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; STYA NARAYAN SHA; RAM NARYAN THAKUR; SAMUNDRI DEVI THAKU; 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 United States District Court for
the Southern District of Texas, No. 4:09-cv-01237, Hon. Keith P. Ellison

# BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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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.

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## INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. companies and professional organizations of every size, in every industry sector, and from every region of the country.[1]

One of the Chamber's most important roles is representing the interests of its members before courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases involving issues of vital concern to the Nation's business community. One such issue—presented in this appeal—is the effort by plaintiffs to use the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as a tool for global forum shopping: the opportunistic filing of lawsuits in American courts regarding purely foreign disputes. See http://www.chamberlitigation.com/cases/issue/global-forum-shopping-litigation-resource-page.

The Chamber has a direct and substantial interest in the issues raised in this appeal. Numerous Chamber members have been and may continue to be named as

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

defendants predicated on expansive theories of liability under the ATS, based solely on their business operations—or those of their affiliates or suppliers—in developing countries. Over the past two decades, the plaintiffs' bar has filed over a hundred ATS lawsuits against businesses in the United States. These suits typically are litigated for a decade or more, imposing substantial legal and reputational costs on companies that operate in developing countries and chilling further investment. Unless plaintiffs' expansive theories of ATS liability in this appeal are rejected, the stream of ATS lawsuits will continue, and the Fifth Circuit may become a magnet for such litigation.

The Chamber unequivocally condemns violations of human rights and takes no position on the factual allegations in this case. But the legal issue here is not whether any such wrongs occurred. Instead, the question is whether private plaintiffs may invoke the ATS to compel U.S. courts to adjudicate violations of international law alleged to have occurred in the furthest corners of the globe. The Chamber and its members have a strong interest in the resolution of these issues.

## SUMMARY OF THE ARGUMENT

The Chamber agrees with defendants and the district court that plaintiffs' claims are legally barred for multiple reasons. See, *e.g.*, ROA.2334-35; ROA.23705-17; ROA.25205-22; ROA.46872-77. In this brief, the Chamber focuses on the plaintiffs' claims under the ATS, which the district court rejected as

an impermissibly extraterritorial application of that statute. ROA346872-73. For the reasons we discuss, the district court was correct; the ATS does not permit U.S. courts to exercise jurisdiction over claims of alleged violations of international law taking place in Nepal, India, Jordan, and Iraq.[2]

The plaintiffs' request that their ATS claims be reinstated is squarely precluded by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which the Supreme Court held, first, that the presumption against the extraterritorial application of statutes applies with full force to the ATS; and, second, that the Court's prior decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), provides the governing standard for assessing whether the proposed application of a statute is impermissibly extraterritorial. See *Kiobel*, 133 S. Ct. at 1669. Under that test, plaintiffs' claims here are impermissibly extraterritorial.

Notwithstanding *Kiobel*, plaintiffs argue for a "fact-specific analysis," under which district courts would be asked to weigh every conceivable connection between the United States (or American interests) and an ATS claim, the parties, and the allegations. Appellants' Opening Br. 35-50. That approach is not only

[2] This case does not involve allegations that the perpetrator of human-rights abuses abroad has sought safe harbor in the United States.

precluded by *Kiobel* and *Morrison*, it is also unsound because it would produce *ad hoc* and unpredictable applications of the ATS.

Moreover, adopting plaintiffs' approach to ATS liability would produce significant adverse consequences. ATS plaintiffs would flock to this Circuit and seek to convert this Court and its lower courts into World Courts, with global jurisdiction over alleged violations of international law, so long as any connection to the United States or U.S. interests can be identified.

The potential for conflicts with the political branches' exercise of authority over foreign affairs is easy to see. Indeed, this action seeks to punish companies for providing logistical support to U.S. military operations in the Middle East by arguing that those companies are vicariously liable for violations of international law allegedly committed abroad by various foreign third parties. And many ATS suits challenging conduct abroad target U.S. companies doing business in countries with troubled human-rights records; these plaintiffs often contend that the companies' investment or commercial activities somehow aided and abetted the abuses. Plaintiffs' approach to ATS liability in this case would open the door to these suits, allowing a multitude of private ATS plaintiffs to seek to reshape U.S. foreign policy by effectively imposing—via litigation—economic sanctions on various countries.

