13-1937(L), 13-2162

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUHAIL NAJIM ABDULLAH AL SHIMARI, TAHA YASEEN ARRAQ RASHID, SALAH HASAN NUSAIF AL-EJAILI, ASA'AD HAMZA HANFOOSH AL-ZUBA'E,
Plaintiffs-Appellants,

—v.—

CACI PREMIER TECHNOLOGY, INC., CACI INTERNATIONAL, INC.,

Defendants-Appellees,

—and—

TIMOTHY DUGAN, L-3 SERVICES, INC.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICUS CURIAE* RETIRED MILITARY OFFICERS SUPPORTING PLAINTIFFS-APPELLANTS IN FAVOR OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Amici are retired military officers who have spent their careers commanding troops at home and overseas. *Amici* have a unique understanding of the significance of the United States' international reputation for the military's ability to operate abroad. The Supreme Court and this Court have recognized the value of the military's perspective on questions related to the application of U.S. laws on territories outside of the fifty states, including places and installations subject to U.S. military control, as well as to the military's ability to fulfill its mission to protect the Nation's security.

Lieutenant Colonel Kevin H. Govern was a Distinguished Military Graduate commissioned in the United States Army in 1984. After law school, he served on Active Duty as a U.S. Army Judge Advocate General's Corps from 1987 until retiring in 2007. He served in peacetime and combat operations at Battalion to Unified Command levels, with a culminating military assignment as Assistant Professor of Law at the U.S. Military Academy, West Point. He presently teaches for California University of Pennsylvania and John Jay College, and is an Associate Professor of Law at Ave Maria School of Law.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until retiring in 2002. From June 2000 through June 2002, Admiral Guter was the

Navy's Judge Advocate General. Admiral Guter was Dean of Duquesne University School of Law from August 2005 through December 2008, and is now President and Dean of South Texas College of Law.

Rear Admiral John D. Hutson was commissioned in the United States Navy in 1969. After law school, he served in the Navy from 1972 until he retired in 2000. From 1994 until 1996, Admiral Hutson served as the Commanding Officer, Naval Legal Service Office, Europe and Southwest Asia. Admiral Hutson served as the Navy's Judge Advocate General from 1997 until 2000. Admiral Hutson was Dean and President of Franklin Pierce Law Center from 2000 until 2011, and is presently Dean Emeritus.

Major General Thomas J. Romig served for four years as the 36th Judge Advocate General of the U.S. Army. His significant military legal positions included Chief of Army Civil Law and Litigation and Chief of Military Law and Operations. His other military legal assignments included Chief of Planning for the JAG Corps; Chief Legal Officer for the 32d Army Air Defense Command in Europe; and Chief Legal Officer for U.S. Army V Corps and U.S. Army forces in the Balkans. He is currently Dean of Washburn University School of Law.

Professor Richard D. Rosen is a former Associate and Vice Dean and current Director of the Center for Military Law and Policy at the Texas Tech University School of Law. Before assuming these positions, Professor Rosen completed a

twenty-six-year career as an Army Judge Advocate. His assignments included Commandant (Dean) of the Judge Advocate General's School, United States Army, in Charlottesville, Virginia; Staff Judge Advocate of the III Armored Corps and Fort Hood, Texas; Staff Judge Advocate of the 1st Cavalry Division; and Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff.

Professor Rachel E. VanLandingham, Lt. Col., USAF, served in the Air Force as a Judge Advocate, including four years as the Chief Legal Advisor for International Law to U.S. Central Command under Generals Dempsey and Petraeus. She taught at the U.S. Air Force Academy, is currently a Visiting Assistant Professor of Law at Stetson University College of Law, and has published several articles on international law issues.

Amici file this brief to point out the importance of questions raised by this case for the United States' reputation as a country that values the rule of law and that provides legal redress for egregious harms committed against citizens of other nations where the U.S. may well be deemed by the community of nations to bear a measure of responsibility for those harms. Based on their experience, *amici* are concerned that a determination that no remedy exists in law for the alleged torture of foreign nationals by U.S. citizens in an area controlled by the U.S. would

undermine the United States' ability to obtain cooperation from foreign nationals when operating overseas and protecting the Nation's security.[1]

[1] Pursuant to F.R.A.P. 29, all parties consent to filing this brief. This brief was not drafted, in whole or part, by counsel for plaintiff or defendant. No party, counsel, or any other person contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a question left open by Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013): what are the circumstances in which the Alien Tort Statute (ATS), 28 U.S.C. § 1350, can apply to conduct occurring outside the traditional boundaries of the United States? As explained below, and contrary to the district court's conclusion, the Supreme Court's holding in Kiobel recognizes that the ATS *may* apply outside the fifty states—and, in particular, the ATS applies in this case to allegations of torture by a U.S. citizen and current U.S. domiciliary defendant at Abu Ghraib, a prison under U.S. control, located within territory governed by the Coalition Provisional Authority (CPA), an entity under the *de facto* control of the U.S. government.

