No. 10-1491

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

BRIEF AMICUS CURIAE FOR THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

In his opinion denying rehearing, a distinguished member of the panel majority below asserted that requiring multinational corporations to defend against customary international law claims in United States courts would subject them to "extort[ed]" settlements, and unjustifiably "beggar" them. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270-72 (2d Cir. 2011) (opinion of Chief Judge Jacobs concurring in the denial of panel rehearing). Such a canard is deeply troubling, not only because it is so clearly legislative in nature, but because it is premised on an indefensible assumption that corporations are freestanding entities less prone to great evil than the fallible human beings who constitute them. It is also deeply puzzling in light of a decade of thoughtful judicial activity in the Second and Third Circuits helping to forge negotiated settlements in numerous cases alleging that more than one hundred German and Swiss corporations had unjustly enriched themselves during the Holocaust-era by knowingly assisting the Nazis in carrying out massive looting, enslavement, genocide, and crimes against humanity.[2] To date, the

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[1] This brief *amicus curiae* is filed pursuant to blanket consents granted by both parties. Pursuant to Rule 37.6, *amicus curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, *In re Holocaust Victim Assets Litig.,* 105 F. Supp. 2d 139, 145-49 (E.D.N.Y. 2000) (upholding the fairness of the $1.25

Holocaust-era settlements, which were not "extort[ed]," have resulted in the distribution of more than $7.5 billion to more than 400,000 victims of corporate wrongdoing without "beggar[ing]" anyone.[3]

The Brennan Center for Justice at NYU School of Law respectfully submits this brief *amicus curiae* in the hope that victims of alleged corporate wrongdoing in violation of customary international law will continue to enjoy access to an Article III forum of excellence capable of providing equal justice under law to the weakest of victims, as well as to the most powerful of multinational corporations.

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billion Swiss bank settlement); *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 149 (2d Cir. 2005, *cert. denied*, 547 U.S. 1206 (2006) (rejecting challenges to structure of settlement); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 431 (D.N.J. 2000) (approving dismissal with prejudice of 49 Nazi-era cases pending against German industrial corporations in return for creation of a $5.2 billion German foundation).

[3] The administration of the Swiss bank settlement in the Eastern District of New York is chronicled at www.swissbankclaims.com. The distribution of the German slave labor settlement is chronicled in the reports of the German Foundation "Remembrance, Responsibility and the Future." *See* Foundation Remembrance, Responsibility, and Future, *Payments to Former Forced Labourers* (last visited Dec. 14, 2011), http://www.stiftung-evz.de/eng/forced-labour/payments-to-former-forced-labourers.

SUMMARY OF ARGUMENT

A divided panel of the Second Circuit below declined to adjudicate a claim for compensatory damages under 28 U.S.C. § 1350 against three corporations whose employees, allegedly acting within the scope of their respective employments, are alleged to have closely cooperated with members of the Nigerian military in subjecting plaintiffs to atrocities aimed at crushing opposition to defendants' oil operations.[4] The panel majority

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[4] The panel opinion below is reported at 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g en banc denied by an equally divided court*, 642 F.3d 379 (2d Cir. 2011) (5-5). Judge Leval's separate opinions rejecting the panel's reasoning on the merits, and dissenting from the denial of rehearing, are reported at 621 F.3d at 149 (merits); and 642 F.3d at 272 (rehearing). The District Court's opinion is reported at 456 F. Supp. 2d 457 (S.D.N.Y. 2006). The separate opinion of Chief Judge Jacobs denying rehearing en banc, as well as the dissenting opinions of Judge Katzmann and Judge Lynch (joined by Judges Pooler, Katzmann and Chin) urging rehearing en banc, are reported at 642 F.3d 379 (2d Cir. 2011). A poll taken after the appointment of a new member of the circuit resulted in a vote of 6-5 to deny rehearing en banc.

Judge Leval concurred in the dismissal of the complaint, 621 F.3d at 149, reasoning that plaintiffs had not pled purposeful participation in lawless behavior required by *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). The precise level of culpability required to establish participatory liability under § 1350 remains unsettled. *See Doe v. Unocal*, 395 F.3d 932, 949-52 (9th Cir. 2002) (applying "knowing facilitation" standard); *Khulmani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring) (same); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 32-39 (D.C. Cir. 2011) (same). Petitioners, whose complaint was filed prior to *Presbyterian Church, Bell Atlantic Co. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S.

reasoned that while plaintiffs' complaint alleged conduct in violation of core customary international law within the meaning of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and while specific corporate employees may be sued personally for violating customary international law, the three corporate principals on whose behalf the unlawful acts were allegedly committed, Royal Dutch Petroleum; Shell Transport and Trading; and Shell Petroleum Development Company of Nigeria, are immune from suit under § 1350 because the concept of derivative corporate *civil* liability for damages caused by the unlawful employment-related conduct of a corporate employee has not yet been incorporated into customary international law.[5]

The lower court was wrong on at least three grounds.

1.

Derivative corporate *civil* liability for the unlawful employment-related acts of corporate employees is so universally recognized by the international community as central to the maintenance of the robust rule of law that it is an

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662 (2009), have expressed confidence that any pleading deficiency is curable by an amended complaint. Brief for Petitioner at 6 n.1.

[5] At least four circuits have rejected the panel's reasoning. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39-57 (D.C. Cir. 2011); and *Sarei v. Rio Tinto*, --- F.3d --- , 2011 WL 5041927 (9th Cir. 2011) (en banc).

integral remedial element of plaintiffs' customary international law claim.

2.

Even if one assumes (incorrectly) that derivative corporate civil liability has not yet been incorporated into customary international law, the panel should have exercised its duty under 28 U.S.C. § 1367(a) and federal common law to shape the procedures, remedies and defenses available in the courts of the United States in connection with judicial enforcement of customary international law claims, including rules governing derivative liability, participatory liability, and contribution.