In addition, ATS lawsuits based on conduct abroad provide a ready vehicle for abusive claims seeking to coerce a settlement regardless of the underlying merits. ATS actions typically threaten the defendants with massive liability. The claims inevitably involve inflammatory allegations of human-rights abuses. And because of the difficulty of determining the contours of international-law norms and the enormous burdens of conducting discovery in countries in the developing world, these ATS cases are costly to defend. The pressure on defendants to yield to a blackmail settlement is immense.

The inevitable result would be to raise the cost of doing business in the developing world—and in some circumstances, to deter companies from engaging in international commerce. Some foreign companies may refrain from investing in the United States in order to avoid the potential for being amenable to suit in U.S. courts under the ATS. The adverse impact on the U.S. economy—and the economies of countries in the developing world—would be significant.

The decision below should be affirmed.

## ARGUMENT

### I. The District Court Correctly Refused To Entertain This Attempted Extraterritorial Application Of The ATS.

#### A. The ATS Does Not Apply Extraterritorially.

The ATS, which was enacted in 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only,

committed in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, § 9, 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350). The statute thus "provides district courts with jurisdiction to hear certain claims"—for a limited number of "international law violations"—but does not create a cause of action. *Kiobel*, 133 S. Ct. at 1663 (internal quotation marks omitted). Federal courts may exercise discretion to "'recognize private claims [for certain violations] under federal common law," provided that the invoked international-law norm has "the requisite 'definite content and acceptance among civilized nations.'" *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)) (alteration by Court).

In *Sosa*, the Supreme Court repeatedly warned federal courts against adventuresome applications of the ATS. On a dozen separate occasions, the majority opinion describes the ATS's scope as "narrow," "modest," or limited." 542 U.S. at 712, 715, 720, 721, 724, 725, 729, 732. Ten times, the Court instructed lower courts to be "wary" of efforts to expand the scope of the ATS, or to exercise "caution," "restraint," and "vigilan[ce]." *Id.* at 725, 727, 728, 729, 733.

The Court offered several "good reasons" for judicial restraint. *Id.* at 725. *First*, judicial development of federal common law has been curtailed since the enactment of the ATS in 1789. Today's "general practice has been to look for legislative guidance before exercising innovative authority over substantive law" and recognizes that "a decision to create a private right of action is one better left

to legislative judgment in the great majority of cases." *Id.* at 726-27. *Second*, the Court observed that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. *Third*, the Court warned that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." *Id.*

*Kiobel* applied these concerns in the context of "the canon of statutory interpretation known as the presumption against extraterritorial application." 133 S. Ct. at 1664. As a general matter, the Court explained, that well-established "presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*")). But "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS"—and is "all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign." *Id.* at 1664-65. The Court noted that "[r]ecent experience" with ATS suits premised on conduct occurring abroad "bears this out," and identified "recent objections to extraterritorial applications of the ATS by

Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom." *Id.* at 1669.

For these reasons, the Court held in *Kiobel* that "the presumption against extraterritoriality applies to claims under the ATS" and "nothing in the statute rebuts that presumption." *Id.* at 1669. The Court therefore held that the petitioners' claim "seeking relief for violations of the law of nations occurring outside the United States"—in that case, in Nigeria—"is barred." *Id.*

### B. Plaintiffs' Proposed Expansion Of ATS Liability Contravenes The Supreme Court's Decision In *Kiobel*.

The claims here, like the one in *Kiobel*, seek to impose vicarious liability for foreign third parties' violations of international law that allegedly occurred outside the United States—in Nepal, India, Jordan, and Iraq. The presumption against extraterritoriality therefore bars plaintiffs' claims just as it barred the claim in *Kiobel*.

