No. 15-1020

In The Supreme Court of the United States

LUNGISILE NTSEBEZA; DOROTHY MOLEFI; TOZAMILE BOTHA; MNCEKELELI HENYN SIMANGENLOKO; SAMUEL ZOYISLILE MALI; MSITHELI WELLINGTON NONYUKELA; MPUMELELO CILIBE; WILLIAM DANIEL PETERS; JAMES MICHAEL TAMBOER; NONKULULEKO SYLVIA NGCAKA, Individually and on Behalf of her Deceased Son; NOTHINI BETTY DYONASHE, Individually and on Behalf of Her Deceased Son; MIRRIAM MZAMO, Individually and on Behalf of Her Deceased Son,

Petitioners,

v.

FORD MOTOR COMPANY; INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Petition asks this Court to resolve splits among the circuit courts over the standard for aiding and abetting liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the application of this Court's "touch and concern" test in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), and the availability of corporate liability under the ATS. IBM and Ford do not seriously dispute the existence of these conflicts. Instead, Respondents seek to cast the decision below as being based on facts, not legal standards. However, the Second Circuit, in a series of decisions culminating in the one below, has adopted the most restrictive rules governing ATS liability – rules in conflict with this Court's decisions, the decisions of other circuits and basic principles of international law. This case presents the opportunity to resolve the circuit splits on the most important issues in current and future ATS litigation. Such guidance is essential and would be timely.

The question presented is whether an ATS claim exists where corporate defendants took repeated intentional actions in the United States to facilitate violations of the law of nations that injured victims abroad. Respondents only address the central aiding and abetting question of the petition in a single footnote, denying that the Second Circuit requires a shared purpose with the principal. Opp. at n.3. But this unprecedented standard, which conflicts with other circuits, was precisely the one applied by the Second Circuit to dismiss the case. *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 170 (2d Cir. 2015) ("*Balintulo II*"). *See*

also Pet. at 11-27; *Ahmad Al Faqi Al Mahdi (Mali)*, Case No. ICC-01/12-01/15, Confirmation of Charges, ¶26 (Mar. 24, 2016) (confirming aiding and abetting under international law does not require "sharing the intent of the perpetrators").

Similarly, there is a circuit split on the application of the presumption against extraterritoriality. Defendants again ignore the lower court's holding, which mirrors the standard from Justice Alito's concurrence in *Kiobel II* and requires that the conduct in the United States itself constitute the international law violation. Other circuits have instead adopted a multi-factor test and consider issues such as defendants' nationality. The aiding and abetting question is intertwined with the extraterritoriality question because, if the lower court had applied the proper *mens rea* standard, the IBM claims would have survived.

Finally, the Second Circuit is the only circuit to prohibit corporate liability. *See In re Arab Bank, PLC Alien Tort Litigation*, 808 F.3d 144, 151-52 (2015). Respondents acknowledge that the court below would have dismissed on these grounds had it not dismissed on extraterritoriality or *mens rea*, Opp. at 36, making review appropriate. Furthermore, unlike in *Kiobel II*, the claims here do not raise foreign relations concerns, as the South African government supports the case, *see* Pet. App-F, and they involve U.S. corporate defendants' direct liability for their own unlawful conduct in the United States. For the above reasons, the Court should grant review.

ARGUMENT

I. REVIEW IS NECESSARY TO RESOLVE THE CIRCUIT SPLIT ON THE STANDARD FOR AIDING AND ABETTING UNDER THE ATS.

The Second Circuit's adoption of an unprecedented aiding and abetting *mens rea* standard requiring defendants to share the intent of the perpetrators has brought it into conflict with other circuits. This "shared purpose with the principal" standard is materially different from other circuits and international law, which require either a knowledge or "purpose to facilitate" standard. *See* Pet. at 16-24. *See also* Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, art. 30(2) (defining distinction in *mens rea*); *Al Mahdi*, ¶26 (affirming aiding and abetting does not require shared purpose). This Court should grant review to resolve the circuit split.