3.

Treating business corporations as freestanding entities whose assets are immune from liability for damages caused by the employment-related actions of their employees in violation of customary international law distorts the web of rights, duties, and expectations that find equilibrium in the modern business corporation.

THE BACKGROUND LEGAL NORMS

This appeal turns on the intersection of three sets of background legal norms: (1) the emergence of the modern business corporation in the mid-nineteenth century as a device for the recognition and enforcement of a bundle of legal rights and duties governing economic transactions; (2) the universal recognition of derivative corporate civil liability for damages caused by the unlawful employment-related

acts of corporate employees; and (3) the post-*Erie* recognition of judicially-enforceable customary international law in the courts of the United States.

A. The Emergence of the Modern Business Corporation

The business corporation began as a device to delegate the performance of public functions to profit-seeking private investors.[6] As long ago as the Roman Republic, Roman law recognized the *societas publicanorum*, enabling entrepreneurs (the *publicani*) to assemble capital needed to build roads and aqueducts using investment vehicles with freely traded shares, extended life, limited liability, and entity-shielding.[7] The concept re-emerged in Genoa during the fourteenth century in the form of government-chartered joint-stock companies designed to exploit state-granted monopolies in salt mining and coal importation,[8] and evolved during seventeenth and eighteenth centuries into the great merchant joint stock companies of Holland and England that functioned as profit-making adjuncts of the state in governing India and settling the New World. *See generally Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245 (Ch.) 1246; 1

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[6] *See generally* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm,* 119 Harv. L. Rev. 1333, 1383-1402 (2006) (documenting the development of the business corporation).

[7] *Id.* at 1356-62 (describing Roman origins). .

[8] *Id.* at 1364-76 (describing Italian city state origins).

Bro. C. C. 469, 470; *The Case of Thomas Skinner, Merchant v. The East-India Company*, (1666) 6 State Trials 710 (H.L.) 711.

The eighteenth century world the Founders knew continued to view the business corporation as a vehicle to permit government delegation of a public function to a small group of favored profit-driven investors.[9] Indeed, many of the political disagreements in the new nation were over whether the practice of delegating public functions to profit-seeking individuals, usually in corporate form, should continue and, if so, whether the rights granted under the charter of delegation should be subject to regulation at the state or federal level. *See, e.g.*, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837); *Stone v. Mississippi*, 101 U.S. 814 (1880). The debate continues today under the rubric of "privatization."

As economic and social conditions changed during the Jacksonian era, access to the beneficial cluster of economic rights and duties summarized by the term "business corporation" became democratized. State after state offered ordinary entrepreneurs access to an investment vehicle with perpetual life, limited liability, and entity-shielding. *See Ligett v. Lee*, 288 U.S. 517, 541, 549 n.4 (1933) (Brandeis, J., dissenting) (setting forth a chronological listing of democratized state incorporation statutes). While it would have been theoretically possible to use the law

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[9] *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1594-97 (1988).

of contracts to build a hand-crafted business enterprise that would have endowed its numerous participants – investors, lenders, suppliers, customers, business creditors, managers, and the labor force – with some or all of the reciprocal legal rights and duties enjoyed by participants in a business corporation, the difficulty of entering into, monitoring, and enforcing such a web of reciprocal contracts, and the impossibility of including unknown future tort victims within such a contractually-defined universe,[10] rendered resort to an off-the-rack legal concept that would automatically confer and impose the desired bundle of reciprocal rights and duties a practical necessity. It was from that practical necessity that the modern business corporation was born. In short, viewed historically, the modern business corporation evolved as a device to democratize, define and enforce a bundle of legal rights and duties belonging to the corporation's human constituents.

B. The Decision To Render Corporations Derivatively Liable for the Unlawful Employment-Related Acts of Corporate Employees

Beginning with the democratization of the business corporation during the Jacksonian era, and culminating in New Jersey's adoption in 1889 of the first unrestricted corporation statute, N.J. Laws, ch.

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[10] *See* Hansmann et al., *supra* note 6, at 1341 n.15 (noting difficulty of integrating tort victims into purely contractual model).

185, at 279 (1889), the corporate form emerged as a dominant mode of economic organization in the United States and throughout the industrialized world. Justice Stephen Field estimated that by the mid-1890's, American corporations controlled more than 3/4 of the nation's wealth. *See* Seymour Dwight Thompson, *Commentaries on the Law of Private Corporations* VI (1st ed. 1895) (preface). The explosion of unrestricted investment vehicles favored with perpetual life, limited liability, and entity-shielding contributed to a remarkable worldwide surge in productive capacity, benefiting millions. But the success of the corporate form also placed enormous power in the hands of a relatively small number of insiders who controlled the corporation's assets *de jure* or *de facto*. It also funded a small army of corporate employees and agents who, in carrying out their duties, occasionally fell short of their legal responsibilities.

Concerns over disproportionate corporate power initially surfaced in protectionist efforts to prevent "foreign" corporations created under the laws of one state from competing with local businesses in another,[11] and eventually led to the passage of anti-

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[11] The seventy-year struggle in the Supreme Court over the status of "foreign" corporations may be traced through *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 585-97 (1839); *Paul v. Virginia,* 75 U.S. (8 Wall.) 168, 178-85 (1868); *Ducat v. Chicago*, 77 U.S. (10 Wall.) 410, 415 (1870); *Phil. Fire Ass'n v. New York*, 119 U.S. 110, 111-20 (1886); and *W. Union Tel. Co. v. Kansas,* 216 U.S. 1, 26-27 (1910). The cases reflect movement from the view of a corporation as an artificial legal entity that could function only under the laws of the state that gave it life, to the modern approach that recognizes a corporation as an association of people who do not necessarily lose their

trust laws,[12] the emergence of the regulatory state,[13] and the effort to limit the power of corporate insiders to exercise disproportionate influence over the democratic process.[14] We continue to debate those concerns today.