Plaintiffs nonetheless assert that the inquiry for determining whether an ATS claim is impermissibly extraterritorial turns on a "fact-specific analysis" of such things as "the parties' identities," "their relationship to the causes of action," the level of "U.S. interest" in the international-law norm, the extent of foreign sovereign authority over the location of the tort, and the degree of interference with U.S. foreign policy. Appellants' Opening Br. 35-50. Plaintiffs' nebulous balancing test is squarely inconsistent with the holding in *Kiobel*.

The Court there held that even if some domestic connection is alleged, the presumption against extraterritoriality bars ATS claims unless the claims "touch and concern the territory of the United States * * * with sufficient force to displace the presumption." *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-73); see also *Morrison*, 561 U.S. at 266 ("[T]he 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.").

In *Morrison*, the Court held that Section 10(b) of the Securities and Exchange Act does not apply extraterritorially. The plaintiffs had argued that their claim was sufficiently domestic because although the securities transactions took place on foreign exchanges, the fraudulent statements came from the United States and some defendants were U.S. citizens. *Id.* at 261.

The Supreme Court rejected the argument, explaining that because Section 10(b)'s "focus" is on the purchase and sale of securities—which occurred abroad—the fact that U.S. defendants allegedly engaged in "deceptive conduct" in the United States was irrelevant. *Id.* at 266-67. The Court noted that it had reached the same conclusion with respect to federal labor statutes: A claim under those statutes is impermissibly extraterritorial if it involves employment overseas, even when the parties are all Americans and the employee was hired in the United States, because the "'focus' of congressional concern" is "domestic employment."

*Id.* at 266 (citing *Aramco*, 499 U.S. at 255, and *Foley Brothers v. Filardo*, 336 U.S. 281, 283, 285-86 (1949)).

By citing *Morrison*, the *Kiobel* Court made clear that the legal standard set out in *Morrison* applies in determining whether a proposed application of the ATS is extraterritorial and therefore barred. 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266). The inquiry, therefore, is whether the acts or events on which the law "focus[es]" occurred outside the United States. *Morrison*, 561 U.S. at 266.

The focus of congressional concern in the ATS was on "tort[s] * * * committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350; see *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). An application of the statute is extraterritorial, and therefore impermissible, when the plaintiffs' claim "seeks relief for violations of the law of nations occurring outside the United States [and is therefore] barred." *Kiobel*, 133 S. Ct. at 1669.

Here, the alleged violations of international law all "occur[ed] outside the United States." *Id.* The plaintiffs, who are Nepalese, alleged that they or their family members were trafficked from Nepal and India and through Jordan and forced to labor in Iraq. ROA.501-07. Because the torts occurred outside the United States, any application of the ATS here would be extraterritorial and therefore impermissible.

In an attempt to avoid this inevitable conclusion, plaintiffs ignore *Morrison*'s "focus" test and suggest that *Kiobel* instead created a "new 'touch and concern' standard." Appellants' Opening Br. 35. But the *Kiobel* Court pointed to its analysis in *Morrison*—and nothing else—in explaining that some ATS claims might have a sufficient U.S. connection to qualify as non-extraterritorial applications of the statute. See 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-73). The words "touch and concern" appear in only a single phrase at the beginning of a sentence—followed by a citation to *Morrison*: "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. __, 130 S. Ct. at 2883-2888." *Kiobel*, 133 S. Ct. at 1669. That passage confirms that *Morrison*'s test is controlling; otherwise, there would have been no reason to cite *Morrison*.

Indeed, the Second and Eleventh Circuits have recognized that *Kiobel* incorporates *Morrison*'s "focus" test. For example, to undertake "the extraterritoriality analysis" under *Kiobel*, the Second Circuit "look[s] to the [Supreme] Court's opinion in *Morrison*" to assess which "territorial event[s]" or "relationship[s]" are "the 'focus' of the ATS." *Mastafa v. Chevron Corp.*, 770 F.3d 170, 183, 185 (2d Cir. 2014). And that "'focus,'" the Second Circuit explained, "is on * * * ***the location of th[e] conduct***" that is "either a direct

violation of the law of nations" or that "constitutes aiding and abetting another's violation of the law of nations." *Id.* at 185 (emphasis added); see also *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 166-67 (2d Cir. 2015) (same); *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013).

