No. 16-1461

IN THE

Supreme Court of the United States

RAMCHANDRA ADHIKARI, *et al.*,
Petitioners,

v.

KELLOGG BROWN & ROOT, INCORPORATED, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Unable to deny that there is a circuit split on the question presented, Respondents spend the bulk of their brief in opposition attempting to distract the Court from the real issue presented by this case: the meaning of the "touch and concern" language in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S.Ct. 1659, 1669 (2013). Despite Respondents' arguments to the contrary, that question remains "unanswered," *id.* at 1669 (Alito, J. concurring), and has generated at least five different standards in the lower courts, thus necessitating this Court's review.

Respondents suggest that the division of authority among the lower courts over *Kiobel*'s "touch and concern" language was resolved by this Court's decision in *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016). That case—which concerned RICO, not the ATS—reaffirmed the use of the "focus" test first articulated in *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247 (2010), for determining whether an application of a statute is extraterritorial. But it did not address how the "focus" test should be applied to the ATS in light of the "touch and concern" test and expressly noted that *Kiobel* "did not need to determine" the ATS's "focus." *See RJR Nabisco*, 136 S. Ct. at 2100–01. Unsurprisingly, lower courts have continued to follow the circuit precedents giving rise to the instant split after *RJR Nabisco,* as that case does not address the question presented in this petition at all.

Respondents also argue that this case makes a poor vehicle for review because they contend that Petitioners' ATS claims were displaced by the 2008 amendments to the Trafficking Victims Protection Reauthorization Act (TVPRA). That argument makes little sense here, as Respondents succeeded below in arguing that those amendments *did not* apply to Petitioners' claims. And even if the amendments could in theory retroactively displace Petitioners' ATS claims for pre-2008 conduct, such a reading would contradict the plain language of the 2008 amendments which expressly preserve "any domestic or extra-territorial jurisdiction otherwise provided by law." 18 U.S.C. § 1596(a).

Respondents' construction of the 2008 amendments to the TVPRA is all the more puzzling when one considers the purpose of those amendments, which was not to cut off remedies, but to *extend* them to ensure that trafficking victims harmed by U.S. actors are able to vindicate their rights in U.S. courts. Against that backdrop, the 2008 amendments to the TVPRA reinforce the appropriateness of this case as the ideal vehicle through which to resolve the post-*Kiobel* circuit split because the Court need not be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Moreover, the Court's resolution of this issue "takes place against the backdrop of the ATS's function of providing redress in situations where

the international community might consider the United States accountable." Br. for the United States as Amicus Curiae Supporting Neither Party at 26, *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. June 27, 2017). If torts in violation of the law of nations committed by U.S.-citizen defendants on territory over which the U.S. military exercises exclusive jurisdiction can ever be the basis for ATS claims after *Kiobel*, the TVPRA demonstrates why this case is an especially appropriate opportunity for so holding.

I. *RJR Nabisco* did not resolve the "touch and concern" circuit split.

Respondents do not dispute that there is a circuit split on the question presented, but they contend that this Court's decision in *RJR Nabisco* "resolved or mooted" any circuit split. Br. for Respondents in Opp'n (BIO) 11. That could not be further from the truth.

RJR Nabisco did not mention the "touch and concern" test at all. Instead, it reaffirmed the same two-step framework for determining the extraterritorial effect of a statute already used in *Morrison* and *Kiobel*. *See RJR Nabisco*, 136 S. Ct. at 2101 ("*Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues."). Indeed, *RJR Nabisco* emphasized that *Kiobel* had no need to settle the "focus" of the ATS. 136 S. Ct. at 2100–01. Rather than settling the meaning of *Kiobel*'s "touch and concern" test as Respondents claim, *RJR Nabisco* did not even

address how courts should understand the ATS-specific "touch and concern" standard in light of the more general "focus" test first articulated in *Morrison*, 561 U.S. at 266. Put another way, Respondents somehow divine from a case applying prior precedents the resolution of a matter those precedents left unsettled. Unless *RJR Nabisco* somehow resolved, *sub silentio*, the meaning of the "touch and concern" test, it could not have settled the circuit split at issue here.

It is a settled rule that courts of appeals must follow circuit precedent "absent a clear indication that those decisions are overruled." *Fed. Deposit Ins. Corp. v. Bowles Livestock Comm'n Co.*, 937 F.2d 1350, 1354 (8th Cir. 1991); *see, e.g.*, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000) ("Our marching orders are clear: follow decisions until the Supreme Court overrules them."). Nowhere in *RJR Nabisco* did the Court purport to overrule the circuit decisions that form the basis of the split at issue here, nor did it even clarify how lower courts should reconcile *Kiobel*'s ATS-specific "touch and concern" test with *Morrison*'s more general "focus" test. Thus, lower courts will continue to follow their circuit precedent until and unless the Supreme Court actually addresses the question presented.