Kiobel applied a presumption against extraterritorial application of American laws in holding that the ATS did not establish a basis for universal, world-wide jurisdiction, rejecting the contention that every ATS claim as a matter of course "reach[es] conduct occurring in the *territory of a foreign sovereign.*" Kiobel, 133 S. Ct. at 1664 (emphasis added). Specifically, Kiobel rejected the application of the ATS to a claim brought against foreign defendants, not residing in the U.S., for conduct occurring in territory over which the U.S. had no control and was instead within the territory of a foreign sovereign. Id. "This presumption [against extraterritorial application of U.S. laws] 'serves to protect against

unintended clashes between our laws and those of other nations which could result in international discord.'" Id. at 1664 (quoting E.E.O.C. v. Arabian American Oil Co. ("Aramco"), 499 U.S. 244, 248 (1991)).

A threshold issue in Aramco—but not in Kiobel, given the factual context—is in what circumstances the presumption against extraterritoriality applies to regions that are *not* in the territory of another sovereign. As the Court observed in Aramco, and elsewhere, the presumption against extraterritoriality applies only to conduct that occurs "beyond places over which the United States has sovereignty *or has some measure of legislative control*." Aramco, 499 U.S. at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (emphasis added)).

As explained in Point I.A., below, for such U.S.-controlled regions, the Supreme Court does not apply any presumption against (or in favor) of the applicability of a U.S. law. Instead, it looks to three factors: whether the text and purpose of the legal provision suggest that its application was intended to be limited to the traditional *de jure* boundaries of the U.S., rather than applying to U.S.-controlled areas; the degree of U.S. control over the region at issue; and whether any other sovereign has practical control, or has imposed a governing legal regime, that would have to be displaced for American law to apply. In this case, the presumption against extraterritorial application has no application to Abu Ghraib, a U.S.-controlled prison within the territory of occupied Iraq when it was

governed by the CPA, an entity under the operational control of the U.S. government.

As explained in Point I.B., below, the text and purpose of the ATS suggest no limitation to the fifty U.S. states; rather, the ATS was enacted in part to ensure judicial remedies for violations of the law of nations occurring in zones governed by no sovereign, such as the high seas. The ATS' application to sovereign-less zones provides strong reason to believe the statute applies to U.S-controlled territories. During the period at issue, Iraq was governed by the U.S.-controlled CPA, and no other sovereign imposed any effective control or governing law over the region.

Second, as set forth in the alternative in Point II, even assuming *arguendo* that the CPA was somehow not under U.S. control so as to *negate* the presumption against extraterritoriality, Kiobel also expressly recognized that certain claims under the ATS may *overcome* the presumption against extraterritoriality. The Court held that certain ATS "claims touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application." Kiobel, 133 S. Ct. at 1669.

The claims here sufficiently touch and concern the U.S. and its interests to overcome the presumption against extraterritoriality. These claims concern U.S. citizen, and resident, defendants, and took place in a region that was effectively

controlled by the U.S and that was under a legal directive expressly subjecting private contractors, such as defendants, to the laws of their own country (in this case, to the laws of the U.S., which include the ATS).

LEGAL ARGUMENT

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY DOES NOT APPLY IN THIS CASE, AND THE ATS PROVIDES A CAUSE OF ACTION FOR DEFENDANTS' TORTURE OF PLAINTIFFS.

A. Rather than Applying a Presumption Against Extraterritoriality to Territories Under Effective U.S. Control, the Court Looks to the Statutory Text and Purpose, the Degree of U.S. Control, and the Degree of Control Exerted Over the Region by Other Sovereigns.

The Supreme Court has long concluded that the presumption against extraterritoriality does not pertain to areas over which the United States exercises a significant measure of control, even if short of *de jure* sovereignty. Aramco, 499 U.S. at 248; Foley Bros., 336 U.S at 285. The Court has employed that principle in a line of cases to hold that the presumption against extraterritoriality did not prevent a constitutional or statutory provision's application to an American-controlled region outside the traditional boundaries of the U.S. See Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008); Vermilya-Brown v. Connell, 335 U.S. 377 (1948).

In these cases, the Court found the presumption against extraterritoriality inapplicable because the U.S. exercised significant control over the place at issue; instead, the Court examined three factors to determine if the particular provision properly applied to that U.S.-controlled region. The Court first analyzed the history and purpose of the provision to assess whether its reach was limited to the conventional borders of the U.S. When the Court found the provision not to be so

limited, it then examined whether the level of control exercised by the U.S. over the place where the conduct occurred was sufficient to warrant application of the statute. The Court did not exercise any presumption against—or in favor of—extraterritoriality. Finally, the Court considered the nature and extent of control by any other sovereign over that region to assess the risk of conflict with another sovereign or its laws if the provision at issue were found applicable.