The Eleventh Circuit similarly adheres to *Morrison*, considering "whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement [of the presumption] and permit jurisdiction." *Doe v. Drummond Co.*, 782 F.3d 576, 590 (11th Cir. 2015).

It is true that the Fourth Circuit has adopted a case-by-case balancing test to assess whether a particular ATS claim is impermissibly extraterritorial. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527, 529 (4th Cir. 2014). But the *Al Shimari* court did not consider *Morrison*'s "focus" test and failed even to mention *Kiobel*'s direct reference to *Morrison*. Instead, the Fourth Circuit stated that *Kiobel* did "not state a precise formula for our analysis." *Id.* But *Kiobel* did adopt a specific test—*Morrison*'s "focus" inquiry—as the *Kiobel* Court's citations to *Morrison* make clear.

An amorphous fact-specific test for evaluating extraterritoriality is, moreover, entirely at odds with the Supreme Court's effort to bring order to lower courts' extraterritoriality analysis. In *Morrison*, the Supreme Court criticized and abrogated various tests that lower courts had used in the Section 10(b) context as

"unpredictable," "inconsistent," and "not easy to administer." 561 U.S. at 258, 260. The Court explained that "apply[ing] the presumption in all cases" would "preserv[e] a stable background against which Congress can legislate with predictable effects." *Id.* at 261. The plaintiffs' approach here would thwart the Supreme Court's effort in *Kiobel* to set the ATS on a similar path toward predictability. This Court should instead follow the circuits that have applied the clear and predictable "focus" test outlined in *Morrison* and incorporated by *Kiobel*.

## II. Allowing ATS Suits Based On Alleged Misconduct In Other Nations Would Threaten The Political Branches' Control Over Foreign Policy And Chill International Commerce, Harming The World Economy.

Plaintiffs' extraordinarily expansive view of the scope of the ATS would undermine U.S foreign policy and impose significant burdens on American businesses, damaging the U.S. economy and deterring the investment in developing countries that is critical to improving the lives of their citizens. That is because the case-specific factual inquiry that plaintiffs advocate would open the door to ATS suits against companies investing or doing business in any country with a poor human-rights record, on the theory that the companies are vicariously liable for abuses committed in those countries.

### A. ATS Suits Targeting Foreign Conduct Subvert U.S. Foreign Policy.

As the Second Circuit has observed, ATS suits often are the equivalent of attempts "to impose embargos or international sanctions through civil actions in

United States courts." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009).

But enabling U.S. courts—at the behest of private plaintiffs located half a world away—to dictate foreign policy would expand judicial authority well beyond courts' constitutional responsibilities. It is settled that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'— departments of the government." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); accord *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

That allocation of authority applies equally to economic sanctions: The Legislative branch typically authorizes sanctions, and the Executive then implements them according to the terms Congress has fashioned. See, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000) (discussing statute that gave the President "flexible and effective authority over economic sanctions against Burma").

Extraterritorial ATS lawsuits would require courts to second-guess the political branches' choices about whether and how to impose economic sanctions for human-rights abuses committed abroad. The political branches can calibrate sanctions based on the national interest. Private ATS plaintiffs, by contrast, pursue their own personal agendas.

Precisely because sanctions fall squarely within the "foreign affairs powers" of the political branches (*Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1983 (2011)), the Supreme Court has rejected attempts to involve the federal judiciary in decisions regarding the imposition of sanctions. See, *e.g.*, *Regan v. Wald*, 468 U.S. 222, 242-43 (1984). Indeed, the Executive Branch has long maintained that "sanctions measures [must be] well conceived and coordinated, so that the United States is speaking with one voice," lest an uncoordinated effort "put the U.S. on the political defensive." *Crosby*, 530 U.S. at 382 n.16 (quoting Testimony of Under Secretary of State Stuart E. Eizenstat before the Trade Subcommittee of the House Ways and Means Committee (Oct. 23, 1997)).