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constitutional right to do business throughout the United States merely because they have adopted the corporate form.

[12] Anti-trust laws responded to efforts by one corporation to acquire control over the stock or assets of other enterprises. The resulting combinations were thought to distort the free market by lessening competition, and to increase the already significant powers of corporate insiders. *See State v. Standard Oil Co.*, 30 N.E. 279, 290 (Ohio 1892) (dissolving "oil trust" as inconsistent with corporate charters); *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 839-41 (1890) (dissolving "sugar trust"). When the trusts reformed under the unrestricted 1889 New Jersey incorporation statute, the battleground shifted to the Sherman and Clayton Anti-Trust Acts. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *N. Sec. Co. v. United States*, 193 U.S. 197 (1904). *See generally* Herbert Hovenkamp, *Anti-Trust Policy After Chicago*, 84 Mich. L. Rev. 213, 217-26 (1985).

[13] The failure of the efforts to dissolve the oil and sugar trusts and the substantial power exercised by railroad corporations led to efforts to impose direct regulation on corporate business activities, triggering disputes over the scope of constitutional protection enjoyed by corporations. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908); *Hale v. Henkel*, 201 U.S 43 (1906); *Smyth v. Ames*, 169 U.S. 466 (1898); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897); *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *The Railroad Commission Cases*, 116 U.S. 307, 342-47 (1886) (Field, J., dissenting).

[14] Public concern over the ability of corporate insiders to tap assets assembled for economic purposes and divert those assets to politics dates from Theodore Roosevelt's 1905 and 1906

Concerns over the competence and honesty of corporate employees and agents drove the nineteenth century law of agency,[15] imposing contractual liability on the corporate treasury for agreements made by corporate employees with actual, apparent, and, ultimately, legally implied power to bind the corporation. Contract theory could not, however, provide a vocabulary for the consequences of tortious behavior by corporate employees. Instead, courts turned to *respondeat superior* and other theories of vicarious liability to render the corporate treasury civilly liable for damages caused by the unlawful employment-related acts of a corporate employee.[16]

The theory underlying derivative corporate tort liability was never tidy, especially when it was complicated by the judicial tendency to think about a business corporation as if it were a sentient being, instead of a shorthand for an association of

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messages to Congress, culminating in the passage of the Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (2006)).

[15] *See Restatement (Second) of Agency* §§2, 219, 220, 228, 229 (1958).

[16] The early vicarious liability cases are summarized in John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 318-37 (1894), and Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 449-52 (1923). The modern "enterprise liability" underpinning of vicarious corporate liability in tort is discussed by several distinguished judges in *Ira S. Bushey & Sons v. United States*, 398 F.2d 167 (2d Cir. 1968) (Friendly, J.); *Konradi v. United States*, 919 F.2d 1207 (7th Cir. 1990) (Posner, J.); and *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995) (Calabresi, J.).

persons.[17] Moreover, doctrines like contributory negligence, last clear chance, the fellow-servant rule, the status of independent contractors, and the notion of frolics of an employee's own often limited a tort victim's practical ability to receive compensation. Despite the theoretical difficulties and the practical impediments, however, the law in every legal system to adopt the corporate form quickly recognized that, as a matter of fundamental fairness and the effective maintenance of the corporate rule of law, corporations must be civilly liable for the unlawful employment-related behavior of corporate employees.[18] In short, from the very beginning, the assets of newly emergent business corporations were made available to compensate victims for damages caused by the unlawful, employment-related behavior of corporate employees.

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[17] Debates raged in the late nineteenth and early twentieth centuries over whether corporations could be guilty of sufficient "fault" to warrant the imposition of punitive damages. *See Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 116-17 (1893).

[18] *Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. 169, 178, 185 (1810) (recognizing that, although a corporation cannot be imprisoned, it may be liable for damages); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 13 (Pa. 1818) (same). *See also* Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* 145-95 (2010) (discussing vicarious employer liability in the French, German, and English legal systems).

C. The Post-*Erie* Emergence of Judicially Enforceable Customary International Law

Analysis of the judicially enforceable nature of customary international law is complicated by the intellectual revolution effected by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Prior to *Erie*, customary international law was viewed as part of the general common law, an unwritten body of rules consisting, in part, of judicial codification of the customary behavior of individuals and nations. Pre-*Erie* enforcement of customary international law raised the same separation of powers issues as efforts to enforce international treaties. In both settings, a pre-*Erie* federal court ascertained the rights and duties generated by the particular treaty or legally enforceable international custom, and decided whether those rights and duties were enforceable in an American court without additional action by Congress. *Compare Brown v. United States*, 12 U.S. (8 Cranch.) 110 (1814), *with La Paquete Habana*, 175 U.S. 677, 708 (1900).

Erie shook the foundations of that legal universe by denying the existence of a general common law, restricting post-*Erie* common law to the pronouncements of state judges with a positive political authorization to make them. Had the story ended there, *Erie* might well have marked the end of judicially enforceable customary international law. Three post-*Erie* developments combined, however, to rescue the concept.

First, even within the positivist focus of *Erie*, federal judges retained power to render federal common law decisions in settings where the intensity

of the federal interest is great, and a need for a uniform national rule exists. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504-13 (1988) (applying federal common law military contractor defense in design-defect case). *See also* Henry J. Friendly, *In Praise of* Erie *and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405-22 (1964).