In Rasul, the Court rejected the government's argument that a presumption against extraterritoriality precluded foreign detainees in Guantanamo from the right to relief under the federal habeas corpus statute. The Rasul Court held that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application" in Guantanamo, an area over which the U.S. "exercises complete jurisdiction and control." 542 U.S. at 480. The Court also examined the history and purpose of the habeas statute, 28 U.S.C. § 2241, with its roots in British common law, and determined that the provision should be understood to apply to areas outside of formal U.S. sovereign boundaries, but over which the U.S. government exercised functional control. Id. at 482. Because the U.S. controlled the Guantanamo naval base, the statute applied to prisoners detained there, notwithstanding the absence of American *de jure* sovereignty. Id. at 475.

Notably, Rasul addressed not only habeas claims, but also the viability of ATS claims. The Court reversed the court of appeals' holding that aliens detained at Guantanamo could not sue under the ATS, specifically rejecting that court's conclusion that "the privilege of litigation does not extend to aliens … who have no presence in any territory over which the United States is sovereign." Id. at 473 (internal quotations omitted). The Court thus reinstated the ATS claims, demonstrating no concern whatsoever about the propriety of the ATS's application to claims arising in Guantanamo, outside U.S. sovereign borders.

In Boumediene, the Court engaged in a similar analysis, considering the intended reach of the law at issue, the degree of control exercised by the U.S., and the presence of another sovereign. Boumediene addressed whether the Constitution's Suspension Clause, which precludes unlawful suspensions of habeas corpus by Congress, protected aliens detained at Guantanamo. As in Rasul, the Court acknowledged that Guantanamo is not formally part of the U.S., but held that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Writing for the Court, Justice Kennedy explained that declining to extend the protections of American law to aliens detained at a prison in a U.S.-controlled territory like Guantanamo would be improper because it would enable the U.S. to "govern without legal constraint," a

consequence inconsistent with the intent of the framers of the Constitution (a document ratified in 1789, the same year Congress enacted the ATS). Id. at 765.

The opinion then examined the practical extent of U.S. control over Guantanamo, which it found to be extensive. Id. at 753-55. The Court also found that Cuba's *de jure* sovereignty presented no barrier to the application of U.S. law. The Court focused on whether the U.S. had practical control, and whether application of U.S. law would, as a practical matter, conflict with the control, or legal regime, of any other sovereign. Id. The final factor—the practical degree of control exerted by another sovereign, and the applicability of another sovereign's law—also suggested that the Suspension Clause should apply, because "no other law other than the laws of the United States applies at the naval station," id. at 751, the U.S. is "answerable to no other sovereign for its acts on the base," and "[t]here is no indication, furthermore, that adjudicating a habeas corpus petition would cause friction with the host government," id. at 770.

Similar considerations underlie the Court's earlier decision in Vermilya-Brown, which found that the Fair Labor Standards Act (FLSA) applied to a military base located in Bermuda, despite the fact that Great Britain maintained formal sovereignty over the base. Instead of applying the presumption against extraterritoriality, the Vermilya-Brown Court stated that whether statutes apply in areas under U.S. control but outside of the conventional borders of the U.S.

"depends upon the purpose of the statute," which it found compatible with U.S.-controlled areas. Vermilya-Brown, 335 U.S. at 389-90.

The Court then examined the nature and extent of control that the U.S. exercised over the base, finding that although the base "is not territory of the United States in a political sense," id. at 380-81, the U.S. exercised practical control, id. at 389-90. The Court also considered whether any other sovereign exercised control over the region, concluding that it was "sure that … Bermuda would not also undertake legislation" on the same subject. Id. at 389. The Court observed that, while Bermuda remained under the sovereignty of Great Britain, under the terms of the lease, "no laws … which would derogate from or prejudice" the right of the U.S. to control the area "shall be applicable." Id. at 382 n.4 (citing 55 Stat. 1560).

By contrast, the Court in two other cases, Smith v. United States, 507 U.S. 197 (1993), and Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993), rejected the application of U.S. statutes to areas in which neither the U.S. nor any other sovereign exercised practical control. In these cases, the Court thus applied the presumption against extraterritoriality because the U.S. lacked practical control over the regions in question. Examining the statutes at issue, the Court found that neither was intended to apply outside the traditional boundaries of the U.S. See Smith, 507 U.S. at 198 & n.5 (the Federal Torts Claims Act does not apply to

claims arising in Antarctica, a "sovereignless region," when the statute's terms do not suggest Congresional intent for extraterritorial application).