Those precedents underscore the dangerous "practical consequences" of using the ATS to adjudicate conduct occurring abroad. *Sosa*, 542 U.S. at 732-33. ATS claims regularly seek just such uncoordinated, *de facto* sanctions regimes: Litigant after litigant has sought to make his or her own foreign policy by punishing corporations for doing business in troubled nations. That is "a direct challenge to U.S. foreign policy leadership." Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 153 (2003).

These quasi-sanctions are particularly harmful, as the government has observed in the past, because they "interfere with the ability of the U.S.

government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." Br. for the U.S. as *Amicus Curiae* in Supp. of Pet'rs at *21, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389 ("*Ntsebeza Br.*"). For example, "in the 1980s, the United States * * * urged companies [doing business in South Africa] to use their influence to press for change away from apartheid, while at the same time using limited sanctions to encourage the South African government to end apartheid"; such policies "would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Id.* Similarly, in this case, plaintiffs' ATS suit would punish companies attempting to provide logistical support in connection with American military operations in the Middle East—which would not only deter some companies from providing continued assistance or helping with future operations, but also directly raise the cost of on-the-ground U.S. operations on foreign soil.

### B. ATS Suits Challenging Conduct Occurring Abroad Deter Cross-Border Investment, Harming American Businesses And The World Economy.

Plaintiffs' proposed expansion in the scope of ATS liability also will harm the U.S. economy and the economic well-being of other nations. Even meritless ATS suits expose defendant companies to enormous potential liability, negative

publicity, and massive defense costs. Those harms, in turn, have ripple effects that are felt across the global economy.

### 1. Extraterritorial ATS suits are tailor-made vehicles for coercing blackmail settlements from businesses that operate or invest abroad.

ATS litigation based on foreign conduct, like abusive securities class actions, "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). To begin with, ATS cases often threaten defendants with immense liability—as much as $400 billion in damages in some cases. Jack Auspitz, *Issues in Private ATS Litigation*, 9 BUS. L. INT'L 218, 220 (2008). And these cases often involve headline-grabbing allegations of tragic circumstances—genocide, torture, slavery—as a matter of course.

The mere filing of an ATS suit can cause corporate stock values and debt ratings to plunge. See Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 WORLD POLY. J. 60, 63 (2004). Even a vexatious suit can irreparably taint the reputations of corporations that are doing business abroad. See Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271, 290-91 (2009).

ATS plaintiffs actively exploit these dynamics to pressure defendants to settle. For example, in a case against Coca-Cola based on the alleged activities of subsidiaries in Colombia, the plaintiffs and their lawyers launched protests at the company's shareholder meetings. See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 517 (2011). The news that the company was being accused of murder and torture prompted some shareholders to quickly dump Coke's stock, even though the case ultimately was dismissed. Kurlantzick, 21 WORLD POLY. J. at 63-64; see also *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), *abrogated on other grounds by Mohamed v. Palestinian Auth.*, 132 S. Ct. 1252 (2012). Similarly, the plaintiffs in another ATS case against several chocolate makers issued press releases and staged demonstrations just before Halloween and Valentine's Day to urge shoppers not to buy the defendant companies' candy because their suppliers in Côte d'Ivoire allegedly had employed "child slavery"—and cited the pending ATS action as proof of the allegations. See, *e.g.*, Deborah Orr, *Slave Chocolate?*, Forbes (Apr. 7, 2006), at http://www.forbes.com/forbes/2006/0424/096.html.

