ATS claims based on purported international norms that "cannot override congressional intent as expressed by statute." *See Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006); *see also Bradvica v. I.N.S.*, 128 F.3d 1009, 1014 n.5 (7th Cir. 1997). This is doubly true given *Sosa*'s emphasis that Congress can "shut the door to the law of nations...at any time (explicitly, or implicitly by treaties or statutes that occupy the field)." 542 U.S. at 727-28, 731; *see also Martinez-Lopez*, 454 F.3d at 502.

In *Enahoro v. Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005), the Seventh Circuit applied *Sosa* in a TVPA case and concluded that, by enacting the TVPA, Congress chose to "occupy the field" and preempt common-law torture claims under the ATS. As *Enahoro* explained, "It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing

[17] In addition to trafficking and forced labor, Plaintiffs purport to allege common-law ATS claims for slavery, involuntary servitude, and false imprisonment. (ROA.552-53). These claims are captured by the TVPRA's broad definition of forced labor and trafficking. *See* 18 U.S.C. §§ 1589, 1590.

when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed." *Id.* at 886.

Third, TVPRA preemption is particularly clear under the "well-established principle" that precisely-drawn and detailed statutes preempt more general remedies arguably available under common law or supposed international norms. *See Hinck v. United States*, 550 U.S. 501, 506 (2007); *Britt v. Grocers Supply Co.*, 978 F.2d 1441, 1448 (5th Cir. 1992). The ATS is as general as it gets. It does not define causes of action nor specify remedies. *See Sosa*, 542 U.S. at 713, 721. In contrast, the TVPRA expressly defines the (1) conduct that constitutes actionable forced labor and trafficking; (2) standard for civil liability; (3) available remedies ("damages and reasonable attorneys fees"); and (4) applicable statutes of limitations. *See* 18 U.S.C. §§ 1589, 1590, 1595. The TVPRA also addresses other issues Congress deemed important when adjudicating trafficking and forced labor offenses. *See, e.g., id.* § 1595(b)(1) (stay of civil action pending criminal adjudication); § 1596 (extending TVPRA to extraterritorial conduct post-2008). The TVPRA's detailed, precisely-drawn framework preempts any general remedy under the ATS.

Fourth, the district court erred in relying on two decisions refusing to find ATS torture claims preempted by the TVPA. (*See* ROA.2321-22).[18] The pre-*Sosa* case of *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), was based on legislative history peculiar to the TVPA—and quite different from the TVPRA.

As for *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (per curiam), its reasoning was flawed. *Aldana* reasoned that the ATS and TVPA each provide "a means to recover for torture as that term separately draws its meaning from each statute." *Id.* at 1250. That ignores the issue. The issue is whether Congress's express standard under the TVPA controls over the common-law standard for which the ATS merely provides a jurisdictional hook. It does.

Despite noting *Sosa*'s statement that the TVPA provided a "clear mandate" for federal claims of torture and extrajudicial killing, *Aldana* incorrectly relied on *Sosa*'s silence as to whether the TVPA "provided the exclusive authority to hear

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[18] KBR is aware of two district court decisions addressing the TVPRA's preemptive effect of on ATS claims. *Compare Velez v. Sanchez*, 754 F. Supp. 2d 488, 497 (E.D.N.Y. 2010) (Congress "limited ATS jurisdiction by enacting [the TVPRA] that occupies the field of civil remedies for human trafficking and forced labor"), *rev'd in part on other grounds*, 693 F.3d 308 (2d Cir. 2012), *with Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1224-26 (S.D. Fla. 2011) (TVPRA does not preempt ATS claims). The *Magnifico* case, however, adopted the Eleventh Circuit's erroneous reasoning discussed *infra* at 54-55. KBR is not aware of any appellate opinions resolving this issue.

torture claims." 416 F.3d at 1250-51. But *Sosa* did not involve a torture claim and had no reason to answer that question, and the Court made clear Congress may "shut the door to the law of nations"—even implicitly—by enacting "statutes that occupy the field."[19] 542 U.S. at 731.

This Court should not follow *Kadic* and *Aldana*, which are inconsistent with Supreme Court precedent. *Cf. Kiobel*, 133 S. Ct. at 1670 (Kennedy, J. concurring) (noting that many abuses abroad "have been addressed by Congress in statutes such as the [TVPA]...and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted"). In creating the TVPRA, Congress spoke directly to what constitutes actionable trafficking and forced labor and the civil remedy available for victims. Congress has occupied the field and displaced any common-law claims otherwise available under the ATS.