The second development emerged from the Nuremberg tribunals. At Nuremberg, lawyers for Nazi defendants challenged the proceedings as *ex post facto*. The Nuremberg tribunals responded by insisting that bans on genocide, slavery, torture, crimes against humanity, and war crimes, constituted an unwritten preexisting body of customary international law (a form of world common law) binding on the Nazi defendants. See *United States of America v. Alstötter, et al.,* 3 T.W.C. 1 (1948) (the "Ministries Cases"). It is important to note that the customary international law norms enforced at Nuremberg were not brought into existence by the Nuremberg tribunal, or by post-war events. That would have rendered the Nuremberg proceedings *ex post facto.* Nor, prior to Nuremberg, had the pre-existing customary international law norms been formally acknowledged as having legally binding status. Rather, the tribunal – and the United States government – acknowledged the existence of a formally unremarked body of unwritten norms empirically derivable from the custom and practice of the international community, without the necessity of a formal treaty or international pronouncement.[19]

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[19] Both the Nuremberg judges and Justice Gray in *La Paquete Habana* rejected arguments that a widely followed

The third step was to locate a Congressional grant of authority empowering federal judges to enforce claims arising under customary international law. In *Filartiga v. Peña-Irala*, 630 F.2d 876, 889-90 (2d Cir. 1980), Judge Kaufman held that § 1350 authorized a damage action in federal court against the former Paraguayan chief of police for torture in violation of customary international law. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725, 731-32 (2004), this Court upheld *Filartiga*, construing § 1350 as a Congressional grant of authority to the federal courts to enforce norms of customary international law analogous in universal condemnation and importance to the ban on piracy that had existed in 1789 when § 1350 was enacted.[20]

Sosa recognized that the 1789 Congressional grant of subject matter jurisdiction and enforcement authority to the federal courts did not freeze judicially enforceable customary international law in its 1789 mold – a mold that would not have included a ban on slavery. Rather, *Sosa* explicitly authorizes

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international custom or practice (bans on genocide at Nuremberg; exempting coastal fishing boats from naval blockades in *La Paquete Habana*) required a ceremony of formal acceptance before becoming part of the judicially enforceable law of nations. *See* 175 U.S. at 708. The panel below fell into precisely the same error in demanding evidence of a formal event accepting derivative corporate civil liability into customary international law. *Kiobel*, 621 F.3d at 120-22.

[20] The *Sosa* court found that plaintiff's allegations of brief arbitrary arrest and seizure did not rise to the level of a customary international law violation because warrantless arbitrary arrest is not treated by the international community with the same universal revulsion as was piracy in 1789. 542 U.S. at 735-738.

federal courts to enforce core elements of customary international law analogous to the ban on piracy, as those core elements are recognized as binding law by the universal custom and practice of civilized nations. 542 U.S. at 724-25, 729-33. A fundamental issue raised by this appeal is whether the universally adopted principle of derivative corporate civil liability for damages caused by the unlawful employment-related acts of corporate employees has been received into customary international law.

ARGUMENT

Business corporations may be sued under 28 U.S.C. § 1350 for damages caused by the employment-related actions of their employees: (1) as a matter of customary international law; (2) under the federal common law of remedies; and (3) in keeping with the rights, duties and expectations of the human beings who constitute the corporate enterprise.

I. Derivative Corporate Civil Liability Is a Universally Recognized Remedial Element of a Claim Arising Under Customary International Law

A. The Universal Recognition of Derivative Corporate Civil Liability

Every legal system that recognizes an investment vehicle enjoying perpetual life, limited liability, and entity shielding also requires, as a *quid pro quo* to

preserve the effectiveness of the rule of law, that victims injured by the employment-related actions of the entity's employees may look to the assets of the entity for compensation. *See e.g.*, *Denver & Rio Grande Ry. Co. v. Harris*, 122 U.S. 597, 608 (1887); *Salt Lake City v. Hollister*, 118 U.S. 256, 261-62 (1886) (describing the disastrous effects on the rule of law that would flow from immunizing corporate assets from damage liability for the unlawful employment-related acts of employees); *Phil. & W & B. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858). *See also The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 559 (1818) (recognizing compensatory, but not punitive, liability of owners of privateer for unlawful acts of ship's crew). *See generally First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 628-29 n.20 (1983) ("[T]he International Court of Justice acknowledged that, as a matter of international law, the separate status of an incorporated entity may be disregarded in certain exceptional circumstances."); Giliker, *supra* note 18, at 145-95.

Despite such a universally accepted legal custom and practice closely linked to the maintenance of the rule of law, the lower court refused to recognize derivative *civil* corporate liability under § 1350 for two reasons: (1) doubts over whether vicarious corporate *criminal* liability is a universally recognized international custom and practice; and (2) the inability of plaintiffs to point to a formal international event announcing that derivative corporate *civil* liability had become part of customary international law. Both reasons are wrong.

As this Court noted in *N.Y. Central & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909), once derivative corporate civil liability is firmly established in a legal system, it is a small jump to vicarious criminal liability. But doubts about the wisdom of making that jump say absolutely nothing about the continued universal acceptance of corporate *civil* liability. As Judge Leval noted below, 621 F.3d at 151-52 (Leval, J., concurring only in the judgment), and as this Court noted in *Salt Lake City v. Hollister,* 118 U.S. at 260-62, immunizing assets held in corporate name from derivative civil liability for the lawless employment-related actions of corporate employees is a blueprint for the erosion of the rule of law. Since the erring corporate employee will rarely possess sufficient assets to compensate an injured victim, and since an immunized corporation would have little incentive to monitor and control its employees, unless derivative corporate *civil* liability exists, the formal legal norms purporting to regulate corporate behavior become virtually meaningless. Even worse, as in this case and as in *Hollister*, to the extent an employee's unlawful acts confer an unjust benefit on the corporation, unless the benefit is subject to recoupment through derivative corporate civil liability, the rule of law is replaced by the law of the jungle, with devastating impact on the incentives of corporate management to abide by the law.