Moreover, ATS cases challenging conduct occurring abroad are enormously costly to defend. Because of the nebulous nature of international-law norms, obtaining the dismissal of an ATS lawsuit on the pleadings is difficult, even when

the allegations are dubious at best. For example, in the Nestlé ATS litigation over Ivoirian cocoa, it took over five years and multiple rounds of briefing before the district court ruled on the motion to dismiss. See *Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1063 (C.D. Cal. 2010). The Ninth Circuit appeal, which drew a flurry of *amicus* briefs, took another five years, and a petition for *certiorari* remains pending. See *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014), *reh'g denied*, 788 F.3d 946 (2015), *cert. petition filed*, No. 15-349 (U.S. Sept. 18, 2015).

If a case survives the pleading stage, the discovery process is unusually expensive and burdensome. See Gary C. Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute,*7 J.INT'L ECON. L. 245, 253 (2004). First, "obtain[ing] discovery from foreign sources" almost invariably is an "expensive, cumbersome, and difficult" process—one that often renders the litigation as whole "prohibitively expensive and resource consuming." Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44-NOV Trial 32, 36-37 (2008). Second, the usual difficulties of overseas discovery are magnified in ATS cases. "[W]itnesses and documents are often overseas, typically in remote locations and developing countries." Auspitz, 9 BUS. L. INT'L at 221. "[S]uits often involve several dozens of defendants, their interactions with each other and government agencies, claims going back dozens of years, documents in foreign

languages, and other similar logistical hurdles." *Id.* Discovery is therefore "vastly expensive." *Id.*

Courts and commentators have recognized as much, observing that discovery in ATS cases is "costly and time-consuming," Amanda S. Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of* Bell Atlantic v. Twombly?, 76 FORDHAM L. REV. 2177, 2208 (2008), and imposes "financial hardships" and "significant delays" on parties and courts alike. *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009); accord *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1152 (C.D. Cal. 2005) ("significant costs and delays" caused by need for translation of foreign documents), *vacated on other grounds*, 564 F.3d 1190 (9th Cir. 2009), *cert. filed*, No. 15-283 (U.S. Sept. 8, 2015).

For example, in defending against an ATS suit, Chiquita Brands International recovered over $8 million for defense costs from just one of its five insurers. Chiquita Brands Int'l Inc., Quarterly Report (Form 10-Q), at 23 (Nov. 7, 2011). Similarly, before the Unocal ATS case was settled,[3] the defendant company spent over $15 million in defense costs. Auspitz, 9 BUS. L. INT'L at 221. And

[3] See, *e.g.*, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (dismissing appeal and vacating district court opinion pursuant to stipulation).

doubtless the defense costs in *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), which took 10 years of litigation before culminating in a defense verdict, were also massive.

All of these factors—the stigma of alleged human-rights violations, the unique burdens of overseas discovery, and the prospect of lengthy litigation—make ATS suits particularly effective vehicles to coerce settlements from corporate "deep pockets," even in meritless actions. Holzmeyer, 43 LAW & SOC'Y REV. at 291; *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part, dissenting in part) (characterizing ATS litigation in that case as "a vehicle to coerce a settlement"), *aff'd for lack of a quorum under 28 U.S.C. § 2109 sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

Given the reputational consequences that can attach to even a baseless ATS complaint, it is all the more likely that a business might make the rational—but costly—decision to settle a claim just to avoid years of expense and burden. Members of the Chamber have had the misfortune of being targeted—often repeatedly—by such lawsuits. Faced with the prospect of a "decade or more litigating, extensive world-wide discovery and seemingly endless procedural motions, coupled with the likely prospect of negative and graphic publicity campaigns," some companies choose to settle even dubious ATS claims. Jordan W. Cowman, *The Alien Tort Statute—Corporate Social Responsibility Takes On A*

*New Meaning*, METRO CORP. COUNS., July 1, 2009, at 30. These risks and expenses to U.S. businesses—and the jobs and communities they support—weigh strongly against plaintiffs' proposed expansion of ATS liability.

**2. Extraterritorial ATS suits chill international commerce.**

To avoid ATS litigation—or the higher insurance and borrowing costs resulting from the threat of ATS litigation—some companies will reduce their investment in or withdraw entirely from developing markets. That will inevitably disrupt the U.S. economy in ways Congress never could have envisioned or intended.