Similarly, in Sale, the Court carefully considered the language, purpose and history of 8 U.S.C. § 1253(h), which forbade the Attorney General to "deport or return" certain aliens, to assess whether it protected a Haitian "alien intercepted on the high seas [who] is in no country at all." 509 U.S. at 179. Sale held that "[b]y using both words [i.e., "deport" and "return,"] the statute implies an *exclusively territorial application*, in the context of … *domestic* immigration proceedings." Id. at 174 (emphasis added). Thus, in Smith and in Sale, the Court considered regions that were not under U.S. control, applied the presumption against extraterritoriality, and found the statutory language there did not overcome that presumption.

By contrast, here, as in Rasul, Boumediene, and Vermilya-Brown, the presumption against extraterritoriality does not arise in the first instance because the U.S. exercised control over the CPA, which governed Iraq when the alleged torture was committed.

B. Applying the Test for the Application of a Statute to a Region Under U.S. Control, the ATS Applies to Abu Ghraib, a Prison Within CPA-Controlled Iraq.

1. The Text, History, and Purpose of the ATS Demonstrate that it was Intended to Apply in U.S.-Controlled Regions, Even if Outside Sovereign U.S. Borders.

The ATS's text and history show that Congress intended it to apply in regions under effective U.S. control, even if beyond sovereign U.S. borders. The ATS provides that "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." 28 U.S.C. § 1350. This broad, unqualified statutory language provides no reason to believe that the reach of the ATS is limited to sovereign U.S. territory. The ATS is thus unlike statutes in which the statutory language suggests its application is limited to sovereign U.S. territory. See Vermilya-Brown, 335 U.S. at 388-89 & n.15 (contrasting the broad language of the FLSA with the "narrower" language of the National Labor Relations Act); Sale, 509 U.S. at 174 (statutory language "implies an exclusively territorial application").

The purpose and underlying goals of the ATS also suggest that its application extends beyond the sovereign borders of the U.S. The ATS authorizes suit for fundamental violations of the law of nations comparable to those existing when the ATS was enacted, which included offenses against ambassadors, piracy,

and violation of the right of safe conducts. Sosa v. Alvarez-Machain, 542 U.S. 692, 720, 725 (2004).[2] The scope of the law of nations and of U.S. treaties was not historically in any sense restricted to regions under U.S. sovereignty.

In fact, as Kiobel recognizes, the ATS unquestionably applies to piracy on the high seas, a region outside any U.S. sovereignty *or* even U.S. control. 133 S. Ct. at 1661. While the applicability of the ATS to sovereign-less regions was not found sufficient to warrant applying the ATS to conduct within sovereign foreign countries, id., the territory at issue here is far different: The U.S. exercised practical control over the territory where the alleged torture took place. Given Kiobel's recognition that the ATS applies to fundamental violations of international law analogous to piracy occurring in such areas as the high seas, outside U.S. sovereignty *or* control, the ATS plainly may apply to such violations in regions controlled by the U.S.[3]

Finally, Congress's primary motivation for enacting the ATS was its desire to provide a reliable federal avenue of redress for violations of the law of nations

[2] Torture, as alleged in this suit, has been broadly recognized to be actionable under the ATS as comparable to modern-day piracy. See, e.g., id. at 724-25 (citing with approval Filàrtiga, 630 F.2d 876).

[3] Not just piracy but safe conduct also applied "when committed at sea," 4 Blackstone, Commentaries 69, *and* to territories under the king's control, "in any port within the king's obe[i]sance against any stranger … under safe-conduct…," id. at 69-70.

for which the international community might well blame the U.S., to avoid reprisal from other countries. See Sosa, 542 U.S. at 715 (explaining that the serious consequences to U.S. interests resulting from unredressed violations of the law of nations was "probably on the minds of the men who drafted the ATS"); see also Michael G. Collins, The Diversity Theory of the Alien Tort Statute, 42 Va. J. Int'l L. 649, 652 (2002) (explaining that when the ATS was enacted, international law imposed a duty upon all sovereigns to remedy violations of the law of nations committed by its citizens).

A case in which American defendants are alleged by foreign plaintiffs to have committed serious violations of the law of nations in an area under the practical control of the U.S. is precisely the type of situation for which the ATS was intended to provide redress. Otherwise, the very danger of international discord Congress sought to prevent through the ATS might well result. See Sosa, 542 U.S. at 715; see also John H. Knox, A Presumption against Extrajurisdictionality, 104 Am. J. Int'l L. 351, 380 (2010) ("Failing to extend U.S. laws to places within sole U.S. jurisdiction may result in underregulated zones, where … other states have no power to legislate, which would create the potential for complaints that the United States is failing to uphold its international legal obligations."). Failing to provide redress to aliens tortured by a U.S.-domiciled

corporation in a territory over which the U.S. exercises practical control is bound to result in such international embarrassment and reprisal.