Since derivative corporate civil liability for the unlawful employment-related acts of an employee is so embedded in the custom or practice of the international community – and is so universally perceived as necessary to the maintenance of a robust rule of law – the panel erred in failing to

recognize that derivative corporate civil liability is an integral remedial component of any claim arising under customary international law.

B. The Lack of a Requirement of Formal Recognition

The panel reasoned, as well, that derivative corporate civil liability, no matter how universally adopted, may not be treated as a component of customary international law in the absence of a formal signal from the international community receiving derivative corporate civil liability into the law of nations. Had the Nuremberg tribunals or the Supreme Court in *La Paquete Habana* applied such a formalistic approach, many prosecutions of Nazis would have been subject to dismissal, and the award in *La Paquete Habana* reversed.

The panel's insistence on a formal signal receiving derivative corporate civil liability into customary international law demonstrates confusion over the nature of customary international law. While a formal signal by the international community would, of course, be a useful aid to a court in determining whether a widely accepted norm qualifies for inclusion, such a signal is not a precondition to judicial recognition. The legal principles underlying the Nuremberg prosecutions were part of customary international law, not because they had been formally recognized by a treaty, or by some other international body, but because they had already been accepted as legally binding by an informal consensus of the civilized international community. Measured by such an empirical (as opposed to formal) test, derivative

corporate civil liability for the unlawful employment-related acts of corporate employees had become an established remedial element of a customary international law claim long before the Second Circuit was asked to apply it in this case.

II. The Court Below Ignored its Duty To Define the Federal Common Law Remedial Aspects of a Customary International Law Claim

Once this Court had definitively recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 724-25, that Congress had granted both subject matter jurisdiction and enforcement authority to federal courts over an important subset of unwritten customary international law, federal judges assumed a common law duty to shape the remedial and procedural contours of such litigation, including the interstitial remedial and procedural rules governing: (1) the availability of declaratory or injunctive relief,[21] (2) the existence of a judicially implied constitutional damage remedy,[22] (3) the scope and

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[21] *See, e.g.*, *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (recognizing availability of rescission, but not damages); *Allen v. State Bd. of Educ.*, 393 U.S. 544 (1969) (availability of declaratory judgment); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (availability of specific performance of promise to arbitrate grievances under labor contract); *Guffey v. Smith*, 237 U.S. 101 (1915) (availability of injunctive relief in federal court in diversity case where state court would lack power to grant injunction); *In re Debs*, 158 U.S. 564 (1895) (United States' right to injunctive relief).

[22] *Compare Davis v. Passman*, 442 U.S. 228 (1979) *and Carlson v. Greene*, 446 U.S. 14 (1980) (recognizing implied causes of action for damages under *Bivens*), *with FDIC v. Meyer*, 510

nature of derivative liability,[23] (4) the scope and nature of contributory liability,[24] (5) the governing statute of limitations,[25] and (6) the scope of common

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U.S. 471 (1994) and *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (declining to imply *Bivens* damage claim against entities that were fully subject to suit under ordinary *respondeat superior* tort law).

[23] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (establishing standards under which high-ranking government supervisors become derivatively liable for the unconstitutional actions of lower-ranking government employees under *Bivens*). *See also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (establishing standards under which local government entities become derivatively liable for the unconstitutional actions of employees under 42 U.S.C. § 1983).

[24] *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286 (1993) (recognizing federal common law right of contribution in connection with non-statutory implied cause of action for damages for violating anti-fraud provisions of the 1934 Securities Act); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (recognizing a right of contribution in admiralty).

[25] *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005) (holding that borrowing most appropriate state statute of limitations remains the norm as matter of federal common law); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (identifying uniform federal statute of limitations for RICO claims); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (rejecting claim of national security immunity and finding prosecutorial immunity inapplicable); *Wilson v. Garcia*, 471 U.S. 261 (1985) (identifying uniform state statute to be borrowed as federal statute of limitation for § 1983 claims); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) (implying federal limitations period in absence of analogous state claim).

law defenses and immunities.[26]

Given the blizzard of cases recognizing a court's duty to set the remedial contours of non-statutory claims falling within the enforcement authority of a federal court, it was clear error for the court below to have declined to consider whether a form of derivative corporate civil liability exists in this case as a matter of federal common law, regardless of the status of derivative corporate civil liability under the law of nations.[27]

The panel's concerns over whether subject matter jurisdiction existed over the corporate defendants overlooked Congress' grant of supplemental jurisdiction in 28 U.S.C. § 1367(a) (overruling *Finley v. United States*, 490 U.S. 545 (1989)) directing

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[26] *See, e.g.*, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (remanding action against Foreign Minister of Somalia for consideration of possible federal common law immunities and defenses); *Iqbal*, S. Ct. at 1945-46 (defining federal common law immunities and defenses available to high-ranking official sued under *Bivens*); *Mitchell*, 472 U.S. at 511 (rejecting claim of national security immunity and finding prosecutorial immunity inapplicable); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (developing federal common law of qualified immunity for close presidential advisors sued under *Bivens*); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (recognizing absolute immunity of President from damage claim for official acts); *Stump v. Sparkman*, 435 U.S. 349 (1978) (recognizing judicial immunity of state court judge); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (recognizing federal common law immunity for state governors sued under § 1983).

[27] While the Court could determine the precise contours of derivative corporate liability in this case, *amicus* suggests that it would be preferable to allow the lower courts the first opportunity to shape the common law doctrine.

federal courts to add "pendent parties" when necessary to adjudicate all claims in a single "case or controversy" arising from a "common nucleus of operative fact," even when the pendent party would otherwise be beyond the subject matter jurisdiction of an Article III court. *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 552-53 (2005); *United Mine Workers v. Gibbs*, 383 U.S 715, 726-27 (1966).