C. *Corporations cannot be liable under the ATS.*

The district court's ATS dismissal should be affirmed for the additional and independent reason that corporations like KBR cannot be liable under the ATS. The Second Circuit, in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 121-

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[19] *Aldana* also reasoned that TVPA preemption of ATS claims would require "clear and manifest" evidence of Congress's intent. 416 F.3d at 1251. The Supreme Court has explained, however, that "evidence of a clear and manifest purpose" by Congress is not required for federal statutes to displace federal common law. *See City of Milwaukee*, 451 U.S. at 317.

22, 148-49 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013), held that "the question of the nature and scope of liability" under the ATS is left "to customary international law," and "[n]o corporation has ever been subject to *any* form of liability...under the customary international law of human rights." The Second Circuit reaffirmed this view after the Supreme Court left the issue open. *See Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014); *see also Nestle*, 788 F.3d at 954-56 (Bea, J., dissenting from denial of reh'g en banc); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *vacated by* 527 F. App'x 7 (D.C. Cir. 2013). This Court should adopt the Second Circuit's well-reasoned approach and reject the position of other courts that the district court followed.[20] (*See* ROA.28357).

The Second Circuit explained why the question of "who may be liable" is answered by international law. *Kiobel*, 621 F.3d at 126-31, 147-48. After surveying international law sources, the Second Circuit concluded that no universal norm of corporate liability supports an ATS claim. *Id.* at 131-44. While the court noted the U.N. Convention Against Transnational Organized Crime, art. 10(1), mentions corporate liability, *id.* at 138-39, that treaty defers to each enacting state's

[20] Although the district court resolved the issue of corporate liability in connection with Daoud's motion to dismiss, (ROA.28357-58), KBR also raised it as grounds for dismissal. (ROA.5302-03). Regardless, whether the ATS permits corporate liability is a jurisdictional issue. *See, e.g.*, *Sosa*, 542 U.S. at 712, 714.

"legal principles" to determine what (if any) liability measures to enact against "legal persons" involved in certain types of crimes. Given *Sosa*'s emphasis on the "great caution" necessary "in adapting the law of nations to private rights," 542 U.S. at 728, this qualified language in a single treaty is inadequate to establish a norm of customary international law imposing liability on corporations. For this additional reason, the dismissal of Plaintiffs' ATS claim should be affirmed.

D. *Plaintiffs failed to satisfy the ATS state-action requirement.*

The Court also may affirm the dismissal of Plaintiffs' ATS claim because their complaint must—but does not and cannot—allege state action or action under color of law. Plaintiffs' ATS claim is based on private action and purported "norms" that have not been recognized by the Supreme Court or this Court. (*See* ROA.552-53).

Sosa instructs that, in evaluating whether norms are actionable under the ATS, courts should consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20. Courts that have considered whether to permit an ATS claim based on violations of an international norm have generally required plaintiffs to allege that state actors or those acting under color of law committed those violations. *See, e.g.*, *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1357 (11th Cir. 2010);

Abdullahi v. Pfizer, Inc., 562 F.3d 163, 188 (2d Cir. 2009); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008); *Kadic*, 70 F.3d at 243; *see also Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165-67 (5th Cir. 1999) (declining to reach state-action question).

The only appellate court not to require state action did so in the context of slavery claims brought by children forced to work on privately-owned cocoa plantations. *See Nestle*, 766 F.3d at 1022. That is factually distinguishable and rests on shaky grounds.[21] The purported international-law sources cited in Plaintiffs' amended complaint offer no clear basis for permitting ATS jurisdiction to reach private action.[22]

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[21] Eight judges dissented from denial of rehearing en banc and sharply criticized the panel for "substitut[ing] sympathy for legal analysis," 788 F.3d at 946 (Bea, J., dissenting). A petition for certiorari currently is pending, *see supra* at 35 n.7.

[22] *See* Convention Concerning Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 (suggesting state action is required because imposes obligations on states); Supplement to Slavery Convention on Abolition of Slavery, Slave Trade & Institutions & Practices Similar to Slavery, Sept. 7, 1956, 18 U.N.T.S. 3201 (focusing on acts distinct from those alleged here); Universal Declaration of Human Rights, G.A. Res. 217A (Ill.), U.N. Doc. A/810, at 71 (1948) (has "little utility" under *Sosa*, 542 U.S. at 735); International Covenant on Civil & Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (same); International Labour Organization's Declaration on Fundamental Principles & Rights at Work, 86th Sess., June 19, 1998, § 2(b), 37 I.L.M. 1233 (same); Convention Regarding Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (not ratified by U.S.).

