No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

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

BRIEF FOR PETITIONERS

Michael E. Elsner
John M. Eubanks
Jodi Westbrook Flowers
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Mark Werbner
SAYLES WERBNER P.C.
4400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
Jenny S. Martinez
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.

PARTIES TO THE PROCEEDING

This petition arises from five separate lawsuits that were consolidated on appeal: *Jesner v. Arab Bank, PLC*, No. 06-CV-3689 (E.D.N.Y.); *Almog v. Arab Bank, PLC*, No. 04-CV-5564 (E.D.N.Y.); *Afriat-Kurtzer v. Arab Bank, PLC*, No. 05-CV-0388 (E.D.N.Y.); *Lev v. Arab Bank, PLC*, No. 08-CV-3251 (E.D.N.Y.); and *Agurenko v. Arab Bank, PLC*, No. 10-CV-0626 (E.D.N.Y.). All of the plaintiffs in these lawsuits whose claims arise under the Alien Tort Statute, 28 U.S.C. § 1350—rather than the Antiterrorism Act, 18 U.S.C. § 2331 *et seq.*—are petitioners here. A complete list of the petitioners has been filed with the clerk's office of this Court.

The sole defendant in all five cases, and the respondent here, is Arab Bank, PLC.

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BRIEF FOR PETITIONERS

Petitioners Joseph Jesner et al., respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 808 F.3d 144 (2d Cir. 2015). The order and accompanying opinions denying en banc review (Pet. App. 34a) are reported at 822 F.3d 34 (2d Cir. 2016). The pertinent order of the district court is unreported but reproduced within the Second Circuit's opinion at Pet. App. 6a.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2015. Pet. App. 1a. A timely petition for rehearing was denied on May 9, 2016. *Id.* 34a. The petition for a writ of certiorari was filed on October 5, 2016, and granted on April 3, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Alien Tort Statute, 28 U.S.C. § 1350, provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

INTRODUCTION

Enacted by the First Congress, the Alien Tort Statute (ATS) provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This statute ensures that federal courts are able to impose civil liability against common "enem[ies] of all mankind." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 732 (2004) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). Specifically, it directs courts to "provide a cause of action" for violating "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of . . . 18th century paradigms" such as piracy. *Sosa*, 542 U.S. at 724-25.

In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), this Court granted certiorari to decide whether the ATS—consistent with other tort statutes in the U.S. Code and tort law in general—allows lawsuits against corporations. *See id.* at 1663. But rather than answering that question, this Court resolved the case based on the presumption against extraterritoriality. Explaining that "all the relevant conduct" giving rise to the *Kiobel* plaintiffs' claims took place outside the United States, this Court held that the claims did not sufficiently "touch and concern" the territory of this country to support jurisdiction here. *Id.* at 1669.

This case involves corporate transgressions that occurred within the United States. Petitioners allege (and a jury has determined in parallel proceedings) that respondent Arab Bank knowingly and willfully

used its New York branch to transfer millions of U.S. dollars to finance suicide bombings and other international terrorist attacks. The Bank also funneled dollars through its New York branch to make so-called "martyrdom" payments—payments compensating and rewarding families of terrorists their actions.

The Second Circuit acknowledged that this Court's opinion in *Kiobel* "suggests that the ATS may allow for corporate liability" and observed that "there is a growing consensus among [its] sister circuits to that effect." Pet. App. 14a; *see id.* 25a (citing *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008)). The Second Circuit nevertheless adhered to its prior position that the ATS categorically forecloses corporate liability regardless of the type of transgression at issue and its connection to this country. Pet. App. 2a, 26a. And on that basis alone, the court of appeals held that this case must be dismissed.

This Court should reverse that judgment and allow this lawsuit to proceed.

STATEMENT OF THE CASE

A. Factual background

1. Over the past few decades, various terrorist organizations have sought "to intimidate and coerce the civilian population of Israel" in furtherance of

those organizations' sociopolitical aims. J.A. 196 (*Almog* operative complaint). One such organization is Hamas, whose aim is to "obliterate" the Jewish State. J.A. 197-98. Similar organizations include the Palestine Islamic Jihad, the Al-Aqsa Martyrs' Brigades, and the Popular Front for the Liberation of Palestine.

The U.S. Department of Treasury has classified these organizations as Specially Designated Global Terrorists, and the Department of State has designated them as "foreign terrorist organizations." J.A. 201, 204, 207-08. This means the organizations "threaten[] the security of United States nationals or the national security" (that is, "the defense, foreign relations, or economic interests") of the United States. 8 U.S.C. § 1189(a)(1), (d)(2).

These terrorist groups' activities "rest[] on a foundation of money." J.A. 96 (quoting congressional testimony of Joseph A. Morris, former General Counsel of the U.S. Information Agency). In fact, "[m]oney is often more important to the masters of terrorism than are people." *Id.* Money is required not only to purchase weapons and to pay for militant training; it is also used to "compensate" families of suicide bombers and others who are apprehended and imprisoned. The promise of posthumous payments reassures terrorists that their families will receive remuneration (and enhanced social status) from terrorist killings. J.A. 98-99; *see also Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008).

