No. 10-1491

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In The
Supreme Court of the United States

ESTHER KIOBEL, et al.,
Petitioners,
v.

ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF CIVIL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The first question presented by this case is "[w]hether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held." Questions Presented (No. 10-1491). This brief addresses that question alone.

Amici curiae[1] are scholars with expertise in federal jurisdiction, federal courts, and civil procedure who have an interest in and have written extensively on the proper interpretation of questions of subject matter jurisdiction, particularly the distinction between true jurisdictional conditions and nonjurisdictional limitations on causes of action. *Amici* take no position on any of the other questions presented in this case.

SUMMARY OF ARGUMENT

Over the last dozen years this Court has focused repeatedly on better defining which questions are properly categorized as "jurisdictional." Subject matter jurisdiction refers to the court's power to hear a case and resolve a claim one way or the other. But questions regarding the scope of that claim, including whether a prohibition applies to a

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[1] Written consents from both parties to the filing of *amicus curiae* briefs in support of either party are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief.

defendant or a defendant's conduct, do not implicate the power of the court, but rather speak to the rights and obligations of the parties and determine whether a plaintiff can state a claim for relief on the merits. *Amici* respectfully submit that the Second Circuit's decision to treat the question of corporate liability under the ATS as a question of subject matter jurisdiction is incompatible with this Court's recent and repeated directives. The implications of the decision reach beyond this particular case and these litigants and therefore merit the Court's attention.

PROCEDURAL BACKGROUND

In the district court, Defendants Royal Dutch Petroleum and Shell Transport and Trading ("Shell") never argued that because they were corporations they were not liable under the Alien Tort Statute for extrajudicial killing, torture, or other violations of the law of nations. During the four years the case was pending in the Southern District of New York, Shell filed two motions to dismiss and an answer to Plaintiffs' First Amended Complaint.

The first motion argued for dismissal under the act of state doctrine, under the doctrine of international comity, and for failure to state a claim upon which relief could be granted on the ground that the ATS does not permit secondary liability. *See* Mem. of Law in Support of Defs.' Mot. to Dismiss at 4–10, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618 (S.D.N.Y. Mar. 17, 2003). Shell did not assert that Plaintiffs had failed to state a claim on the ground that liability under the ATS does not extend to corporations. The second motion to dismiss responded to Plaintiffs' amended complaint and

simply incorporated Shell's earlier arguments by reference. *See* Mem. of Law in Support of Defs.' Mot. to Strike or Dismiss at 4, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-7618 (S.D.N.Y. June 1, 2004). Shell's Answer raised nine defenses, including lack of personal jurisdiction, failure to exhaust Nigerian remedies, and lack of standing. J.A. 111–13.[2] A defense on the ground of Shell's corporate form was not among them. *Id.*

The district court granted in part and denied in part Shell's motion to dismiss, permitting Plaintiffs to proceed with their claims for torture, crimes against humanity, and arbitrary arrest and detention. Pet. App. B-23. The order was certified for interlocutory review. *Id.*

On appeal, Shell argued that no norm of customary international law permitted the imposition of liability for the acts of its subsidiary based on agency or corporate veil piercing. These issues, Shell asserted, concerned subject matter jurisdiction:

> The uncontroverted record evidence—reviewable by this Court because it goes to subject matter jurisdiction—is that SPDC is an independent corporation . . . . [A]lthough there is no competent source of customary international law that would suggest that the Shell

[2] *Amici* use the following abbreviations to refer to the appendices before this Court: J.A. (Joint Appendix); Pet. App. (Appendix to the Petition for a Writ of Certiorari); and Resp. App. (Appendix to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari).

> Parties, as "dominating" owners of SPDC, could be held liable for extrajudicial killing, even the incompetent evidence suggests that the law of nations does not attach civil liability to corporations under any circumstance.

Resp. App. 58a-59a.

The Court of Appeals agreed that the issue of corporate liability was one of subject matter jurisdiction.[3] It then conducted a review, without the benefit of briefing by the parties, of the work of certain international criminal tribunals, a score of treaties, and other selected international law sources. The Court concluded, based on its review, that international law did not provide for liability over corporations for human rights violations and that therefore subject matter jurisdiction under the ATS was lacking in this case.