Even if, therefore, one views plaintiffs' customary international law claim (erroneously) as limited to an action against a corporate employee, the corporate employer would, nevertheless, be a classic pendent party joined under § 1367(a) in order to secure complete relief pursuant to the federal common law of remedies.[28]

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[28] Nothing in the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2006)), authorizing relief against an "individual" guilty of committing torture under the authority of, or under color of law of, a "foreign nation," justifies immunizing private business corporations from derivative civil liability under § 1350. Since the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11 (2006), would ordinarily block efforts to impose derivative liability on the "foreign nation" that had employed the actual torturer, it made excellent textual sense for Congress to describe the only non-immune torture defendant in an ordinary TVPA case as an "individual." *See Samantar v. Yousuf*, 130 S. Ct. at 2286-89 (discussing the application of FSIA to an "individual"). Congress obviously used the term "individual" instead of the generic term "person" to avoid appearing to create a conflict with the FSIA's grant of immunity to foreign government defendants. *See Monell*, 436 U.S. 658 at 690-95 (1978) (reading "person" as including government employer).

The narrow issue in *Mohamad v. Rajoub*, 634 F.3d 604, 607-08 (D.C. Cir. 2011) is whether the term "individual" should be

III. Derivative Corporate Civil Liability for the Unlawful Employment-Related Acts of Employees Accurately Reflects the Expectations of the Human Participants

John Dewey's dissection of the history of corporate legal personality demonstrates its role as a useful fiction permitting the implementation and enforcement of many of the rights, duties, and expectations of the human beings who join together to form a corporate enterprise. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 Yale L.J. 655, 665-69 (1926). *See* Morton J. Horowitz, Santa Clara *Revisited*: *The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 175 (1985); Frank H. Easterbrook and Daniel Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416, 1417-18 (1989).

Precisely because it is such useful shorthand for the complex cluster of personal rights, duties and expectations that reach equilibrium in the modern business corporation, there is universal agreement that business corporations should often be recognized as having independent legal personalities. *Louisville,*

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read literally to block a derivative claim against a foreign governmental employer like the Palestinian Authority, capable of empowering its agents or employees to act under color of foreign law, but lacking the attributes of statehood needed to qualify for sovereign immunity under the FSIA. The answer to that narrow question of statutory construction says nothing about the derivative civil liability of a private business corporation for violations of customary international law committed by corporate employees in the course of their duties.

Cincinnati, & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558-59 (1844) (corporation is a "citizen" of state of incorporation for Article III purposes); *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1185-86 (2010) (corporation is a "citizen" of both place of incorporation and its "nerve center"); *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (corporation is a "person" for purposes of Fourteenth Amendment Equal Protection Clause).

Unfortunately, as did the court below, judges and commentators have occasionally confused the pragmatic decision to grant a business corporation a fictive legal personality with a command to treat a corporation as if it were a wholly freestanding being whose rights and duties may be logically derived, catalogued, and enforced without regard to the expectations, rights and duties of the human beings who constitute the corporate universe. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935). In the United States, judicial indulgence in such "transcendental nonsense" about corporations has done little harm[29] because, as John Dewey

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[29] The movement to treat a corporation as greater than the sum of its human parts was primarily led by Continental jurists seeking to limit what they perceived as excessive individualism by submerging human beings into collective institutions – the corporation; a church; the nation-state; the proletariat; a race; a political movement – whose collective needs would overwhelm the specific person's rights. *See, e.g.*, Frederich Karl von Savigny, *Jural Relations* (W.H. Rattigan, trans., 1884); Léon Michoud, *La Notion de Personnalité Morale*, 11 Revue du Droit Public 1, 8 (1899); Ernst Freund, *The Legal Nature of Corporations*, (1897); Otto Friedrich von Gierke, *Political Theories of the Middle Age* (Frederic William Maitland, trans.,

demonstrated, treating corporations as fictive legal entities is ordinarily a useful shortcut to recognizing and protecting the rights, duties, and expectations of human beings who have joined together in what Justice Scalia has called "the deal." *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 686-87 (1989) (Scalia, J., dissenting) (briefly describing "the deal" entered into by participants in a corporation), *overruled by Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010). *See Louisville, Cincinnati, & Charleston R.R. v. Letson,* 43 U.S. (2 How.) 497, 558-59 (1844) (permitting corporate business enterprise to sue and be sued efficiently in federal court);[30] *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S.

1900); Frederic William Maitland, *Moral Personality and Legal Personality*, *in Collected Papers* 311-15 (H.A.L. Fisher ed., William S. Hein Co. 1981) (1911); Harold J. Laski, *The Personality of Associations*, 29 Harv. L. Rev. 404, 408-10 (1916). The European experiment in romanticizing metaphysical collectives at the expense of the person went tragically wrong, providing the theoretical underpinnings of law in Nazi Germany and Stalinist Russia.

[30] *Letson* reversed *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809), which had treated a corporation as an association having the citizenship of each of the shareholders, rendering it difficult for a corporation to sue or be sued in federal court under diversity jurisdiction 43 U.S. (2 How.) 497 at 555. The move from *Deveaux* to *Letson* illustrates the usefulness of the corporate fiction. *See Marshall v. Balt & Ohio R.R.*, 57 U.S. (16 How.) 314, 327-28 (1854) (an intermediate stage reaching the same result by relying on a conclusive presumption that all shareholders are citizens of the same state). See also *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 364-66 (1921) (class members presumed to share citizenship of named-representative).

