No. 15-1464

IN THE

Supreme Court of the United States

FARHAN MOHAMOUD TANI WARFAA,
Cross-Petitioner,
v.
YUSUF ABDI ALI,
Cross-Respondent.

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

REPLY BRIEF FOR THE CROSS-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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Yusuf Abdi Ali is an individual war criminal who, by availing himself of the privileges and protections of U.S. law, has evaded and escaped accountability for the most serious violations of international law, including crimes against humanity and war crimes he committed in Somalia. Because he resides here legally and is not subject to the jurisdiction of any other country's justice system, the holding below—that a U.S. federal court cannot even entertain claims against Ali simply because the underlying tortious conduct occurred abroad—insulates a war criminal from *any* accountability for the worst of his many atrocities.

Ali is a natural person. He is not equivalent to a multinational corporation, present in several jurisdictions, whose only connection to the United States is a small office. *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (noting that defendants were multinationals). Nor is Ali's presence in the United States "[m]ere happenstance." *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016). The conduct underlying the claims against him did not begin and end in Somalia—those acts were only one segment of a larger arc of conduct giving rise to claims that deeply and fundamentally touch and concern the United States: claims seeking to enforce international norms against a natural person who flouted them in Somalia and then sought safe haven here within our borders.

While leaving unanswered in the majority opinion the question whether a natural person's U.S. residency is a relevant factor in determining whether the presumption against extraterritoriality is displaced in a given case, *Kiobel* established definitively the lens through which this Court must view this question:

does a *claim* against an individual war criminal, who enjoys safe haven through legal permanent residency in the United States, "touch and concern" the United States? *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (noting that the majority was "careful to leave open a number of significant questions" and that "other cases may arise" that are not covered "by [*Kiobel's*] reasoning and holding"). As Justice Breyer cautioned in his concurrence, extraterritorial conduct may "substantially and adversely" impact U.S. national interests, including "a distinct interest in preventing" the United States from providing safe haven for a "torturer or other common enemy of mankind." *Id.* at 1671. Denying review of the Fourth Circuit's decision would ensure that Justice Breyer's warning goes unheeded and Ali's safe haven goes unchallenged.

Ali fails in his attempt to explain away the conflict between the Fourth Circuit's decision and the analysis mandated by *Kiobel*. That "mere corporate presence" was insufficient in that case to confer ATS jurisdiction does not preclude analysis of whether other factors involving non-tortious conduct, such as the permanent residency of an individual, touch and concern the United States. As other circuit courts attempting to apply the "touch and concern" test have acknowledged, other factors, including residency, may be relevant and should be considered. Because the Fourth Circuit failed to perform the requisite analysis, it is in conflict with both this Court and other circuit courts.

Ali's arguments based on a decision of this Court, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016), issued after Warfaa filed his Conditional Cross-Petition, are unpersuasive for two reasons. First, Ali suggests application of the wrong test, one

that a majority of the Court rejected in *Kiobel*. Second, he conflates the ATS, a jurisdictional statute requiring a *Kiobel* "touch and concern" analysis of the substantive claims brought thereunder, with the statute at issue in *RJR Nabisco*, a conduct-regulating statute that was assessed for extraterritoriality purposes based solely on the Congressional intent underpinning its conduct-regulating provisions.

A. The Fourth Circuit's Decision Conflicts With the Decisions of This Court.

1. The Fourth Circuit's Decision Conflicts With *Kiobel* and Is in Tension with *Sosa*.

The Fourth Circuit's decision conflicts with this Court's analysis in *Kiobel*. Ali is wrong to argue that that analysis was based entirely upon the Court's determination that "all the relevant conduct occurred outside the U.S." Pet. Opp. 13-14 (quoting *Kiobel*, 133 S. Ct. at 1669). In fact, the *Kiobel* Court acknowledged the relevance of other factors—such as the status and residence of the defendant, and whether adequate, alternative fora were available for redress—and endeavored to give them full and fair consideration.