It is also important to bear in mind that "[m]oney is fungible." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 37 (2010). Money a terrorist

group obtains under the auspices of charitable donations and the like can "be redirected to funding the group's violent activities." *Id.* at 37. So terrorist groups often "systematically conceal their activities behind charitable, social, and political fronts." *Id.* at 30 (quoting M. Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* 2-3 (2006)).

At the same time, contributions to terrorists typically must be wired across borders before the donations can be put to use. The U.S. dollar—a stable, easily exchanged currency—is the preferred currency for accomplishing such transfers into the West Bank and Gaza.

To process international payments denominated in U.S. dollars without using Fedwire (the system established by the Federal Reserve) or assuming the risk of having to cover the cost of the dollars itself, a bank must use the Clearing House Interbank Payments System (CHIPS). That system requires participants to process payments through "an office located in the United States" that is "subject to regulation" under U.S. law. *See* The Clearing House, *CHIPS Rules and Administrative Procedures*, Rules 6 & 19(a)(1) (Feb. 15, 2016).[1] For a bank seeking to provide services to Hamas or a similar terrorist organization, therefore, a presence in the United States is critical.

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[1] The Clearing House Rules are available at https://www.theclearinghouse.org/~/media/files/payco%20files/chips%20rules%20and%20administrative%20procedures%202016.pdf?la=en.

2. The founders and top executives of respondent Arab Bank—a multinational financial corporation based in Jordan that had a federally chartered branch in New York during the relevant time period here—have long shared the view that Israel poses a grave "threat" to Arab interests. According to a history commissioned by the Bank, its founder "link[ed] the idea of establishing a bank to the urgent need of protecting their Arab homeland, of reinforcing their powers of resistance to colonialism and Zionism, and of assuring the Arabs of ultimate victory over those enemies." Arab Bank Ltd., *The Indomitable Arab: The Life and Times of Abdulhameed Shoman (1890-1974) Founder of the Arab Bank* 118 (1st ed. 1984). And the Bank's official documents have referred repeatedly to Israel as an "enemy," exhorting people "to sacrifice the lives and offer the money needed for their self-defence and for the liberation of their sacred places and all their occupied territories." Arab Bank Ltd., 39th Annual Report 1968, at 13 (1968); *see also* Arab Bank Group, Annual Report, at 6 (2003) (Arabic version); Arab Bank Group, Annual Report, at 4 (2000) (Arabic version); Arab Bank Ltd., 41st Annual Report, at 4 (1970); Arab Bank Ltd., 28th Annual Report, at 13 (1957).

Just before and during the "Second Intifada"—the sustained Palestinian uprising against Israel that began in 2000—the Bank provided a range of financial services to terrorists and terrorist front groups posing as charities. J.A. 97. For one thing, the Bank hosted bank accounts for such individuals and organizations, fully aware of their terrorist goals. Pet. App. 11a. The Bank, for example, maintained accounts for numerous well-known

leaders of Hamas—including several of the group's founders, one of its military leaders, and the head of its Gaza operations. *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 301-03 (E.D.N.Y. 2015). While some of these clients had not yet been placed on terrorist watch lists when they opened their accounts, the Bank has admitted that it processed 282 fund transfers—a total amount of $2,563,275—for individuals the United States had designated *at the time of the transfers* as terrorists. *Id.* at 304.

The Bank also accepted private donations directly into these sorts of accounts, knowing they were solicited by the groups to fund terrorism. Pet. App. 11a. The Bank, for instance, opened an account at the request of Hamas leader Osama Hamdan. On one of its websites, Hamas subsequently encouraged supporters to make donations to that account. *Linde*, 97 F. Supp. 3d at 311, 341. The Bank later reviewed and approved multiple transfers to the account, listing the beneficiary as "Hamas." *Id.* at 311, 332.

Finally, the Bank served as the "paymaster" for Hamas and other terrorist organizations through an organization called the Saudi Committee for the Support of the Intifada Al-Quds, helping the organization identify, locate, and pay the families of suicide bombers and other terrorists. *Linde*, 97 F. Supp. 3d at 298, 304. Between 2000 and 2002, the Bank made at least "24 payments to the families of suicide bombers from Hamas." *Id.* at 304. And there is no doubt the Bank knew the purpose of these payments: A 2001 internal document, for instance, "appended lists of payments to the families of deceased individuals, whose cause of death was noted as . . . 'martyrdom operations.'" *Id.* at 304-05.

Nearly all these various transactions in aid of Palestinian terrorists were processed through the Bank's New York branch. Indeed, as explained above, the Bank could not have conducted the transfers at issue here in U.S. dollars without using its branch on U.S. soil. *See supra* at 5. The New York branch also held accounts for each branch of the Bank worldwide, including Arab National Bank, which held and serviced the account for the Saudi Committee for the Support of the Intifada Al-Quds.