For example, in today's global marketplace, developing countries are important sources of raw materials and also serve as export markets for U.S. business. ATS suits targeting companies that do business in those countries, however, raise the prices of those materials and increase the costs of accessing those markets—which results in increased costs for U.S. businesses that, in turn, produce increased prices for U.S. consumers and elimination of American jobs.

These ATS suits also deter foreign investment in the United States, which is critical to the long-term health of the national economy. See U.S. Dep't of Commerce, THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT: SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 2 (2008). Foreign companies often invest in the United States by

establishing a business presence here. But that step may subject a company to ATS claims under plaintiffs' approach, particularly if the company establishes a U.S. subsidiary for conducting some of its operations. The most obvious way for those companies to avoid ATS litigation is to invest their resources outside the United States.

Moreover, the loss of foreign investment can severely harm developing nations themselves. Trade between the United States and developing nations, and U.S. investment in those nations, is a major factor in facilitating the economic growth of developing nations. See *U.S.-Africa Trade Relations: Creating a Platform for Economic Growth: Joint Hearing Before the H. Comm. on Energy and Commerce and the H. Comm. on Foreign Affairs*, 111th Cong. (2009) (statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa). That growth promotes the development of stable political institutions. And stable political institutions, in turn, create the conditions for further foreign investment. See NAT'L SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (2002).

ATS suits targeting alleged misconduct in those countries can disrupt—and sometimes destroy—that cycle. Not only does the threat of these suits curtail trade and investment, it also can result in reduced "access * * * to international credit markets," because "[c]ountries on the losing side of ATS cases will find that bank

credit and bond placements are more difficult." GARY C. HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 43 (2003). The consequences are stark. As the government has previously emphasized, deterring foreign investment due to ATS litigation "could have significant, if not disastrous, effects on international commerce." *Ntsebeza Br.*, 2008 WL 408389, at*3 (internal quotation marks omitted).

Worst of all, after companies abandon developing countries in response to ATS risks, the human-rights situation in the country is likely to get worse. Talisman Energy's withdrawal from the Sudan in response to ATS pressure is a chilling example. While Talisman was in the country, it hired PriceWaterhouse Coopers to help verify compliance with its voluntary adoption of the International Code of Ethics for Canadian Businesses. Stephen J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 444 (2004). Talisman also "engaged in extensive community development efforts, including building hospitals, clinics, schools and wells" where it operated. *Id.* Yet in the wake of continuing pressure—including an ATS suit—it finally sold its assets and left Sudan. *Id.* at 426.

For the activists who orchestrated a massive campaign against Talisman, this should have been a tremendous victory. But for the people in Sudan, the reality was much bleaker. The vacuum produced by Talisman's departure has been filled

by Chinese companies that take an official policy of "noninterference in domestic affairs"—which means they are not likely to engage in efforts to build the civil society structures that are essential to promoting both democracy and general economic prosperity. See Stephanie Hanson, *China, Africa, and Oil* (June 6, 2008), at http://stephaniehanson.com/2008/06/06/china-africa-and-oil.

* * *

Plaintiffs' *ad hoc* approach to determining the extraterritorial application of the ATS not only is inconsistent with the Supreme Court's decision in *Kiobel*, but also would invite abusive ATS lawsuits that subvert U.S. foreign policy, chill investment in the United States, and harm developing nations.

## CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2015, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

s/ Andrew J. Pincus
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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i), and Fifth Circuit Rule 32.2, because—according to the word-count facility in Microsoft Word—the brief contains 5,545 words, which is no more than half the 14,000 limit for defendants-appellees' answering brief.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word in a proportionally spaced typeface in Times New Roman with 14-point typeface.

s/ Andrew J. Pincus
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## CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on December 2, 2015, the foregoing brief was transmitted to the Clerk of the U.S. Court of Appeals for the Fifth Circuit via the Court's CM/ECF system, and that (1) the required privacy redactions were made pursuant to Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document pursuant to Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Microsoft Forefront Endpoint Protection and is free of viruses.

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