III. The District Court Correctly Dismissed Plaintiffs' Negligence Claim As Barred By Limitations.

Plaintiffs are in no position to complain about the dismissal of their negligence claims on limitations grounds. Plaintiffs.Br.54-60. They consented to application of a two-year statute of limitations under Texas and California law, and never once suggested that Iraq's purportedly longer limitations period should apply. The district court rightly found Plaintiffs did not plead or assert any facts supporting a basis for extending the limitations period. (ROA.2334-35 & n.4). The only thing "cursory" about the limitations analysis, Plaintiffs.Br.54, was Plaintiffs' lack of justification for maintaining their untimely negligence claims.

A. *Plaintiffs waived reliance on Iraq law.*

Plaintiffs waived their choice-of-law argument by failing to raise it below. *Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 747 (5th Cir. 2011) (per curiam). Plaintiffs did not dispute that their negligence claim was governed by the two-year limitations period under Texas or California law when KBR moved to dismiss that claim. (*Compare* ROA.1112 & n.13, *with* ROA.1472-73). Plaintiffs later reinforced that position by *invoking* Texas's statute of limitations themselves. (*See* ROA.3080-81 & n.23).

Throughout nearly seven years of litigation, Plaintiffs never hinted that Iraq law should supply the applicable limitations period—even after this Court analyzed Iraq's approach to limitations in *McGee v. Arkel International, LLC*, 671

F.3d 539, 547 (5th Cir. 2012)—which Plaintiffs mention for the first time here. Plaintiffs.Br.57. Plaintiffs actually argued *against* the relevance of Iraq law by contending that KBR was immune from Iraqi law. (ROA.20492; ROA.20507). This Court should reject Plaintiffs' newfound reliance on Iraqi limitations law.

B. *Plaintiffs' conclusory assertions do not demonstrate any basis for extending the limitations period.*

Plaintiffs' attempt to extend the limitations period similarly relies on assertions and theories that were not raised below. Plaintiffs.Br.57-60. Plaintiffs never mentioned the discovery rule below and cannot rely on it now. *See Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 620 n.9 (5th Cir. 1993) (per curiam). Plaintiffs also never asserted they lacked notice of KBR's alleged involvement until less than two years before filing suit. (*See* ROA.500-63; ROA.1472-73). It is hardly "legal error" for the district court to not credit or address a theory Plaintiffs never presented. *See* Plaintiffs.Br.58.

As for equitable tolling, Plaintiffs say they were not required to plead that defense specifically, Plaintiffs.Br.59-60, but their cited cases show they were at least required to allege "sufficient facts to put [KBR] on notice" of the defense. *See Brandau v. Howmedica Osteonics Corp.*, 439 F. App'x 317, 320 (5th Cir. 2011) (per curiam) (internal quotation omitted); *accord Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1137 (9th Cir. 2001) (en banc). Plaintiffs'

amended complaint omits any factual basis for equitable tolling, (ROA.500-63), which was reason enough to reject it.

When faced with KBR's motion to dismiss, Plaintiffs asserted only that the Nepali "civil conflict" delayed their suit. (ROA.1473 n.29). In Plaintiffs' equitable-tolling cases, however, the plaintiff had shown specific impediments to his ability to bring a suit against a particular defendant, such as where the defendant was part of a foreign military regime that oppressed and threatened the plaintiff,[23] or where a court ruling barred the plaintiffs' claims against the defendants.[24] By contrast, Plaintiffs simply pointed to news reports about the conflict in Nepal without linking it to any particular Plaintiff's delay in filing suit and without any link to KBR. Plaintiffs.Br.60. As the district court noted, Plaintiffs never indicated they were "prohibited from traveling or were otherwise cut off from the information necessary for them to learn of [KBR's] actions" or that the war directly or significantly affected their ability to bring claims "against an American company with no connections to the fighting." (ROA.2335).

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[23] *See, e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 779-80 (11th Cir. 2005); *Chavez v. Carranza*, 559 F.3d 486, 490-91, 493 (6th Cir. 2009); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 478, 481-82 (D. Md. 2009), *aff'd on other grounds*, 402 F. App'x 834 (4th Cir. 2010).

[24] *See Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 596 (9th Cir. 1991).

Plaintiffs compounded their omissions by failing to show whether they exercised diligence, a matter uniquely within their knowledge and control. The district court properly dismissed Plaintiffs' state-law claims.

PRAYER

For these reasons, KBR requests that this Court affirm the district court's take-nothing judgment and prays for such further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellees in electronic form on counsel of record by filing it using the Court's CM/ECF system on the 25th day of November, 2015 as follows:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(i) because this brief consists of 13,981 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman font.

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United States Court of Appeals

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No. 15-20225 Ramchandra Adhikari, et al v. Daoud & Partners, et al
USDC No. 4:09-CV-1237

Dear Mr. Harris,

The following pertains to your redacted appellees' brief electronically filed on 12/2/15.

You must submit the seven (7) paper copies of your redacted brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Jim deMontluzin

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