ARGUMENT

This Court has recently and repeatedly expressed "a marked desire to curtail" the so-called "drive-by jurisdictional rulings" that miss the critical distinction between "true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010); *see also Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006); *Steel Co. v. Citizens*

[3] *Amici* do not consider here the question whether, and if so under what circumstances, an appellate court may consider any issue not properly raised below.

for a Better Env't, 523 U.S. 83, 90 (1998); *see also* 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.30[1] (3d ed. 2010) ("the parties and courts sometimes erroneously conflate the question of subject matter jurisdiction with the question of whether the plaintiff can prove that the federal statute actually applies to the defendant or to the defendant's conduct"); Howard Wasserman, *The Demise of "Drive by Jurisdictional Rulings*," 105 Nw. U. L. Rev. 947 (2011).

This Court has focused over the last dozen years on the difference between subject matter jurisdiction and the scope of an asserted claim for relief because the distinction has important consequences. Shifting the burden to the courts to resolve contested merits-related facts as part of the subject matter jurisdiction inquiry increases the burden on the judiciary, alters the incentives facing litigants, and undercuts the role of the adversarial process. The misclassification of merits issues as subject matter jurisdiction also affects *res judicata*, the standard of proof, appellate review, and potentially the jury right.

The issue of subject matter jurisdiction can be raised at any time, including at the Supreme Court stage, by a court *sua sponte* or by a party, whether or not the objection was made below. *E.g.*, *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379 (1884). An objection that a complaint fails to state a claim upon which relief can be granted must be asserted by a party and does not endure beyond trial on the merits. *See* Fed. R. Civ. P. 12.

The failure to differentiate between the two may lead to gamesmanship and a waste of judicial resources. *See, e.g., Arbaugh*, 546 U.S. at 508 (noting trial court commentary on the waste of judicial resources caused by a party's objection to lack of subject matter jurisdiction in response to an adverse jury verdict); *United Phosphorus v. Angus Chem. Co.*, 322 F.3d 942, 958 (7th Cir. 2003) (Wood, J., dissenting) (mischaracterizing complex issues as questions of subject matter jurisdiction provides "an irresistible invitation to the losing party" to revisit issues whether or not objection was preserved below).

Classification of issues as jurisdictional may also determine whether the trial court, the jury, or a court of appeals resolves contested facts. Mischaracterizing merits issues as "jurisdictional" shifts responsibility away from the jury and thereby erodes the Seventh Amendment right to a trial by jury. Moreover, since jurisdictional issues may be raised for the first time on appeal, misuse of the jurisdictional label undermines the trial court's special role in deciding disputed issues in the first instance. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

Res judicata and the relationship between state and federal courts may also be affected. A claim dismissed for lack of subject matter jurisdiction may be actionable in state court, whereas a claim dismissed on the merits is not. The classification may determine whether a case is remanded to state court or dismissed. Similarly, jurisdictional dismissal will affect a federal court's ability to retain supplemental jurisdiction over state

law claims. *Arbaugh*, 546 U.S. at 514. In some cases, that may require dismissal of state law claims even after they have been "fully tried by a jury and determined on the merits." *Id.* Conversely, given the scope of a "claim" under federal preclusion law, a merits dismissal may preclude subsequent litigation of related state law causes of action. Restatement (Second) of Judgments §§ 24, 25 (1982). In addition, under 28 U.S.C. § 1447, a district court's remand order based on lack of subject matter jurisdiction is immune from appellate review. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229–30 (2007). These consequences will be felt far beyond the context presented here. *See* Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55, 55–66 (2008).

I. THE SCOPE OF LIABILITY IS A MERITS QUESTION

Subject matter jurisdiction "properly comprehended" refers to a court's "power to hear a case." *Union Pac. R.R. Co.*, 130 S. Ct. at 596 (citation omitted); *Cotton*, 535 U.S. at 630; *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (subject matter jurisdiction is "the authority conferred by Congress to decide a given type of case one way or the other"). So long as the allegations invoking the court's jurisdiction are not "wholly insubstantial and frivolous," subject matter jurisdiction exists over the merits of a controversy. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946); *see also Steel Co.*, 523 U.S. at 89; *Hagans*, 415 U.S. at 536–38. Even where phrased in "jurisdictional" terms, a statute that "*creates* jurisdiction where none previously existed" "speaks not just to the power of a particular court but to the

substantive rights of the parties." *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997).