394, 396 (1886) (assuring human participants in the corporate enterprise equal legal treatment of their property rights); *The Railroad Commission Cases*, 116 U.S. 307, 331 (1886) (protecting corporate participants against unlawful takings of their property); *Smyth v. Ames,* 169 U.S. 466, 522-24 (1898) (protecting corporate participants against deprivations of their property without due process of law); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (protecting Fourth Amendment privacy interests of participants in corporate enterprise); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931) (protecting participants in foreign corporations against uncompensated takings of their property); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (protecting corporate participants against costs of multiple criminal prosecutions in violation of Double Jeopardy Clause); *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945) (measuring specific *in personam* jurisdiction over corporation by activities of corporate participants); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (requiring volitional behavior by corporate constituents to impose specific *in personam* jurisdiction over corporate assets); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984) (setting limits on general jurisdiction over corporation premised on unrelated activities of corporate constituents).[31]

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[31] The Court engages in a similar process in deciding when an unincorporated association may act as shorthand for the rights and duties of its members. *E.g. United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 385-89 (1922) (labor union

Not surprisingly, cases where the Court has declined to recognize a corporate constitutional right have usually involved settings where there is a substantial likelihood that intra-corporate conflicts of interest exist. In such a setting, recognizing a corporate constitutional right would risk favoring one set of participants in the corporate enterprise, usually high ranking officers, at the expense of others.[32] In those conflicted settings, to avoid distorting the web of intra-corporate relationships, each human participant must shoulder the burden of asserting his or her own constitutional rights. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) (no corporate right against self-incrimination since public disclosure of criminal wrongdoing by one or more corporate employees is in the interest of many corporate participants); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 66-67, 71, 76 (1974) (banks not constitutionally exempt from financial reporting requirements since disclosure of large cash transactions advances the interests of many participants in a banking enterprise); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77

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subject to suit for actions of members); *NAACP v. Button*, 371 U.S. 415, 429-31 (1963). (association may raise members' First Amendment rights); *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343-44 (1977) (association may assert members' rights)*; Int'l Union, UAW v. Brock*, 477 U.S. 274, 282-84 (1986) (same).

[32] Recognition of the potential for widespread conflicts of interest within the modern large corporate enterprise dates from Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* 207-19 (Transaction Publishers 2009) (1932) (describing the gulf between ownership and control).

(1970) (diminished Fourth Amendment protection for corporations engaged in alcohol industry is appropriate because it reflects the expectations of numerous participants in enterprise); *United States v. Biswell*, 406 U.S. 311, 315-16 (1972) (same for firearms industry). *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (intra-class conflicts and agency concerns preclude recognition of *ad hoc* legal entity empowered to act in each constituent's name).

Since intra-corporate conflict is highly unlikely in a single-shareholder corporation, Justice Kennedy's dissent in *Braswell v. United States*, 487 U.S. 99, 119-20 (1988) (Kennedy, J., dissenting, joined by Brennan, Marshall, and Scalia, JJ.), agreeing with denial of the privilege against self-incrimination to large multi-shareholder corporations, but urging its grant to a single shareholder corporation, appears to have been correct. It is also no coincidence that *Marshall v. Barlows, Inc.*, 436 U.S. 307, 311-12 (1978), exempting a corporation from unannounced inspections by OSHA, involved a small family plumbing business organized as a corporation.

The Court's corporate free speech cases illustrate the role of a fictive separate corporate legal personality in facilitating the recognition and protection of First Amendment rights actually held by the human participants in the corporate enterprise. For example, the commercial speech cases deploy a fictive corporate personality to protect the common interest of each participant in a corporate business enterprise in assuring that accurate information about a corporate product is

widely disseminated to the consuming public.[33] The restriction in *Central Hudson Gas v. Public Serv. Comm'n*, 477 U.S. 557, 563-64 (1980) of commercial free speech protection to "truthful" commercial speech about "lawful" products reflects the strong interest of many participants in the corporate enterprise in avoiding false advertising and lawless behavior capable of adversely affecting the corporation's reputation and credibility.

Similarly, the free press cases recognize and protect the common interest of each human participant in a business enterprise engaged in the sale of speech in assuring the widest range of product dissemination, and the widest autonomy over what speech to sell.[34]

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[33] *E.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762-64 (1976); *Linmark, Assocs. v. Willingboro*, 431 U.S. 85, 92 (1977); *Carey v. Population Servs., Intl.*, 431 U.S. 678, 683-84 (1977); *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478-80 (1995); *44 Liquormart, Inc v. Rhode Island*, 517 U.S. 484, 515-16 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-56 (2001).

[34] *Kingsley Int'l Pictures Corp. Regents*, 360 U.S. 684, 688-89 (1959); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Time, Inc. v. Hill*, 385 U.S. 374, 388-89 (1967); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149-51 (1967); *N.Y. Times Co. v. United States*, 403 U.S. 713, 723-24 (Douglas, J., concurring) (1971) (per curiam); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-54 (1975); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-53 (1988); *Simon & Schuster, Inc v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115-16 (1991); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988).

The non-profit corporate free speech cases reflect the Court's recognition that human beings who voluntarily associate together in corporate form in order to advance a given set of values share a common interest in maximizing their collective ability to communicate in aid of those values; a shared interest that is best protected by vesting its assertion in the corporation itself.[35]

As Justice Kennedy's dissent in *Braswell* recognizes, it is in the context of large, multi-shareholder corporations that Justice Scalia's brief description of the corporate "deal" in *Austin* may break down in certain contexts. 487 U.S. at 119-120 (Kennedy, J., dissenting).[36] Indeed, apart from the commercial speech and press cases cited *supra*, where intra-corporate commonality of interest in asserting free speech protection almost certainly existed, the only corporate speech case decided by this Court actually involving a large multi-shareholder business corporation was *First Nat'l*

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[35] *E.g.*, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981); *FEC v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 263-64 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 686 (1989) (Scalia, J., dissenting); *FEC v. Wis. Right to Life*, 551 U.S. 449, 487-88 (2007); *Citizens United v. FEC*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.). *See also NAACP v. Alabama*, 357 U.S. 449, 463-64 (1958); *Hurley v. Irish-American Gay, Lesbian and Bisexual Gr. of Bos.*, 515 U.S. 557, 569-70 (1995).