Accordingly, this Court held that whether the *Kiobel* presumption is displaced requires a case-specific factual inquiry into whether the *claims* have a strong connection to the United States, and did not, as Ali argues, restrict its inquiry to the location of the tortious conduct. That the facts alleged in *Kiobel* were insufficient to displace this presumption does not render this analysis unnecessary. *See Kiobel,* 133 S. Ct. at 1669 (holding that the presumption is not displaced "[o]n these facts" because "mere corporate presence" in the United States of foreign multinational, presumably amenable to suit in other

countries, does not sufficiently "touch and concern" the United States).

Kiobel instructs lower courts to apply the principles "underlying" the presumption against extraterritoriality "when considering causes of action that may be brought under the ATS." *Kiobel*, 133 S. Ct. at 1661. These include preventing "foreign policy consequences not clearly intended by the political branches," *Kiobel*, 133 S. Ct. at 1664; preventing diplomatic friction; upholding "the credibility of our nation's commitment" to human rights; and avoiding becoming a safe harbor for international criminals. U.S. Supp. Br., *Kiobel*, 2012 WL 2161290, at *17-18, 19-20 (June 11, 2012); *see also Kiobel*, 133 S. Ct. at 1664 (stating that courts should avoid conflicts with foreign laws that stoke "international discord"); *RJR Nabisco*, 136 S. Ct. at 2100 ("Although 'a risk of conflict between the American statute and a foreign law' is not a prerequisite for applying the presumption against extraterritoriality, [] where such a risk is evident, the need to enforce the presumption is at its apex.") (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)).

Additional principles underlying the presumption against extraterritoriality include familiar choice of law notions: the need for contacts with the forum, sovereign interests arising from those contacts, and notice enabling the defendant to reasonably anticipate being subject to the forum's law. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (analyzing extraterritorial application of state law under Due Process and Full Faith and Credit clauses). Finally, *Kiobel* requires consideration of the nationality and residency of the defendant and the availability of other fora. *Kiobel,* 133 S. Ct. at 1669. These considerations are particularly relevant in a case like

this one; unlike Ali, multinational corporations might be amenable to suit in many jurisdictions, while an individual is likely suable in just one. *See Kiobel,* 133 S. Ct. at 1669 (noting that defendants were multinationals); *accord* U.S. Supp. Br., *Kiobel*, 2012 WL 2161290, at *19.

In contrast to the facts in *Kiobel*, the defendant here is a natural person, and the living embodiment of the lacuna Justice Kennedy identified as "covered neither by the TVPA [Torture Victim Protection Act] nor by the reasoning and holding of [*Kiobel*]," 133 S. Ct. at 1669 (Kennedy, J., concurring)—a gap, Justice Breyer warned, that must be resolved to avoid international discord and prevent enemies of mankind from finding safe haven in the United States. *Id.* at 1671. Unlike the plaintiff in *Kiobel*, Warfaa seeks to enforce U.S. laws against a U.S. resident who has purposefully availed himself of the benefits of living in the United States and is only available for suit in one place: here. All of these factors deeply touch and concern the United States and thus displace the *Kiobel* presumption. Accordingly, a more detailed analysis than that performed by the Fourth Circuit is necessary.

Nor can the Fourth Circuit's analysis and decision be squared with *Kiobel* and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), regarding the original purpose and scope of the ATS. Ali attempts to defend the Fourth Circuit's decision by reducing *Kiobel*'s application to a single type of claim, *i.e.*, the "ability to provide judicial relief to foreign officials injured in the United States." Pet. Opp. 12-13. This, however, is only one of three historical violations of international law identified by this Court for which the ATS was enacted, and no court has limited the scope of the ATS

to only such conduct. *See Kiobel*, 133 S. Ct. at 1663 ("We thus held that federal courts may 'recognize private claims [for such violations] under federal common law.'") (quoting *Sosa*, 542 U.S. at 732) ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