This Court has repeatedly emphasized that subject matter jurisdiction does not turn on the scope, applicability, or ultimate success of a cause of action. *See Morrison*, 130 S. Ct. at 2877; *Steel Co.*, 523 U.S. at 89–92; *Nw. Airlines, Inc. v. Cnty. of Kent, Mich.*, 510 U.S. 355, 365 (1994) ("whether a federal statute creates a claim for relief is not jurisdictional"); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812–13 (1993) (Scalia, J., dissenting) (whether statute reaches conduct alleged is a merits question); *Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) (whether an implied private right of action exists is not a question of jurisdiction); *Bell*, 327 U.S. at 682–85 (jurisdiction is not defeated where right of petitioners to recover will be sustained if Constitution and laws are given one construction and will be denied if they are given another); *cf. Lamar v. United States*, 240 U.S. 60, 65 (1916) (objection that an indictment does not charge a crime against the United States goes only to the merits of the case, not subject matter jurisdiction).

In *Morrison*, 130 S. Ct. at 2877, this Court found that the Second Circuit had erred when it classified the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") as a question of subject matter jurisdiction. This Court observed that 15 U.S.C. § 78aa provides that the district courts "shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act],"

Morrison, 130 S. Ct. at 2877 n.3 (brackets in original), and concluded that the district court "had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the defendant's] conduct." *Id.* at 2877. But the issue of whether the court had subject matter jurisdiction under 15 U.S.C. § 78aa "presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Id.* Drawing a firm line between the jurisdictional provision that defines the court's power to hear the case and the substantive law defining the violation at the heart of the controversy, *Morrison* held that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." *Id.*

Likewise, in *Steel Co.*, this Court evaluated whether the requirements of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11046(a)(1), implicated the district court's subject matter jurisdiction. 523 U.S. at 89. EPCRA provided that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." This Court found that "[i]t is unreasonable to read this as making all the elements of the cause of action under subsection (a) jurisdictional" and rejected as "fanciful" the expansive notion that the use of the term "jurisdiction" rendered "the existence of a violation necessary for subject-matter jurisdiction." *Id.* at 90–92.

The ATS 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." 28 U.S.C. § 1350. Other jurisdictional statutes share a similar formulation. For example, 28 U.S.C. § 1363 provides that "[t]he district courts shall have original jurisdiction of any civil action brought for the protection of jurors' employment under section 1875 of this title." [4] But whether or not a defendant is subject to liability under section 1875 is a merits question. *E.g., Garcia v. Municipality of Mayaguez*, 118 F. Supp. 2d 153 (D.P.R. 2000); *cf. Arbaugh*, 546 U.S. at 511.[5]

This Court explained that "the ATS gave the district courts 'cognizance' of certain causes of action" and was "intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." *Sosa v. Alvarez-*

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[4] Other examples include 7 U.S.C. § 1642(e), which provides that "[t]he district courts of the United States shall have jurisdiction of violations of this chapter or the rules and regulations thereunder . . ." and 15 U.S.C. § 80a-43, which provides that the district courts "shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or the rules, regulations, or orders thereunder."

[5] Similarly, section 1964 of the Racketeer Influenced and Corrupt Organizations Act provides that "[t]he district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962" and that a person injured by such a violation may bring suit. 18 U.S.C § 1964 (a) & (c). Whether or not section 1962 has been violated is consistently analyzed as a merits issue. *E.g.*, *Hemi Group, LLC v. City of N.Y.*, 130 S. Ct. 983 (2010); *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008).

Machain, 542 U.S. 692, 713–14 (2004) (citation omitted). *Sosa* further described the jurisdictional grant in the ATS as "best read as having been enacted on the understanding that the common law would provide a cause of action." *Id.* at 724.[6] As in *Morrison* and *Steel Co.*, the existence of a violation of the underlying substantive law, whether defined in a separate statute or by the common law, is determined on the merits, not as a question of subject matter jurisdiction.

The United States relied upon this line of cases when it recommended this Court decline to review the Second Circuit's decision in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009), explaining that "the validity of a federal-common-law claim under *Sosa* should generally be treated as a merits question, with the ATS conferring subject-matter jurisdiction so long as the allegations of a violation of customary international law are not plainly insubstantial." Br. for the U.S. as *Amicus Curiae*, *Pfizer Inc. v. Abdullahi*, 2010 WL 2214874, at *20 (U.S. May 2010) (citing, *e.g.*, *Hagans*, 415 U.S. at 542 n.10).

The last dozen years of this Court's jurisprudence confirm that subject matter jurisdiction does not turn on the scope, applicability

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[6] *Sosa* explained that the ATS was not "stillborn" "once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time." *Id.* at 714. In another context, this Court recognized that federal common law as well as Congressional enactments may provide a cause of action and both are "laws" of the United States. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100 (1972).

or ultimate success of a cause of action, a question that does not implicate a court's power to adjudicate a case but rather speaks to the rights and obligations of the parties.

