13-1937 (L), 13-2162

IN THE 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.

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria,
Case No. 08-cv-0827, Judge Gerald Bruce Lee

BRIEF OF CIVIL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

One of the questions presented by this case is: did the district court err in concluding that the Supreme Court's analysis in *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (Apr. 17, 2013), of the extraterritorial reach of claims brought under the Alien Tort Statute, 28 U.S.C. §1350, related to the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) rather than to whether a plaintiff has stated a claim for relief under Fed. R. Civ. P. 12(b)(6)? AOB at 19. This brief addresses that question.

Amici curiae[1] are scholars with expertise in federal jurisdiction, federal courts, and civil procedure who have an interest in the proper interpretation of questions of subject matter jurisdiction, particularly the distinction between true jurisdictional conditions and nonjurisdictional limitations on causes of action. *Amici curiae* are:

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[1] 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.

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Amici have authored preeminent texts on civil procedure and federal jurisdiction, including: Federal Jurisdiction (Aspen Publishers, 6th ed., 2011) (Erwin Chemerinsky); Wright & Miller's Federal Practice and Procedure (Helen Hershkoff et al.); Civil Procedure: Cases & Problems (Aspen Publishers, 4th ed., 2012) (Allan Ides et al.); *see also The Demise of "Drive-by Jurisdictional Rulings*", 105 Nw. U. L. Rev. 947 (2011) (Howard Wasserman); and National Security Law & Counterterrorism Law, 2012-2013 Supp. (Wolters Kluwer Law & Business, 2013) (Stephen Vladeck et al.).

Amici take no position on any of the other questions presented in this case.

ARGUMENT

The Supreme Court has repeatedly focused on the difference between subject matter jurisdiction and the scope of an asserted claim for relief. The Court has also twice resolved questions regarding the scope of the Alien Tort Statute, 28 U.S.C. § 1350, explaining that although the statute is strictly jurisdictional, it authorizes federal courts to recognize common law causes of action to enforce a small number of international law norms.

The Supreme Court has explained that the determination of whether a plaintiff's allegations entitle him or her to relief under a cause of action is a determination on the merits. Indeed, the Court has held this is so when the question is whether a cause of action extends to extraterritorial conduct. *Amici* respectfully submit that the district court committed a threshold error when it treated the reach of Plaintiffs' claims under the Alien Tort Statute as a question of subject matter jurisdiction. The implications of the decision reach beyond this particular case and therefore merit this Court's attention.

A. The Alien Tort Statute -- Relevant Rulings

The Supreme Court has twice resolved questions regarding the scope of the Alien Tort Statute. *See Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (Apr. 17, 2013); *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004).

1. *Sosa*

In *Sosa*, the Supreme Court considered whether a Mexican national kidnapped and detained in Mexico, allegedly at the instigation of agents of the United States Drug Enforcement Agency, had a claim under the Alien Tort Statute against a Mexican national involved in his detention. *Sosa,* 542 U.S. at 712-738. Ultimately, the Supreme Court found that the illegal detention of less than a day, followed by transfer to lawful authorities in the United States, did not violate international law and could not support a cause of action under the ATS. *Id*. at 738.

In its consideration of the case, the Supreme Court evaluated the history and purpose of the ATS. *Id.* at 712-734. All Members of the Court agreed that § 1350 "is only jurisdictional" but they also agreed that the jurisdiction was "understood to be available to enforce a small number of international norms that a court could properly recognize as within the common law enforceable without further statutory authority." *Id*. at 729. The Court observed that it "would have been passing strange" for the First Congress "to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action," and further explained that "the jurisdictional grant is best read as having been enacted on the

understanding that the common law would provide a cause of action." *Id*. at 719, 724.

The Supreme Court cautioned that recognition of a cause of action was subject to judicial caution in light of the "potential implications for the foreign relations of the United States," *id*. at 727, and that the decision "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts." *Id* at 732-33. *Sosa* highlighted several principles that lower courts might apply to limit the availability of relief under the ATS, including that the claimant exhaust any remedies available in his or her domestic legal system and that courts employ a "policy of case-specific deference to the political branches." *Id.* at 733 n.21.

2. *Kiobel*

In *Kiobel*, the Supreme Court followed the *Sosa* framework, reiterating that while the ATS is "strictly jurisdictional," it "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." *Kiobel*, 133 S.Ct. at 1664 (citing *Sosa*, 542 U.S. at 713). Whereas *Sosa* identified a number of factors that might guide courts in recognizing a common law cause of action, the Court in *Kiobel* focused specifically on extraterritoriality. *Id.* The Supreme Court explained that courts would "typically apply the presumption [against extraterritoriality] to discern whether an Act of Congress regulating

conduct applies abroad" but that the ATS, on the other hand, "does not directly regulate conduct or afford relief." *Id.* The Supreme Court concluded that nonetheless "we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS." *Id*.

Kiobel concerned allegations that Dutch and British parent corporations had aided and abetted the Nigerian military in committing human rights violations in Nigeria. *Id.* The Supreme Court applied the principles underlying the presumption against extraterritoriality to the facts of *Kiobel* and concluded that the "mere corporate presence" of the foreign corporate defendants was insufficient to overcome the presumption where there was no other connection to the United States. *Id.* at 1669-670 (Alito, J., concurring) ("perhaps there is wisdom in the Court's preference for this narrow approach"). The Supreme Court explained that claims that "touch and concern" the territory of the United States with "sufficient force" may "displace" the presumption. *Id*. at 1669. Justice Kennedy expressly anticipated that other cases will arise that would not be covered by the reasoning and holding of *Kiobel*. *Id.* at 1669 (Kennedy, J., concurring). Indeed, all three concurring opinions observed that the majority opinion left many questions unanswered about the reach and interpretation of the ATS in future cases. *Id*.