The circuits have split on the central question of the petition – "Whether the *mens rea* element of aiding and abetting liability under the ATS is specific intent requiring the aider and abettor to share the purpose of the principal . . . or whether the *mens rea* is intent (or purpose) to facilitate with knowledge of the result." Pet. at i-ii. Respondents scarcely address the first question, only denying in a footnote that the Circuit required a "shared purpose with the principal." Opp. at n.3. However, this is precisely the standard applied by the court below. Despite finding that IBM "design[ed] particular technologies in the United States that

would facilitate South African racial separation," and that these allegations appeared "to be both 'specific and domestic' conduct," the court below found this did not meet its *mens rea* standard. *Balintulo II*, 796 F.3d at 169-70. The court dismissed the claims as it mandated more than a "purpose to facilitate" (or an intentional act with knowledge), instead requiring IBM to possess the shared purpose of the principal of "denationalizing black South Africans" and the motive of "furthering the aims of a brutal regime." *Id*. at 170.

This position, like the Fourth Circuit's, contrasts starkly with the *mens rea* standards applied in the Eleventh and Ninth Circuits and international law. *See* Pet. at 11-20. These circuits and international law assess intent (or "purpose") by evaluating whether there is an intentional act, committed with knowledge that it will facilitate a wrong. *See* Pet. at 11-15. The Second and Fourth Circuits define "purpose" by evaluating whether a defendant desired the consequences or end result. Thus, Respondents' assertion that there is no circuit split because different circuits have used the same term – "purpose" – is specious. Opp. at 16-20.

The circuits themselves have recognized a circuit split on the *mens rea* standard. In *Aziz*, the Fourth Circuit recognized the split when adopting the aiding and abetting standard of the Second Circuit articulated in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009). *See Aziz v. Alcolac*, 658 F.3d 388, 397, 400 (4th Cir. 2011) (rejecting "knowing assistance" in favor of "specific intent" requirement); *see also Doe v. Nestle*, 766 F.3d 1013, 1029-31

(9th Cir. 2014) (Rawlinson, J., concurring in part and dissenting in part) (noting contrast between Ninth Circuit and *Aziz* and *Talisman*, which require plaintiffs to allege that defendants acted with "specific intent" and "the purpose of causing the injuries suffered by the Plaintiffs").

Respondents also wrongly assert that *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), did not consider the *mens rea* standard under the ATS. Opp. at 14 and n.4. *Cabello* addressed the standard for claims under both the ATS and Torture Victim Protection Act ("TVPA") of 1991, 28 U.S.C. § 1350, note, stating that liability could be found where the defendant "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance." 402 F.3d at 1158.

Respondents also erroneously suggest *Doe v. Drummond Co., Inc.*, 782 F.3d 576 (11th Cir. 2015), does not establish that the knowledge test applies to ATS claims. Opp. at 19. *Drummond* affirmed that *Cabello* was the controlling precedent for both the ATS and TVPA, and that *Cabello* adopted a "'knowledge' mens rea" standard. *Id.* at 608-09.[1] This Eleventh Circuit standard clearly contrasts with the "shared purpose" standard of the Second and Fourth Circuits, confirming the need to resolve the circuit split on this issue.

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[1] Contrary to Respondents' claims, Opp. at 19-20, *Drummond* explicitly states that the Eleventh Circuit has not applied "vigilant doorkeeping" to the ATS *mens rea* standard. 782 F.3d at 606.

Despite purporting to rely on international law, and specifically on the Rome Statute, the Second Circuit decision clearly conflicts with authoritative statements about the *mens rea* standard. In a glaring omission, Respondents fail to mention article 30(2) of the Rome Statute, which states: "a person has intent where (a) [i]n relation to conduct, that person means to engage in the conduct; (b) [i]n relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events." Most recently, in a decision released after the filing of the petition in February, the International Criminal Court's Pre-Trial Chamber interpreted the Rome Statute's article 25(3)(c) aiding and abetting standard, including its "purpose of facilitating" language; it explicitly rejected a "shared purpose" standard:

> It is not required that the assistance be "substantial" or anyhow qualified other than by the required specific intent to facilitate the commission of the crime *(as opposed to a requirement of sharing the intent of the perpetrators)*.

Al Mahdi, ¶26 (emphasis added); *see also Prosecutor v. Charles Blé Goudé*, Case No. ICC-02/11-02/11, Confirmation of Charges (Dec. 11, 2014). Other international tribunals also have not adopted the "shared purpose" standard. Pet. at 19-21. *See, e.g.*, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, ¶127 (Int'l Crim. Trib. for the Former Yugoslavia, May 9, 2007) (noting "mental element of aiding and abetting is knowledge").