[36] Justice Scalia's brief description of the corporate "deal" in *Austin* was aimed at rebutting the notion that the Michigan statute at issue was narrowly tailored to protect shareholders in large corporations. 494 U.S. at 686.

Bank of Boston v. Bellotti, 435 U.S. 765 (1978), a case involving a bank's speech about a state-wide referendum on income taxes where it was highly unlikely that intra-corporate conflicts of interest over the speech existed.[37] Most importantly, Justice Powell's majority opinion in *Bellotti* found that the Massachusetts statute, viewed as an effort to protect dissenting corporate participants, was both under- and over-inclusive "under the circumstances of this case," (435 U.S. at 792-795), leaving open the constitutionality of an appropriately drawn shareholder protection statute. *See* 435 U.S. at 805-06. (White, J., dissenting).

This Court has never been confronted with an actual case or controversy involving the First Amendment rights of a large multi-shareholder corporation with a substantial likelihood of intra-corporate conflict between and among the holders of the First Amendment rights at issue. Despite *dictum* to the contrary in *Citizens United* (which dealt with the speech of a non-profit corporation similar to *MCFL),*[38] it remains unclear whether the Court will

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[37] Justice Powell noted that not a single member of the First National Bank of Boston corporate community had objected to the speech in question, or had appeared in the litigation in defense of the Massachusetts statute. 435 U.S. at 795, n. 34.

[38] As in *First Nat'l Bank v. Bellotti*, the *Citizens United* Court declined to rule squarely on the conflict of interest argument, finding the statute before the Court both under-inclusive (because it was limited to a short period immediately prior to an election), and over-inclusive (because it covered both non-profit and small for-profit corporations, as well as large multi-shareholder corporations). 130 S. Ct. at 911.

deploy the fiction of a reified corporate First Amendment right in the context of large multi-shareholder corporations with significant potential intra-corporate conflicts of interest.[39] If, however, the Court ultimately opts to vest the management of large multi-shareholder corporations with a corporate First Amendment right to engage in politics with other people's money, it would be genuinely astonishing to allow corporations to spend treasury funds to influence elections, while simultaneously shielding those treasury funds from compensatory liability for employment-related violations of customary international law.

The concept of corporate personality becomes pernicious, when, as in the panel's opinion below, the idea of a corporation is allowed to assume a wholly

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[39] In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977), *Keller v. State Bar of Cal.*, 496 U.S. 1, 8 (1990), and *United Foods, Inc. v. United States*, 533 U.S. 405, 409 (2001), the Court ruled that organizational insiders could not use money provided under government compulsion to fund speech opposed by the providers of the funds. While government compulsion is generally not involved in corporate settings, the price to a dissenting shareholder, lender, business creditor, or customer of severing relationships with the corporation to avoid funding personally distasteful political speech is very substantial, involving the incurring of potential capital gains tax liability for a shareholder, and forcing an immensely inefficient political distortion of the economic marketplace for everyone else. Viewed as a "burden" on the dissenting corporate participant's First Amendment rights, the costs of exiting the corporation appear to exceed the "burden" deemed sufficient by this Court to invalidate Arizona's effort to key public election subsidies to the spending of privately funded candidates. *Arizona Free Enter. Club v. Bennett*, 131 S. Ct. 2806, 2820-21 (2011).

independent life of its own untethered to – and potentially disruptive of – the web of intersecting human legal and personal relationships that make up the legally-constructed corporate universe. In this case, as in *Colonnade Catering* and *Biswell*, rendering corporate treasury funds liable for compensatory damages caused by the employment-related acts of employees would reflect the *ex ante* expectations of the members of the corporate community who provided the funds in question – shareholders, lenders, business creditors and consumers. Denying corporate liability in such a setting frustrates and distorts the expectations that were part of the "deal" a corporate participant entered into by joining the corporate enterprise.

No law-abiding participant in a civilized corporate community would expect – or wish – to provide resources enabling a corporate employee to violate customary international law without expecting those resources to be available to compensate victims of the unlawful behavior. While the erring employee may, of course, be held liable for his or her unlawful behavior, the personal assets of the employee will rarely be adequate to provide meaningful compensation to victims, especially in the context of widespread damage caused by violations of core concepts of customary international law. Moreover, confining liability to the erring employee, whether civil or criminal, would require assigning personal responsibility to a single employee for complex behavior by numerous corporate employees, a process that would unduly complicate and often frustrate efforts to obtain compensatory redress. Finally, immunizing a

corporation's assets from the consequences of its employees' unlawful acts removes any financial incentive for corporate management to monitor employees. When, as here, the employees' allegedly lawless action benefits the corporate treasury, immunizing that treasury from liability unjustly enriches the corporation, removing any economic incentive to monitor or discipline an erring employee. It would, therefore, constitute a genuine threat to the maintenance of a corporate rule of law to treat the three corporate defendants in this case as freestanding entities in a manner that immunizes corporate assets from liability for the unlawful employment-related actions of corporate employees.

CONCLUSION

For the above-discussed reasons, *amicus curiae* urges the Court to vacate the panel decision below and to remand the proceedings to the District Court for: (1) a determination of whether the alleged actions of the corporate employees herein violated customary international law; and, (2) if so, a determination of the scope and nature of the derivative civil liability of the three named corporate defendants herein for the unlawful employment-related actions of their respective employees.

Respectfully submitted,

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