(Kennedy, J., concurring); *id.* (Alito, J., concurring); *id*. at 1673 (Breyer, J., concurring in judgment).

3. The District Court's Opinion

The district court interpreted *Kiobel* as compelling the dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. *Al Shimari v. CACI Int'l, Inc*., 2013 WL 3229720, *7 (E.D. Va. June 25, 2013) (found at A1804-33). The district court believed that *Kiobel* "makes clear that the presumption is only rebuttable by legislative act, not judicial decision" and held that "absent congressional action, the ATS cannot provide jurisdiction for alleged violations of the law of nations where the alleged conduct occurred in territories outside the United States." *Id*. at *7-8. The district court noted that Kiobel's "'touch and concern' language is textually curious" and expressed its concern that "it is unclear to the Court how to apply a 'touch and concern' inquiry to a purely jurisdictional statute such as the ATS." *Id*. at *9-10.

B. Subject Matter Jurisdiction

The Supreme 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. The 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*, 559 U.S. 154, 161 (2010); *see also Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011); *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2876-77 (2010); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

The misclassification of merits issues as subject matter jurisdiction affects *res judicata*, the standard of proof, appellate review, and potentially the jury right. For example, 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 timely 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).

Subject matter jurisdiction "properly comprehended" refers to a court's "power to hear a case." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eg'rs & Trainmen Gen. Comm. Of Adjustment*, 558 U.S. 67, 81 (2009) (citation omitted); *see also 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.

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).

The determination of whether Plaintiffs' allegations entitle them to relief under a cause of action is a determination on the merits. *Bell*, 327 U.S at 682; *Herero People's Reparations Corp. v. Deutsche Bank*, 370 F.3d 1192, 1194 (D.C. Cir. 2004). The Supreme Court has already corrected an error similar to the error made by the district court in this case. In *Morrison,* the Second Circuit had considered the extraterritorial reach of section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") to raise a question of subject matter jurisdiction. 130 S. Ct. at 2877. The Supreme Court described the Second Circuit's analysis as "a threshold error" and explained that "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question." *Id.*

The Supreme 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 extraterritorial 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*. (citing *Bell*, 327 U.S. at 682).

Similarly, in *Steel Co*., the Supreme 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." *Id.* at 90. The Supreme Court found that "[i]t is unreasonable to read this as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial powers of the court, viz., to enforce the violated requirement and to impose civil penalties." *Id.* at 90–92; *see also Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851-53 (7th Cir. 2012) (overturning *United Phosphorus*, 322 F.3d 942, in light of Supreme Court emphasis "on need to draw a careful line between true jurisdictional limitations and other types of rules") (citing *Morrison*, 130 S. Ct. 2869).

The Supreme Court has twice 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." *Sosa*, 542 U.S. at 724; *see also Kiobel*, 133 S.

Ct. at 1664.[2] As in *Morrison* and *Steel Co*., whether the allegations the plaintiff makes entitle him or her to relief on a cause of action is determined on the merits, not as a question of subject matter jurisdiction. The district court misread these directives from the Supreme Court when it interpreted *Kiobel* as compelling the dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. *Al Shimari*, 2013 WL 3229720 at *7. The district court explained that "it is unclear to the Court how to apply a 'touch and concern' inquiry to a purely jurisdictional statute such as the ATS," *id.* at *9-10, but failed to recognize that the "touch and concern" inquiry applied to the underlying common law cause of action, and presented a merits question. In so doing, the district court ignored both the Supreme Court's holdings on the ATS in *Sosa*, 542 U.S. at 724, and *Kiobel*, 133 S.Ct. at 1664, and the Court's repeated directives regarding subject matter jurisdiction, including in *Bell*, 327 U.S. at 682–83, *Steel Co.*, 523 U.S. at 89, and *Morrison*, 130 S. Ct. at 2877.

[2] *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." *Sosa,* 542 U.S. at 714. In another context, the Supreme Court has also 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); *see also Provident Life & Accident Ins. Co. v. Waller,* 906 F.2d 985, 988-993 (4th Cir. 1990) (establishing subject matter jurisdiction exists under 28 U.S.C. § 1331 over dispute governed by federal common law, and determining on merits whether common law provides a remedy).

CONCLUSION

For the above reasons, this Court should reverse the district court's holding that Plaintiffs' claims are barred because the ATS does not provide jurisdiction over their claims.

November 5, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2013, I electronically filed the foregoing Brief of Civil Procedure Professors as *amici curiae* supporting Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the use of the Appellate CM/ECF system, with paper copies to follow via a 3rd party commercial carrier. The following counsel of record was automatically served through the Court's CM/ECF system:

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 29 (c)(7) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared in Microsoft Word using 14-point Times New Roman typeface and is double-spaced (except for headings and footnotes). The undersigned further certifies that the brief is proportionally spaced and contains 2,821 words exclusive of the portions exempted under the applicable rules, and therefore satisfies the type-volume limitation of Fed. R. App. P. 29(d).

Dated: November 5, 2013

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