Brief of David J. Scheffer as *Amicus Curiae* Supporting Petitioners' Writ of Certiorari, 5-9, 11-15, *Nstebeza, et al. v. Ford, et al.* (No. 15-1020). Assuming the standard articulated in the Rome Statute is applicable,[2] the specific intent and "shared purpose" standard adopted by the Second and Fourth Circuits is incorrect.

Contrary to Respondents' argument, the Nuremberg jurisprudence establishes a knowledge standard for aiding and abetting. Opp. at 26-27. Respondents misinterpret both cases on which they rely. First, Respondents' reading of *The Ministries Case* is confused. The tribunal initially found that the defendant's knowledge that the use of bank loans was to facilitate slave labor met the *mens rea* standard. *United States v. Von Weizsaecker (The Ministries Case)*, 14 Tr. War Crim. before Nuernberg Mil. Trib. 308, 622 (1949). The tribunal also expressly adopted a knowledge standard for other defendants, who "neither originated [the deportation program], gave it enthusiastic support, nor in their hearts approved of it. The question is *whether they knew* of the program and . . . aided, abetted or implemented it." *Id.* at 478 (emphasis added). The quotation on which Respondents rely comes from a separate *actus reus* analysis. *Id.* at 622.

In the *Zyklon B Case*, the tribunal held that the evidence necessary for liability was "that the accused knew that the gas [his firm supplied] was to be used

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[2] Petitioners do not concede that international law is the source of law for determining the aiding and abetting standard. *See* Pet. at 13 n.4.

for the purpose of killing human beings." *The Zyklon B Case: Trial of Bruno Tesch and Two Others*, 1 L. Rep. of Tr. of War Crim. 93, 101 (1947). Respondents' argument that training was essential to conviction was not part of the tribunal's own articulation of the standard it applied. Opp. at 26. Moreover, IBM similarly trained South African authorities to use its products to denationalize black citizens. Pet at 25 n.13. In fact, the *Zyklon B Case* belies Respondents' mistaken reliance on the court's characterization of the data collected by IBM as "innocuous." *See* Opp. i, 2, n.18. Just as the Zyklon B gas could be used for delousing or genocide, the context in which data collected by IBM technology was used affects liability. *See* Pet. at n.18. Here the lower court itself noted that IBM's products, elsewhere characterized as "innocuous," were "essential" to "the system of racial separation in South Africa." *Balintulo II*, 796 F.3d at 165.

The question this Court faces is this: are there actionable ATS claims when pleadings allege that IBM, from the United States, bid on a contract to denationalize black South Africans, won that contract, and then for years, provided customized hardware, software, and training to facilitate that denationalization? And regarding Ford: are ATS claims actionable when the company repeatedly made U.S.-based decisions to provide specialized vehicles to known human rights violators in the apartheid security forces when the United Nations and the United States had made clear through their sanctions regimes that such vehicles facilitated violence and killings?

The lower court answered these questions by dismissing the claims based on a restrictive application of the "touch and concern" test and an unprecedented *mens rea* standard for aiding and abetting requiring that Respondents share the apartheid regime's intent to violate human rights. These standards are in clear conflict with both international law and other circuits, and this Court should grant review to resolve the split.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON THE STANDARDS FOR "TOUCH AND CONCERN" AND "RELEVANT CONDUCT."

This Court should grant review to resolve a circuit split as to *Kiobel II*'s "touch and concern" test, including the standard for assessing "relevant conduct." As to the "touch and concern" test, the Second Circuit, joined by the Eleventh, has clearly applied Justice Alito's concurrence in *Kiobel II,* while the Fourth and Ninth Circuits have adopted a multi-factor test. *Compare Balintulo II*, 796 F.3d at 166-67; *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015), *with Al Shimari v. CACI Premier Tech., Inc.,* 758 F.3d 516, 527 (4th Cir. 2014) ("[C]ourts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action."); *Mujica v. AirScan Inc.*, 771 F.3d 580, 596 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015). Multi-factor tests consider issues such as defendants' U.S. nationality, oversight and

management of employees from the United States, and attempts to conceal law of nations violations in assessing whether "claims" are sufficiently connected to the United States to proceed. *See* Pet. at 31-32. Unlike this case, *Kiobel* involved foreign defendants whose relevant conduct occurred exclusively abroad. The multi-factor test is faithful to the majority opinion in *Kiobel II*. Indeed, Justice Alito himself indicated that the singular focus on violations in the United States was not adopted by the *Kiobel II* majority. 133 S. Ct. at 1669-70 (Alito, J., concurring).