2. The U.S. Exercised Practical Control over Iraq through the Coalition Provisional Authority.

The acts of torture alleged in this case occurred in the U.S.-controlled Abu Ghraib prison in occupied Iraq, which was governed by the CPA, an entity answerable to and controlled by the U.S. Indeed, as the U.S. as *amicus curiae* explained in its filings in U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295 (4th Cir. 2009), the CPA was functionally under the control of the U.S., and is best understood as an instrumentality of the U.S. See Supplemental Brief of the United States, U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 444 F. Supp. 2d. 678 (E.D. Va. 2006), 2005 WL 1129476 at text surrounding n.1 ("Supplemental Brief") (stating, in the context of the False Claims Act, the U.S. exercised such a degree of control over the CPA that "[t]he United States believes that the CPA is an instrumentality of the United States").

In March 2003, U.S.-led coalition commenced hostilities against Iraq and ousted the government of Saddam Hussein. In May 2003, the U.S. formed the Coalition Provisional Authority (CPA) to act as the governing authority of the territory. See Supplemental Brief at text surrounding n.3, 2005 WL 1129476. Paul Bremer, a U.S. diplomat, was appointed head of the CPA by President Bush and was given the title of Administrator. "All authority of the CPA rested in the

Administrator." Supplemental Brief at text surrounding n.9, 2005 WL 1129476. Among his sweeping powers, Bremer was empowered to "dispose of all Iraqi state assets and direct all Iraqi government officials." James Dobbins et al., RAND Corporation National Security Research Division, Occupying Iraq: A History of the Coalition Provisional Authority, ("Occupying Iraq") xiii, available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG847.pdf.

On May 16, 2003, Bremer issued CPA Regulation No. 1, vesting himself with "all executive, legislative and judicial authority necessary to achieve [the CPA's] objectives." CPA Regulation 1 (2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority.pdf.

Further, Congress repeatedly expressly described the CPA as a U.S. government entity. See National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136 § 1203(b), 117 Stat. 1392, 1648 (2003) (describing "Department of Defense entities, including ... the Office of the Coalition Provisional Authority"); Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, § 1042(b)(2)(N), 118 Stat. 1811, 2050 (2004) (listing "the Armed Forces, the Coalition Provisional Authority, other United States government agencies and organizations"). In an appropriations bill, Congress referred to "the Coalition Provisional Authority in Iraq (in its capacity as an entity

of the United States Government)." Emergency Supplemental Appropriations, 117 Stat. 1209, 1225.

An Iraqi Governing Council was established, but it was subordinate to the CPA, and any Governing Council decisions had to be approved by the CPA before they could go into force. Kristen A. Stilt, Islamic Law and the Making and Remaking of the Iraqi Legal system, 36 Geo. Wash. Int'l L. Rev 695, 701 (2004); see also Occupying Iraq xxi (stating that CPA advisors "retained veto authority over major decisions" of the Iraqi ministries of the governing council).

The vast, all-encompassing legislative, executive and judicial authority the U.S.-led CPA enjoyed over occupied Iraq was similar to the control exercised by the U.S. in cases like Rasul, Boumediene, and Vermilya-Brown. In Rasul and Boumediene, the Court focused on the plenary control the U.S. exercised over Guantanamo in deciding that the U.S. laws should apply to that territory. Rasul, 542 U.S. at 480; Boumediene, 553 U.S. at 753-55. While Cuba retained sovereignty over Guantanamo in the "legal and technical sense of the term," the U.S., and no other sovereign, exercised practical control over the area. Boumediene, 553 U.S at 754; see also Vermilya-Brown, 335 U.S. at 377 n.4 (finding practical U.S. control).

Similarly, in this case, the U.S. possessed the power to enact and enforce any and all laws that it believed would promote the CPA's objectives; the U.S. had the

power to veto any laws enacted by the Iraqi governing council; and, as explained below, despite the nominal membership of other sovereigns in the U.S.-led coalition, the U.S. was not subject to any control or oversight from any other sovereign. "All authority of the CPA rested in the Administrator, [who] served at the pleasure of the President, and was under the supervision of the President and the Secretary of Defense." Supplemental Brief at text surrounding n.9, 2005 WL 1129476; see also Brief for the United States, Custer Battles, 2007 WL 1834331 (acknowledging the high "degree of federal control over the CPA," which "manifestly gave the federal government sufficient control to ensure that the CPA, like other federal instrumentalities, acted consistently with the policies and goals of the federal government."). The U.S.-controlled CPA therefore exercised a level of practical control over Iraq readily sufficient to make the presumption against extraterritoriality inapplicable, and to justify the application of the provision at issue, as in Rasul, Boumediene, and Vermilya-Brown.

