

No. 11-649

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IN THE  
**Supreme Court of the United States**

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RIO TINTO PLC AND RIO TINTO LIMITED,  
*Petitioners,*

v.

ALEXIS HOLYWEEK SAREI, ET AL.,  
*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF  
AND BRIEF FOR PROFESSORS OF INTERNATIONAL  
LAW, FOREIGN RELATIONS LAW AND FEDERAL  
JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF  
PETITIONERS**

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December 28, 2011

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**MOTION FOR LEAVE TO FILE *AMICI CURIAE*  
BRIEF**

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The individuals listed on page iv (hereinafter the “Professors of International Law, Foreign Relations Law and Federal Jurisdiction” or “*amici*”) respectfully move for leave to file the attached *amici curiae* brief pursuant to this Court’s Rule 37.2(b). In accordance with Rule 37.2(a), *amici* (through their counsel) provided notice to counsel for all parties, at least 10 days prior to the due date of *amicus* briefs supporting Petitioner, of their intent to file a brief. Petitioners have consented in writing, in a letter on file with the Clerk of this Court, to the filing of all *amicus curiae*

briefs. Respondents have declined to consent to the filing of this brief.

### **INTEREST OF *AMICI CURIAE***

*Amici curiae* are professors who teach international law, foreign relations law, and/or federal jurisdiction at law schools, and as such have expertise in the legal issues concerning the scope and application of the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350.

This case raises important issues concerning the use of the ATS to create an extraterritorial federal common law tort action to remedy foreign governments’ conduct within their own territory, and the availability (if any) of a federal common law aiding and abetting liability against nonstate actors for such alleged violations. This Court’s ruling in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), emphasizes the constrained role of federal common lawmaking in this area, particularly with respect to alleged violations of the law of nations that were not recognized at the time the ATS was enacted. *Amici* write to urge the Court to grant the instant Petition as a means of resolving important questions concerning the scope of ATS litigation that will remain regardless of how the Court ultimately decides the ATS case currently on its docket, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491.

### **CONCLUSION**

*Amici* respectfully request that their motion for leave to file a brief in support of Petitioners be granted.

Respectfully submitted,

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## LIST OF AMICI\*

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**Eugene Kontorovich** is Professor of Law at Northwestern University Law School. He has been on the faculty there since 2007.

**Julian Ku** is Professor of Law at the Maurice A. Deane School of Law at Hofstra University. He has been on the faculty there since 2002.

**John O. McGinnis** is the George C. Dix Professor in Constitutional Law at Northwestern University Law School. He has been on the faculty there since 2002.

**Michael D. Ramsey** is Professor of Law, University of San Diego School of Law. He has been on the faculty there since 1995.

**Ernest A. Young** is the Alston & Bird Professor at Duke Law School. He has been on the faculty there since 2008.

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\* Affiliations are provided for identification purposes only.

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The interest of *amici curiae* is set forth in the accompanying Motion for Leave to File a Brief.

### ARGUMENT

The Petition in this case presents several important issues concerning the scope of the ATS as to which this Court's guidance is urgently needed. The federal courts have faced a wave of litigation against U.S. and foreign corporations, much of it—like the present case—seeking to hold those corporations secondarily liable for the conduct of foreign governments. This Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that only a “very limited” category of violations of the law of nations are actionable as federal common law claims under the ATS, 542 U.S. at 712, and left open several critical questions, including the extraterritorial applicability of the ATS (if any) to conduct in the territory of a foreign sovereign, and the scope (if any) of secondary liability under the ATS. These are questions of great importance—raising both separation-of-powers and foreign-policy concerns—that the lower courts have struggled to answer, and that are squarely presented by the instant Petition.

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<sup>1</sup> The parties were notified ten days prior to the due date of this brief of *amici's* intention to file. Petitioners consented to the submission of this brief; Respondents did not. Accordingly, pursuant to Rule 37.2(b), a motion for leave to file this brief has been filed with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.



This Court has already agreed to hear a case concerning the fourth question presented in the Petition, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (addressing whether corporations are subject to liability under the ATS), but other questions presented by the Petition are of at least equal importance to that question, and appear unlikely to be resolved in *Kiobel*. Indeed, the *amicus* brief for the United States in *Kiobel* notes that there are “a number of other questions” that are “important” and “unanswered by this Court” but “were not decided by the court of appeals” in *Kiobel*, including at least two of the questions presented by the Petition in this case: “whether or when a cause of action should be recognized for theories of secondary liability such as aiding and abetting” and “whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country.” Brief for the United States, *Kiobel v. Royal Dutch Petroleum Co.* (Dec. 21, 2011) (No. 10-1491), at 12-13.

*Amici* respectfully submit that, even if the Court rules for respondents in *Kiobel*, ATS actions will remain available against the employees of private corporations and other individual defendants. Accordingly, regardless of the outcome in *Kiobel*, at least the first two questions in the Petition will remain important ones that require resolution by this Court.

In particular, there will remain for decision whether, and under what circumstances, an extraterritorial federal common law cause of action should be recognized for violations of international law that occur within foreign countries; and to what extent, if any, nonstate actors may be liable under

the ATS for aiding and abetting violations of international law committed by foreign states. Both of these issues are of central importance to whether the ATS creates, in essence, a federal common law remedy for alien plaintiffs aggrieved by the human rights violations of foreign governments. Both issues are squarely presented by the Petition.<sup>2</sup>

### CONCLUSION

The petition for certiorari should be granted, at least with respect to the first and second questions presented in the Petition.

Respectfully submitted,

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<sup>2</sup> *Amici* take no position on the third question presented, relating to the exhaustion of local remedies.