The Second Circuit has also defined "relevant conduct" more narrowly than its sister circuits by defining "relevant conduct" as the same conduct constituting a violation of the law of nations, excluding from "relevant conduct" actions that contribute to, but do not fully constitute, a violation. Pet. at 31. In contrast to the court below, the Fourth, Ninth, and Eleventh Circuits have all explicitly recognized decision-making that contributes to unlawful actions as a factor in assessing relevant conduct under the "touch and concern" test. *See Al Shimari*, 758 F.3d at 530-31 (allegations that defendants approved, encouraged, and attempted to cover up extraterritorial misconduct from the United States relevant to "touch and concern" analysis); *Mujica*, 771 F.3d at 590-91 (U.S-based decisions furthering conspiracy between defendants and perpetrators relevant to jurisdictional inquiry); *Drummond* 782 F. 3d at 597 (jurisdictional inquiry assessing "claim" "may indeed extend to the place of decision-making").

Respondents mistakenly frame the issues here as factual questions unworthy of review.[3] The different legal standards discussed above had a decisive effect on the outcome, however, and thus review of the legal standards is appropriate. First, the lower court's adoption of Justice Alito's concurrence led it to ignore the non-conduct factors considered by other circuits, including defendants' U.S. nationality, oversight and management of employees from the United States, and attempts to conceal law of nations violations. Second, the Second Circuit's restrictive relevant conduct standard is intertwined with the application of the incorrect aiding and abetting standard. If the court had not required Respondents to share the specific intent to denationalize South African citizens, the court's own restrictive test to overcome the presumption against extraterritoriality would have been met. *See Balintulo II*, 796 F.3d at 169-70 (finding that IBM's actions constituted "'specific and domestic' conduct that would satisfy the first of the two steps of our jurisdictional analysis" but dismissing based on insufficient *mens rea*).

Indeed, at every step of its analysis, the court below applied contested and incorrect legal standards to dismiss claims that were factually sufficient under the standards of other circuits and international law. The

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[3] Respondents mistakenly focus on "general corporate supervision," Opp. at 31, rather than the key question of whether there was unlawful decision-making in the United States. Petitioners assert direct liability only for Respondents' own actions in the United States, not those of their subsidiaries.

facts pled here are that Ford and IBM in the United States made repeated decisions to develop and sell specialized vehicles and customized technology for the apartheid regime for years despite full knowledge that these products were deemed by the United States and United Nations to facilitate violence and oppression in violation of international law. The court below, in contrast to other circuits, held that these unlawful decisions and wrongful acts committed on U.S. soil to assist a crime abroad were not sufficient for claims to proceed. This Court should grant review to resolve the circuit split regarding its ruling in *Kiobel II*.

III. THE DECISION BELOW NAMED CORPORATE LIABILITY AS AN INDEPENDENT GROUND FOR DISMISSAL, MAKING THIS CASE AN APPROPRIATE VEHICLE FOR CONSIDERING THE QUESTION.

The Second Circuit has acknowledged that *Kiobel II* may allow corporate liability, and the consensus of other circuits is that such liability exists. *In re Arab Bank, PLC Alien Tort Litigation*, 808 F.3d 144, 151-52 (2d Cir. 2015). Nevertheless, the Second Circuit has continued to hold that the ATS does not reach corporate actors. *Id*. This case is therefore a necessary vehicle for considering the question of corporate liability. Although the court below noted the claims would fail because Petitioners "cannot establish jurisdiction under the ATS for claims against corporations," Pet. App. A10 n.28, Respondents assert that the issue of corporate liability had "no bearing on the outcome

here," Opp. at 36. The court's discussion makes clear that it considers corporate liability a sufficient and independent ground for dismissal. If the issues of extraterritoriality or aiding and abetting are resolved in Petitioners' favor, the case would only be dismissed on corporate liability on remand if this Court does not resolve the circuit split on this issue.

CONCLUSION

For the above reasons, the petition should be granted to resolve the circuit splits on each of the three issues.

Respectfully submitted,

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