Indeed, district courts that have considered the "touch and concern" test after *RJR Nabisco* have continued to follow pre-*RJR Nabisco* circuit precedent and to express uncertainty regarding whether and how to apply the focus test to ATS

claims. In *Salim v. Mitchell*, ----F. Supp. 3d----, 2017 WL 3389011, at *15 (E.D. Wash. Aug. 7, 2017), for example, the court applied pre-*RJR Nabisco* Ninth and Fourth Circuit precedent to conclude that the claims at issue touched and concerned the United States. Noting that other circuits have applied the focus test, the court declined to do so because the Ninth Circuit had not. *See also, e.g.*, *Sexual Minorities Uganda v. Lively*, ---F.Supp.3d----, 2017 WL 2435285, at *6-7 (D. Mass. June 5, 2017) (discussing this case and pre-*RJR Nabisco* decisions by the Fourth Circuit and the Second Circuit before concluding that it lacked jurisdiction under the ATS, albeit *without* applying the focus test). These cases reiterate what was already obvious—that *RJR Nabisco* did nothing to clarify the meaning of the "touch and concern" test, or to resolve the circuit split at the heart of this Petition.[1]

Finally, as the Petition demonstrated, certiorari is warranted not just because of the division among the lower courts, but because the Court of Appeals' decision in this case wrongly undervalued the numerous and substantial

[1] Even in their view of *RJR Nabisco*, Respondents concede that lower courts have applied the "focus" test unevenly. For example, the Eleventh Circuit examines the focus of both "the claim" and the relevant conduct, while the Fifth Circuit narrowly defines the focus to be where the injury occurred. *See* BIO 15. Thus, even if Respondents are correct that *RJR Nabisco* silently substituted the "focus" test for the "touch and concern" standard, there would still be division among the circuits over how that applies to ATS claims.

connections between Respondents' tortious conduct and the United States. KBR employees, including those in the United States, knowingly obtained trafficked labor—paid for in U.S. taxpayer dollars—to satisfy KBR's contract with the U.S. government to provide workers for a U.S. military base over which the United States exercised de facto exclusive jurisdiction and control.[2] Because of these substantial connections,

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[2] In their Statement of the Case, Respondents persist in repeating allegations that the district court rejected outright at summary judgment. As just one of many examples, Respondents assert that the victims were not "forcibly detained in Jordan and transported unwillingly to Iraq," BIO 5, but the district court stated that the evidence proffered by Petitioners demonstrated that "when the men arrived in Jordan, they were subject to threats and harm; their passports were confiscated; and the men were locked into a compound and threatened" and that Plaintiffs had presented sufficient evidence "that each alleged victim suffered unlawful coercion." Pet. App. 118a. KBR relies solely on a letter written by one decedent after he had been held captive for a month. Such letters by trafficking victims to reassure relatives are not unusual, *see, e.g.*, *U.S. v. Farrell*, 563 F.3d 364, 370 (8th Cir. 2009), and the district court did not credit KBR's interpretation of the letter. *See* Pet. App. 118a, 122a. KBR also tries to distance itself from the fact that the trafficking victims who arrived at the base worked under KBR's direction and control. However, the court found that Petitioners had presented sufficient evidence that KBR's conduct was knowing, *Id.* at 117a, that KBR controlled the recruitment and supply of the laborers, *Id.* at 121a, and that no corrective action was initiated by KBR until the U.S. military acted. *See* Br. for Retired Military Officers as Amici Curiae Supporting Appellants at 6, *Adhikari*, No. 15-20225 (5th Cir. Oct. 1, 2015). Indeed, the district court denied summary judgment to Respondents

the only place the victims can bring their claims is the United States; indeed, no other country has jurisdiction. If the ATS extends to *any* claims arising on foreign soil after and in light of *Kiobel*, surely it extends to these because "[t]he function of the ATS is to ensure private damages remedies in circumstances where other nations might hold the United States accountable if it did not provide a remedy." Br. of the United States as Amicus Curiae Supporting Neither Party at 7, *Jesner*, No. 16-499.

II. The 2008 amendments to the TVPRA militate in favor of, rather than against, certiorari.

Unable to muster any stronger reason for not resolving the ATS-specific circuit split animating this Petition, Respondents pivot to the argument that this case is a poor vehicle for review because the district court rejected their contention that Petitioners' ATS claims are retroactively displaced by the 2008 amendments to the TVPRA. *See* BIO 24 (citing Pet. App. 81a-82a).[3] Rather than

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based on these facts before holding that it lacked subject matter jurisdiction. Pet. App. 99a, 124a.

[3] Respondents also rather awkwardly contend that this case is a bad vehicle because it may be mooted by this Court's ruling in *Jesner,* No. 16-499, but then ask the Court not to hold this Petition for disposition in light of that decision. BIO 26-27. Petitioners express no opinion on whether the Petition should be held pending the disposition in *Jesner*, but note only that an affirmance of the Second Circuit would not necessarily dispose of this case. The specific norm of international law at issue in this case *recognizes* corporate

militating against certiorari, however, Congress' actions vis-à-vis human trafficking claims only underscore the suitability of this Petition for resolving the question presented.

In the Fifth Circuit, Respondents successfully argued that the 2008 amendments, which expressly gave the TVPRA extraterritorial effect, could not be applied retroactively to Petitioners' claims to "create a new cause of action for [pre-enactment] extraterritorial conduct." Brief of Defendants-Appellees at 17, *Adhikari*, No. 15-20225 (5th Cir. Nov. 25, 2015). The court therefore affirmed the district court's dismissal of Petitioners' TVPRA claims because they involved only conduct that occurred before 2008. Pet. App. 30a.