II. THE SECOND CIRCUIT ERRED IN HOLDING THAT CORPORATE LIABILITY UNDER THE ATS IS A QUESTION OF SUBJECT MATTER JURISDICTION

Notwithstanding the care with which this Court has admonished lower courts to approach this distinction, the Second Circuit here did not treat the question of whether a corporate defendant can be liable under international law as a merits question, but described its holding, which the Circuit explicitly termed as resolving "the scope of liability" under the statute, as a question of subject matter jurisdiction. Pet. App. A-15.

The Court of Appeals conceded that "the text of the ATS limits only the category of *plaintiff* who may bring suit." Pet. App. A-32, n.30. The Court nonetheless believed that the statute's requirement "that a claim be predicated on a 'violation of the law of nations' incorporates any limitation arising from customary international law on who properly can be named a *defendant*" into the scope of its subject matter jurisdiction inquiry. *Id.* *Amici* respectfully submit that the Second Circuit's analysis conflicts with this Court's oft-repeated directive that what conduct a legal rule reaches or prohibits is a merits question. *E.g.*, *Morrison*, 130 S. Ct. at 2877; *Steel Co.*, 523 U.S. at 89–92; *Hartford Fire Ins. Co.*, 509 U.S. at 812–13 (Scalia, J., dissenting); *Nw. Airlines*,

510 U.S. at 365.[7] It also ignores this Court's admonition that it is "unreasonable" to read this type of statutory formulation as making all of the elements of a violation jurisdictional. *Steel Co.*, 523 U.S. at 90–92; *see also Morrison*, 130 S. Ct. at 2877; *Arbaugh*, 546 U.S. at 511.

But even if one declines to read the ATS against the backdrop of this Court's recent subject matter jurisdiction jurisprudence, the plain text does not include the term "defendant" within the statute's threshold limitations. *Arbaugh*, 546 U.S. at 515 (a clear statement by the legislature is required); *see also* Howard Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643, 662–65 (2005). Some jurisdictional provisions in Title 28, like section 1350, impose threshold limitations on the status of the plaintiff. *E.g.*, 28 U.S.C. § 1345 (plaintiff must be the United States or an agency or officer thereof); 28 U.S.C. § 1362 (plaintiff must be an Indian tribe). Others impose threshold limitations on the status of the defendant, something section 1350 does not do. *Compare Argentine Republic v. Amerada Hess*

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[7] Indeed, in five post-*Sosa* decisions concerning corporations' liability under the ATS, the Second Circuit has never held that the availability of corporate liability is a question of subject matter jurisdiction. *Abdullahi*, 562 F.3d 163 (upholding ATS claims against corporation), *cert. denied*, 130 S. Ct. 3541 (2010); *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*, 335 F. App'x 81 (2d Cir. 2009) (summary order) (same); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (affirming dismissal on the merits after summary judgment); *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008) (affirming dismissal on the merits under Rule 12(b)(6) and Rule 56); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (upholding ATS claims against corporation).

Shipping Corp., 488 U.S. 428, 438 (1989) (section 1350 "does not distinguish among classes of defendants"), *with, e.g.*, 28 U.S.C. § 1330 (defendant must be foreign state); 28 U.S.C. § 1346 (defendant must be United States); 28 U.S.C. § 1348 (defendant must be a banking association); 28 U.S.C. § 1351 (defendant must be a consul or member of a diplomatic mission). Congress certainly knows how to make party status a jurisdictional element when it wants to. *E.g.*, 28 U.S.C. § 1332 (a) & (c) (corporate citizenship). The failure to even mention the category of "defendant" in the text of the ATS is hardly a clear statement of Congress' intent to make the defendant's status a threshold jurisdictional limitation.

Particularly absent such a clear statement, subject matter jurisdiction does not turn on whether a defendant is subject to suit under a given cause of action. *See, e.g.*, *Arbaugh*, 546 U.S. 500; *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) (question of whether Congress intended to allow a cause of action against the Postal Service is not a question of subject matter jurisdiction); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277–79 (1977) (whether defendant is subject to suit under 42 U.S.C. § 1983 is not a question of subject matter jurisdiction); *cf. Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953) (whether Jones Act applies to suit by alien seaman against foreign ship owner not a question of subject matter jurisdiction); *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 305–06 (1923) (whether transactions took place in interstate commerce not a question of subject matter jurisdiction: "jurisdiction cannot be made to stand or fall upon the way the court may

chance to decide an issue as to the legal sufficiency of the facts alleged").