Similarly, Ali fails in his attempt to brush aside *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992), both cited approvingly in *Sosa*. Pet. Opp. 15. *Sosa* considered whether U.S. courts have authority to recognize a cause of action under the common law that enforces an international norm, and it recognized that *Filártiga*, which provided a cause of action for completely extraterritorial torts, reflected a "proper exercise of the judicial power" to do so. *Sosa*, 542 US at 731; *see also Kiobel*, 133 S. Ct. at 1675 (Breyer J. concurring) (persuaded that *Sosa*'s reliance on *Filártiga* and *Marcos* suggests "that the ATS allowed a claim for relief in such circumstances"); Tr. of Oral Argument at 13:21–23, *Kiobel* (No. 10-1491) (Feb. 28, 2012) (Kennedy, J., noting that *Filártiga* is a "binding and important precedent"). The *Sosa* Court even acknowledged that the TVPA, an explicitly extraterritorial statute, was created to affirm this proper exercise of power. *See Sosa*, 542 U.S. at 731 ("Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power [in the *Filártiga* line of cases], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail"). Thus, *Sosa* postulates

that the exercise of jurisdiction over claims like those recognized in *Filártiga* and *Marcos* are proper exercises of judicial authority, even where all of the underlying conduct occurred abroad.

Allowing the Fourth Circuit's decision to stand would lead to exactly the unintended consequence Justice Breyer foretold: The United States would become "*a safe harbor . . . for a torturer or other common enemy of mankind.*" 133 S. Ct. at 1671 (Breyer, J., concurring) (emphasis added). For this reason alone, the Court should grant certiorari, review the Fourth Circuit's failure to perform a full and proper *Kiobel* analysis, and resolve the resulting conflict between the Fourth Circuit's decision and this Court's decisions.

2. *RJR Nabisco* Does Not Alter *Kiobel's* "Touch and Concern" Analysis and Thus Did Not Resolve the Conflict Between the Fourth Circuit's Decision and this Court's Cases.

As this Court acknowledged in *RJR Nabisco*, the *Kiobel* test is not the "focus" test set forth in *Morrison*. *RJR Nabisco*, 136 S. Ct. at 2101. The "focus" test, as applied in *RJR Nabisco*, considered the conduct-regulating provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") to determine which provisions Congress intended to have extra-territorial effect. The ATS, unlike RICO, is a purely jurisdictional statute and whether the *Kiobel* presumption is displaced requires "touch and concern" analysis of the claims. Therefore, Ali is wrong to suggest that *RJR Nabisco*'s holding buttresses the Fourth Circuit's analysis of Warfaa's claims.

a. *Kiobel* Requires Application of the "Touch and Concern" Test, Not the *Morrison* "Focus" Test.

In *Kiobel*, this Court took a "narrow" approach to the application of the presumption against extraterritoriality by establishing a displaceable presumption that looks to whether the "claims" "touch and concern" the United States with sufficient force. *Kiobel*, 133 S. Ct. at 1669.

The *Kiobel* Court did not delineate every factor that could displace the *Kiobel* presumption, but it plainly did not rule out the existence of a valid ATS claim based on extraterritorial violations of international law in some circumstances, such as when the defendant has chosen to reside on U.S. soil. Rather, the majority was "careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]." 133 S. Ct. at 1669 (Kennedy, J., concurring). Only a two-Justice concurrence argued for the application of the *Morrison* "focus" test—a broader test that ends its analysis on the location of the tortious conduct—but acknowledged that it was not adopted by the majority. *Kiobel* 133 S. Ct at 1670 (Alito J., concurring) (emphasis added) ("perhaps there is wisdom in the [majority's] preference for this narrow approach. I write separately *to set out the broader standard*.").

In arguing for application of the "focus" test in this matter, Ali effectively asks the Court to apply the "broader standard" of a minority concurrence rather than the majority opinion. The Court should reject this argument.

b. The ATS Is a Jurisdictional Statute, Not a Conduct-Regulating Statute, so the Presumption Against Extraterritoriality May Therefore Be Displaced.

It would be inappropriate to depart from *Kiobel* here based on *RJR Nabisco* for a second reason: the ATS is a jurisdictional statute and, as such, is not subject to the "focus" analysis this Court employed to interpret conduct-regulating statutes. The *Kiobel* approach controls here.