3. Applying U.S. Law to U.S.-Controlled Iraq Would Not Clash with Another Sovereign's Laws, Because Neither Iraq nor any Other Foreign Sovereign Exercised Practical Control over Iraq.

During the period at issue in this case, the CPA—through the plenary power of Administrator Bremer—exercised ultimate control over occupied Iraq. Not only did Iraq lack any practical control over the territory, but under CPA Regulations, the other members of the Coalition exercised no functional control over the CPA or

the region. See CPA Regulation 1 (CPA Orders and Regulations require only "the approval or signature of the Administrator," and therefore did not require the consent of any other member nation). See also Melissa A. Murphy, A "World Occupation" of the Iraqi Economy? How Order 39 Will Create a Semi-Sovereign State, 19 Conn. J. Int'l L. 445, 448 (2004) ("Despite the indistinct name, the CPA is essentially an American-led operation.")

The CPA was not subject to oversight by any other sovereign, and the other members of the Coalition exercised virtually no control over the region. See Occupying Iraq xiv (explaining that while some level of international oversight would have made the Iraqis more comfortable with the American presence, the U.S. ultimately decided against such an arrangement). Notwithstanding nominal U.K. involvement, the CPA was subject only to the supervision and reporting requirements of the U.S. government. Indeed, the Supreme Court has held that given the level of practical control the U.S. exercised over Multi-National Force-Iraq (MNF-1), the successor to the CPA, a detainee held pursuant to MNF-1 authority was in U.S. custody for purposes of habeas jurisdiction, despite the participation of other countries in MNF-1. Munaf v. Geren, 553 U.S. 674, 685-86 (2008).

CPA control over Iraq and Abu Ghraib was thus far more akin to U.S. control over Guantanamo than to the shared role the U.S. exercised over Landsberg

Prison in post-World War II Germany, which was under the collective jurisdiction of the four Allied regimes, making the U.S. answerable to its Allies for all activities occurring there. See Boumediene, 553 U.S at 768 (contrasting the level of control the U.S. had over Guantanamo to that which it had over Landsberg Prison to illustrate that Guantanamo was under the practical control of the U.S.).[4]

Here, the CPA had exclusive control over Abu Ghraib and occupied Iraq, and the U.S. had control over the CPA. No other sovereign had any power, *de facto* or *de jure*. The only relevant local law in place, CPA Order 17, directed that CPA contractors, such as defendants in this case, "are not subject to the laws or jurisdiction of the occupied territory," and are instead "subject to the exclusive jurisdiction of their Parent States," "consistent with the national laws of the Parent State"—i.e., the laws of the U.S., including the ATS. A667, §2.4, 6. If U.S. law does not apply, defendants could torture with impunity in a U.S.-controlled lawless zone.

[4] In contrast, in Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010), the D.C. Circuit concluded that the Bagram Air Base in Afghanistan differs from Guantanamo for Suspension Clause purposes because Afghanistan "remains a theater of war," Bagram is "within the territory of another *de jure* sovereign," and prisoners there were held "pursuant to a cooperative arrangement with Afghanistan on territory as to which Afghanistan is sovereign." 605 F.3d at 97-98. Habeas rights were thus found potentially "disruptive of that relationship" with "the Afghan government." Id. None of these factors pertains in this case.

II. THE FACTS OF PLAINTIFFS' CLAIM SUFFICIENTLY TOUCH AND CONCERN THE UNITED STATES TO DISPLACE THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

As explained in Point I, above, the presumption against extraterritoriality does not apply to this case. In the alternative, if this Court were to find that the CPA was not within U.S. control and thus to conclude that the presumption against extraterritorial application of the ATS *does* apply to this case, plaintiffs' claims "touch and concern the territory of the United States … with sufficient force to displace" that presumption. Kiobel, 133 S. Ct. at 1669.

Even prior to Kiobel, the Supreme Court had established a mode of analysis for determining whether the presumption against extraterritoriality is displaced in a particular case because the claims touch and concern U.S. interests. This analysis begins with an assessment of the "focus" of congressional concern; once the court has identified that focus, it then determines whether the focus suggests an intention for the statute to apply to the conduct at issue even if it occurred outside the sovereign boundaries of the U.S. See Morrison v. National Australia Bank Ltd., 130 S. Ct. 2869, 2884 (2010); accord Aramco, 499 U.S. at 247; Foley Bros., 336 U.S. at 283, 284-87.