Finally, the fact-intensive inquiry undertaken by the Court of Appeals underscores the pitfalls of mischaracterizing a complex merits issue as subject matter jurisdiction. The Circuit recognized that international law is not static, Pet. App. A-62, and that specialized treaties may impose obligations on corporations for the violations of international law, including of human rights norms, described in those treaties, but not more broadly. Pet. App. A-55. This merits-laden analysis is best undertaken with the benefits that flow from a full airing of the issues pursuant to the adversarial process, with the jury resolving contested facts.

III. THE DISTRICT COURT HAD THE POWER TO RESOLVE PLAINTIFFS' NON-FRIVOLOUS CLAIMS ON THE MERITS

A claim is insubstantial and frivolous "if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Hagans*, 415 U.S. at 538 (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933)); *Steel Co.*, 523 U.S. at 89 (dismissal only appropriate where claim is insubstantial, implausible, foreclosed by prior decisions, or otherwise so completely devoid of merit as not to involve a controversy (citing *Oneida Indian Nation v. Cnty. of Oneida, N.Y.*, 414 U.S. 661, 666–67 (1974)); *Bell*, 327 U.S. at 682–83.

The Second Circuit did not explicitly address

the question of whether Plaintiffs' allegations of corporate liability were plainly insubstantial or frivolous,[8] but such a finding appears to be ruled out by the concurrence's observation that the majority opinion conflicts with virtually every other reported decision. Pet. App. A-108, n.14 (Leval, J., concurring); *see also id.* at A-106, n.12.

Recently, the Seventh, Ninth, and District of Columbia Circuits joined the Eleventh Circuit in holding that corporate defendants and other private entities are within the scope of liability imposed by the ATS. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40-57 (D.C. Cir. 2011) (holding, on the merits, that liability under the ATS is properly extended to corporate defendants); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011) ("factual premise of the majority opinion in the *Kiobel* case is incorrect" rendering *Kiobel* an "outlier" among the Circuits); *Sarei v. Rio Tinto*, ___ F.3d ___, 2011 WL 5041927, at *6, *17-27 (9th Cir. Oct. 25, 2011) (en banc) (finding ATS contains no bar to corporate liability and analyzing individual claims over which district court had found jurisdiction); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (citing *Aldana v. Del Monte Fresh*

[8] While the Second Circuit employs "a more searching review of the merits" for ATS claims under Federal Rule 12(b)(1), *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), whether that standard or the insubstantiality standard, *Bell,* 327 U.S. at 682–83, is employed the result is the same. *Kadic*, 70 F.3d at 238, read consistently with *Sosa*, 542 U.S. at 724, *Morrison*, 130 S. Ct. at 2877, and *Steel Co.*, 523 U.S. at 89, does not import an analysis of the scope of liability into the threshold subject matter jurisdiction inquiry.

Produce, N.A., 416 F.3d 1242 (11th Cir. 2005)).[9] Indeed, the Second Circuit's own willingness to sustain ATS cases against juridical entities over the past thirteen years[10] further demonstrates that Plaintiffs' claims are not "frivolous" and cannot be considered "foreclosed by prior decisions." *Hagans*, 415 U.S. at 543; *Steel Co.*, 523 U.S. at 89.

CONCLUSION

Without taking any position on whether corporations and other private entities should be subject to liability for violations of customary international law when that question is properly raised by the parties and considered on the merits, *Amici* respectfully submit that the Second Circuit's decision on subject matter jurisdiction is incompatible with recent, and repeated, directives from this Court and is in error.

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[9] *Cf. Mwani v. Bin Laden*, 417 F.3d 1, 14 (D.C. Cir. 2005) (subject matter jurisdiction exists over plaintiffs' more than colorable claims against al Qaeda); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.,* 370 F.3d 1192, 1995 (D.C. Cir. 2004) (holding subject matter jurisdiction exists because claim against corporate defendant under international law is not frivolous); *Deutsch v. Turner Corp.*, 324 F.3d 692, 718 (9th Cir. 2003) (finding "indisputable federal jurisdiction" for international law claims but dismissing on statute of limitations grounds); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (affirming dismissal under Fed. R. Civ. P. 12(b)(6)).

[10] *See supra* note 7. The Second Circuit's first decision concerning an ATS claim against a corporate defendant was *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998).

Respectfully submitted,

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APPENDIX

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