The sole purpose of the ATS is to give U.S. federal courts jurisdiction to hear causes of action based on violations of specific, universal, and obligatory international norms—not to define those norms or proscribe particular conduct. To the extent that the *Kiobel* majority relied on *Morrison*, it did so only to define the presumption against extraterritoriality. That is because, whereas the *Morrison* 'focus' test is used to determine the conduct that Congress intended to regulate in a statute like RICO, *Kiobel*'s "touch and concern" test is used to limit what *common-law* causes of action may be recognized under the ATS. *See RJR Nabisco*, 136 S. Ct. at 2100 (citing *Kiobel*, 133 S. Ct. at 1664, and noting *Kiobel's* conclusion "that the principles supporting the presumption should 'similarly constrain courts considering causes of action that may be brought under the ATS.'"). Courts use the "focus" test in examining conduct-regulating provisions of a statute, to determine whether claims based on U.S. territorial conduct are within the focus of a statutory provision. *Id.* By contrast, because the ATS contains no provisions regarding conduct, a different analysis is required. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (emphasis added) ("Since

the focus test turns on discerning Congress's intent when passing a statute, *it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms*.").

Had the presumption applied to strictly jurisdictional statutes, the *RJR Nabisco* Court could not have found, as it did, that portions of RICO applied extraterritorially. *See generally RJR Nabisco* (finding that two criminal provisions of the RICO statute applied extraterritorially). If Ali's argument were correct, then criminal and civil suits involving overseas conduct would be dismissed for lack of subject-matter jurisdiction, even if they were based on explicitly extraterritorial statutes or brought by diverse parties, because 18 U.S.C. § 3231, 28 U.S.C. § 1331, and 28 U.S.C. § 1332 are not explicitly extraterritorial. Similarly, *Morrison* applied the presumption only to the substantive provision of the Securities and Exchange Act, and not to the specific grant of subject-matter jurisdiction contained therein. *Morrison*, 561 U.S. at 254 (affirming that district court still had "jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies" extraterritorially).

Because the ATS is jurisdictional and not conduct-regulating, the principles underlying the presumption against extraterritoriality apply only to the claims brought under the ATS, and not to the statute itself. *RJR Nabisco* does not change this analysis.

B. The Fourth Circuit's Decision Conflicts With Decisions of Other Circuits.

"The Court's 'touch and concern' test is cryptic and has understandably divided the circuits." *In re Arab Bank, PLC Alien Tort Statute Litigation*, 822 F.3d 34,

44 (2d Cir. 2016) (Pooler, J., dissenting). Ali attempts to deny this reality by claiming that "the only other Circuit Court to consider the issue" of whether a defendant's residence is relevant to ATS jurisdiction, *Doe v. Drummond*, 782 F.3d 576 (11th Cir. 2015), reached "the identical result" relative to the Fourth Circuit's decision below. Pet. Opp. 17. But the *Drummond* court explicitly stated that "it would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct." *Drummond*, 782 F.3d at 593 n.24 (emphasis in original) (citation omitted). Moreover, the *Drummond* defendant was a corporation, and thus the Eleventh Circuit's finding that the corporate defendant's U.S. citizenship was insufficient in and of itself to confer jurisdiction does not establish uniformity among the circuits regarding the U.S. residency of a natural person who is only amenable to suit in one jurisdiction. As explained in the Cross Petition (at 15-21), a circuit split exists on the issue of whether a court may, as the Fourth Circuit did, deny that a natural person's longtime U.S. residency is a "a cognizable consideration in the ATS context." *Warfaa*, 811 F.3d at 661.

C. The Fourth Circuit's Decision Refusing to Consider Ali's U.S. Residency Conflicts with the Views of Both Political Branches and Undermines U.S. Foreign Policy.

Both political branches of the federal government agree that jurisdiction in the United States is proper in circumstances like these. Warfaa's Cross-Pet. 22-30. Ali discounts those expressed views by noting that the government chose not to reiterate them in this case. Pet. Opp. 18-20. But, as Warfaa has explained, the Executive and Legislative branches have repeatedly and consistently stated for years that ATS claims

such as Warfaa's here should be recognized. Such agreement by the political branches is a fact of undeniable importance.

CONCLUSION

If the Court grants Ali's petition, Cross-Petitioner Farhan Mohamoud Tani Warfaa's petition should be granted.

Respectfully submitted,

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