Here, plaintiffs do *not* contend that the ATS applies within the territory of a foreign sovereign, as in Kiobel, but rather assert that the ATS applies to conduct by an American corporation within a territory under exclusive and significant U.S.

control (even if, *arguendo*, that control was not sufficient to negate the presumption against extraterritoriality). The ATS was enacted to provide civil recourse in federal courts to aliens suffering injuries reasonably attributable to the U.S. that might otherwise go unremedied, thereby causing potential discord with other nations. See Kiobel, 133 S. Ct. at 1666; 4 W. Blackstone, Commentaries on the Law of England 68 (1769) (discussing the need for a country to provide aliens with a remedy for offenses against violations of the law of nations to avoid discord and war). The proper inquiry therefore is whether the conduct at issue here—the alleged torture of Iraqi nationals in U.S.-controlled Abu Ghraib, within territory governed by the U.S.-controlled CPA, by U.S. citizen defendants—sufficiently touches and concerns U.S. territorial interests in avoiding international discord. As explained below, that standard is readily met.

A. Kiobel Holds that the Presumption Against Extraterritoriality is Overcome when a Claim Sufficiently Touches and Concerns United States Interests.

Kiobel held that the ATS does not as a matter of course reach claims that arise in the territory of a foreign sovereign. It does not hold—contrary to the district court's conclusion—that the ATS may never apply outside the U.S. As Justice Kennedy's concurrence observed, the "opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," specifically, "elaboration" of the "proper

implementation of the presumption against extraterritorial application." Id. (Kennedy, J., concurring). This case presents precisely the opportunity for elaboration that Justice Kennedy envisioned.

Part IV of Chief Justice Roberts' opinion in Kiobel recognized that certain claims can sufficiently touch and concern U.S. territorial interests to overcome the presumption against extraterritoriality. Kiobel, 133 S. Ct. at 1669 (citing Morrison, 130 S. Ct. at 2883-88). Morrison is part of a line of cases demonstrating the proper mode of analysis for determining whether a claim touches and concerns U.S. territorial interests. See also Aramco, 499 U.S. at 247; Foley Bros., 336 U.S. at 283, 285-86.

In Part III of Morrison, 130 S. Ct. at 2877-83, the Court recognized that the presumption against extraterritoriality applies to claims in areas beyond U.S. sovereignty or control unless the statute clearly evidences an intended extraterritorial application. The Court found that the language of the Securities Exchange Act did *not* demonstrate congressional intent for § 10(b) to apply extraterritorially, id. at 2882, particularly when compared to "[s]ubsection 30(a), [which] contains what § 10(b) lacks: a clear statement of extraterritorial effect." Id. at 2883. Comparing the clear statement of extraterritorial reach in subsection 30(a) to the silence in § 10(b), the Court found that § 10(b) was not intended to apply *generally* to reach any and all conduct that occurred abroad (much as the

Kiobel Court held that the ATS did not have such universal extraterritorial application).

In Part IV of Morrison, however—the section cited by the "touch and concern" portion of Kiobel—the Court went on to consider whether, in the circumstances of a *particular* case, § 10(b) could apply to a suit in which the claim did not arise within the territorial U.S. but nonetheless sufficiently implicated the core American interests upon which Congress focused in enacting the statute. See Id. at 2884 n.9 (explicating the two distinct analytical steps). As the Court explained, the "presumption [against extraterritoriality] (as often) is not self-evidently dispositive, but its application requires further analysis." Id. at 2884.

In its further analysis, the Court explained that the presumption is properly displaced when the circumstances in a particular case involve U.S. territorial interests and implicate the "'focus' of Congressional concern." Id. (citing Aramco, 499 U.S. at 255; Foley Bros., 336 U.S. at 283, 285–86). The Court concluded that "the focus of the [Securities] Exchange Act is … upon purchases and sales of securities in the United States" and thus on "transactions in securities listed on domestic exchanges." Id. Morrison's reading of that particular statute (a conclusion with no bearing to the ATS claims here) found it to be limited to fraud concerning securities traded on American stock exchanges. Id.

Part IV of Kiobel similarly observes that certain ATS "claims [may] touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. 1669. Kiobel thus embraces the mode of analysis adopted in Morrison concerning whether, given the "focus of congressional concern" or the "object" of Congress's "solicitude," Morrison, 130 S. Ct. at 2884, the facts of a particular ATS case displace the presumption against extraterritoriality.

Justice Kennedy's concurrence in Kiobel underscores the propriety of a case-by-case approach to "human rights abuses committed abroad," allowing for the possibility of redressing "significant violations of international laws" through the ATS in future cases not "covered … by the reasoning and holding of today's case." 133 S. Ct. at 1669 (Kennedy, J., concurring). Even Justice Alito's Kiobel concurrence, id. at 1669-70 (Alito, J., concurring), specifically embraces this interpretation of the Kiobel majority's construction of Morrison as permitting displacement of the presumption against extraterritoriality in particular future ATS cases (though going on to apply that analysis in an unduly cramped manner).