Despite that holding, Respondents contend that the very same amendments nonetheless retroactively "displace" Petitioners' ATS claims, leaving them without redress for their injuries. BIO 24. That argument is not only inconsistent—particularly where relief under the TVPRA is

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liability. As the Second Circuit noted in *Kiobel I*, some treaties "impose obligations on corporations in the context of the treaties' particular subject matter," and the Transnational Crime Convention, which includes the Trafficking Protocol, is one such treaty. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 138–41 (2d Cir. 2010). Indeed, the Trafficking Protocol explicitly incorporates the provisions of the Transnational Crime Convention providing for corporate liability. Trafficking Protocol, art. 1. Because *Kiobel I* did not involve an international norm that incorporates corporate liability is in such cases..

unavailable to Petitioners—but is contradicted by the plain language of the statute. Unlike the statute in the case relied on by Respondents, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011), the amendments to the TVPRA expressly state that they are providing for extraterritorial jurisdiction "[*i*]*n addition to* any domestic or extra-territorial jurisdiction otherwise provided by law." 18 U.S.C. § 1596(a) (emphasis added). Thus, even though "[l]egislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law," *American Electric*, 564 U.S. at 423, here, Congress has manifested a clear intent *not* to displace trafficking claims under existing jurisdictional statutes, including the ATS.[4]

Indeed, this Court noted in *Sosa*, 542 U.S. at 725, that Congress had not "limited civil common

[4] Moreover, unlike the "unusual exercise of law-making by federal courts" at issue in *American Electric*, 564 U.S. at 423, Congress enacted the ATS expressly "understanding that the common law would provide a cause of action," *Sosa*, 542 U.S. at 724. This congressional mandate to apply common law distinguishes ATS claims from federal common law at issue in *American Electric*, which merely filled in the gaps left by statutes. Further, the decision in *American Electric* was premised on the idea that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id.* at 423-24. The same cannot be said about the ATS, where the content of the cause of action is determined by "the law of nations," which is not prescribed by Congress, but by the agreements and practices of States.

law power [under the ATS] by another statute," confirming that no pre-*Sosa* human rights statute—including the TVPRA, which was originally enacted in 2000—displaces the ATS. *Id.* at 725, 731. *Sosa* specifically described the TVPA, a closely related statute, as "legislation *supplementing*" the "proper exercise of judicial power"—not displacing it. *Id.* at 731 (emphasis added).[5]

The 2008 amendments underscore Congress' determination to combat human trafficking and forced labor, and further cement the prohibition of these crimes as specific, universal and obligatory. *See Sosa*, 542 U.S. at 728, 731. Further, they demonstrate that Congress was specifically concerned that trafficking connected to the United States through the nationality or location of the perpetrator was actionable in U.S. courts. *Id.*

Thus, the concerns expressed in *Kiobel* regarding "the danger of unwarranted judicial interference in the conduct of foreign policy," 133 S.Ct. at 1661, are ameliorated here, where

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[5] The majority of lower courts have held that statutes such as the TVPRA and TVPA do not displace ATS claims. *See, e.g.*, *Drummond*, 782 F.3d at 601 (TVPA does not displace ATS); *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1226 (S.D. Fla. 2011) (TVPRA does not displace ATS); *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 n.29 (E.D. Va. 2009); *see also Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (allowing ATS and TVPA claims to go forward in tandem); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003) (same). *But see Enahoro v. Abubaker*, 408 F.3d 877, 884-86 (7th Cir. 2005).

Congress has made clear that it supports providing redress to victims of human trafficking committed abroad by U.S. actors. Unlike other torts actionable under the ATS, the transnational nature of human trafficking makes it even more necessary and appropriate for the United States to provide a forum for victims of trafficking by U.S. defendants. *See Int'l Trafficking in Women and Children: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 3, 14 (2000) (testimony of Hon. Frank E. Loy, Under Sec'y of State for Global Affairs, Dep't of State) ("Because trafficking is a global problem, the nations of the world are linked as countries of origin, transit and destination and inevitably will succeed or fail in combatting it together"). The TVPRA thus simplifies this Court's analysis of the jurisdictional issue because the Court need not be as "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Kiobel*, 133 S.Ct. at 1664.[6]

* * *

The five-way circuit split over the meaning of *Kiobel*'s "touch and concern" test was not settled by *RJR Nabisco*, and the 2008 amendments to the

[6] To the extent Respondents argue that the passage of the 2008 amendments somehow makes review no longer necessary, they overlook the fact that application of the "touch and concern" test continues to be a subject of confusion for the lower courts in both trafficking cases *and* cases involving other violations of international law.

TVPRA only underscore the implications of closing U.S. courthouse doors to human rights claims—especially where those claims are against U.S. defendants for human trafficking on soil over which the United States exercised exclusive de facto control. It is therefore difficult to envision a better vehicle through which to resolve the post-*Kiobel* circuit split.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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