Under Kiobel and Morrison, a court engages in the appropriate "touch and concern" analysis by ascertaining the focus of congressional concern underlying the enactment of the ATS to determine whether the presumption against

extraterritorial application is displaced. The district court here failed to conduct that analysis.

B. Congress's Focus in Enacting the ATS Was Redressing Injuries to Alien Plaintiffs to Protect against International Discord.

As explained in Part I, the Supreme Court has recognized that the first Congress enacted the ATS to provide a judicial remedy for violations of the law of nations to avoid "threatening serious consequences in international affairs" in the absence of such a remedy. Sosa, 542 U.S. at 715. The Court has found examples of such violations at the time of enactment to include offenses against ambassadors, violations of safe conducts, and piracy. Id. at 720 (relying upon 4 Blackstone, Commentaries 68). Commission of these offenses violated norms of international character that, left unremedied, would have caused "diplomatic strife" for the country reasonably thought responsible. See Kiobel, 133 S. Ct. at 1669; see also Sosa, 542 U.S. at 725.

At the time, nations were understood under the "law of nations" as responsible for injuries inflicted upon aliens if they did not provide a means of legal redress; a nation's providing that redress for violations by its citizens, or for actions for which it could otherwise be thought responsible, served to avoid international discord. 4 W. Blackstone, Commentaries at 68-69. The nation itself was considered responsible for violations it failed to prevent in regions it controlled, id. at 68, and "since it is not in the power of the foreign prince to cause

justice to be done to his subjects by the very individual delinquent, . . . he must require it of the whole community," id at 68-69. There is thus every reason to believe the ATS applies to fundamental violations of international law by private individuals in U.S.-controlled regions, given that when the ATS was enacted, such violations by individuals were attributable to the polity.

In the modern day, torture is understood by the international community as a fundamental violation of international law. The U.S., in a filing to the U.N. concerning its compliance with the Convention Against Torture, acknowledged that the Convention requires U.S. "jurisdiction over acts of torture by United States nationals wherever committed or over such offences committed elsewhere by alleged offenders present in United States territory whom the United States does not extradite." U.S. Dep't of State, United States Report to the Committee Against Torture, available at http://www.state.gov/documents/organization/100296.pdf. at ¶187. The U.S. has enacted criminal laws so providing. Id. at ¶188. The State Department filing specifically asserts that "U.S. law provides statutory rights of action for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits [is] the Alien Tort Claims Act of 1789," i.e., the ATS. Id. at ¶277.

Application of the ATS in this case is warranted not only for serious violations of international law committed by U.S. citizens, but also because the

U.S. might be seen as harboring defendants from liability, since they are U.S. citizens *and* residents. In Sosa, the Court referred with approval to lower court cases interpreting the ATS as providing a remedy to prevent the U.S. from becoming a safe harbor for "the torturer [who] has become—like the pirate and slave trader before him, an enemy of all mankind." Sosa, 542 U.S. at 732 (citing Filártiga, 630 F.2d at 890); see also 4 Blackstone, Commentaries 73 (discussing a statute defining certain acts of piracy as encompassing conduct by "any natural born subject, or denizen"—i.e., to citizens *and* residents). As Congress contemplated in drafting the ATS, the U.S. has an interest in preventing such individuals from residing safely within its borders, free from liability for their wrongful conduct.

C. Kiobel's Touch and Concern Test Is Met in this Case.

This case presents precisely the set of circumstances the ATS was enacted to address. The actions alleged—torture—constitute fundamental violations of the law of nations; the torture was committed by U.S. citizens and domiciliaries; and it occurred in a territory under U.S. control, or, at the least, subject to very significant levels of U.S. control, and devoid of any other sovereign's control or legal regime. Under the touch and concern approach of Morrison, explicitly endorsed by Justice Roberts' majority opinion in Kiobel, the issue is whether the claims in this case implicate the focus of congressional concern underlying the ATS.

Given the ATS's focus on redressing fundamental violations of the law of nations that if unremedied could be attributable to the United States, the actions alleged plainly meet this test. In the absence of a judicial forum for redress, the alleged torture by U.S. defendants here could readily be attributable to the U.S., thus implicating U.S. interests in avoiding international discord. This situation thus touches and concerns U.S. territorial interests sufficiently to displace the presumption against extraterritoriality, assuming *arguendo* it is even applicable.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing plaintiffs' ATS claims.

Respectfully submitted,

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Date: November 5, 2013

CERTIFICATION OF COMPLIANCE WITH Fed. R. App. P. 32(a)(7)(B)

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,996 words (as indicated by Microsoft Word), exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of Times New Roman in 14-point type.

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November 5, 2013

CERTIFICATION OF SERVICE

I hereby certify that on this date this brief was served electronically via this Court's CM/ECF system upon all parties or their counsel of record, who are registered users.

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November 5, 2013