In 2004 and 2005, two of Arab Bank's U.S. regulators—the Financial Crimes Enforcement Network (FinCEN) and the Office of the Comptroller of the Currency (OCC)—investigated the Bank on suspicion of violating Anti-Money Laundering and Bank Secrecy Act regulations. FinCEN determined that Arab Bank's New York branch had transferred U.S. dollars to and from many individuals whose names appeared on terrorist watch lists and that the branch's money-conversion and wire-transfer practices posed an ongoing risk of "terrorist financing." CA2 App. 1013-14. The OCC agreed and ordered the branch to cease offering those and other banking services. *Id.* 982.[2]

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[2] A decade later, the Solicitor General reported to this Court that the Bank had become a "constructive partner with the United States in working to prevent terrorist financing." Br. for the United States as Amicus Curiae at 20, *Arab Bank, PLC v. Linde*, 134 S. Ct. 2869 (2014) (No. 12-1485). The Solicitor General did not speak to the Bank's actions during the time period culminating with the FinCEN and OCC proceedings.

B. Procedural history

1. Petitioners are victims of terrorist attacks—including family members and estate representatives—that took place between 1995 and 2005 in Israel, the West Bank, and Gaza. In five separate lawsuits filed between 2004 and 2010 in the U.S. District Court for the Eastern District of New York, they sued Arab Bank, alleging that it knowingly and intentionally facilitated this terrorism through its activities in New York. *See* Pet. App. 3a-4a (listing cases), 12a. Petitioners also allege that the Bank, through the involvement of its New York branch, knowingly and intentionally distributed millions of dollars to terrorists and their families as compensation for these and other terrorist attacks.

Petitioners, as foreign nationals, bring their claims under the ATS. Specifically, they allege that Arab Bank violated the law of nations insofar as it financed terrorism, and also insofar as it directly and indirectly engaged in genocide and crimes against humanity.[3] Other plaintiffs in these and related lawsuits are U.S. nationals. The U.S. national plaintiffs have asserted parallel claims under the Antiterrorism Act (ATA), 18 U.S.C. § 2331 *et seq.*, which allows U.S. citizens to recover for injuries caused by a corporation's material support for terrorist activities. *See id.* § 2333(a); *see*

[3] Some petitioners also asserted other claims besides their ATS allegations. The district court dismissed those claims, and the Second Circuit affirmed. *See* Pet. App. 29a-33a. Petitioners do not press those claims here.

generally Humanitarian Law Project, 561 U.S. 1 (describing and construing particulars of material support statute).

The district court consolidated all five cases, along with six others advancing essentially the same allegations. Pet. App. 12a & n.12. While discovery progressed, the district court rebuffed various efforts by the Bank to have the cases dismissed. The district court held that petitioners' ATS claims satisfy the statute's requirement that claims allege violations of specific "norm[s] of international character accepted by the civilized world," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). CA2 App. 543-77. The court further determined that "the complaint[s] here include[] claims of actionable conduct by Arab Bank in New York." CA2 App. 783.

2. After further discovery, the district court severed petitioners' ATS claims from the U.S. nationals' ATA claims, and the latter proceeded to trial. In 2014, a jury found the Bank liable under the ATA for providing material support to a designated foreign terrorist organization. Specifically, the plaintiffs proved that the Bank "knowingly provided financial services to Hamas by providing financial services to its operatives; to 11 charities controlled by Hamas; and to an organization called the Saudi Committee for the Support of the Intifada Al-Quds, an entity connected to the Saudi Arabian government that made payments to beneficiaries identified by Hamas-controlled organizations, including the families of Hamas suicide bombers and prisoners." *Linde*, 97 F. Supp. 3d at 299. "Nearly all transactions at issue," in Arab Bank's own words, "were routed through the Bank's New York Branch."

Br. for Appellant at 9, *Linde v. Arab Bank, PLC* (2nd Cir. Oct. 21, 2016) (No. 16-2119). The jury also found that the Bank's actions substantially contributed to twenty-two separate terrorist attacks—many of which form the basis for petitioners' ATS claims.

The district court upheld this verdict "in large part," Pet. App. 7a n.9, and it is now on review in the Second Circuit. *Linde v. Arab Bank, PLC*, No. 16-2119 (2d Cir. 2016).

3. While petitioners' ATS claims were pending in the district court, the Second Circuit decided *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (reproduced at Pet. App. 64a-242a). In that case, a divided panel of the Second Circuit held *sua sponte* that the ATS does not recognize corporate liability. Pet. App. 88a. The majority did not reach this conclusion by ordinary means of statutory interpretation. Instead, it focused on a footnote in *Sosa*, which states that courts confronting ATS claims should consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20. On the majority's view, that footnote established that the decision whether an ATS suit may go forward "depends entirely" on whether the particular type of "defendant is subject to liability under customary international law." Pet. App. 81a; *see also id.* 93a-100a. Stressing that the jurisdiction of "every international tribunal of which [it was] aware" has been limited to imposing liability on natural

persons, the Second Circuit majority construed the ATS to share the same limitation. Pet. App. 78a.

Writing separately, Judge Leval described the majority's holding as "illogical, misguided, and based on misunderstandings of precedent." Pet. App. 145a (concurring only in the judgment). He explained that footnote 20 merely "refers to the concern . . . that some forms of noxious conduct are violations of the law of nations when done by or on behalf of a State, but not when done by a private actor independently of a State." Pet. App. 175a. Neither the footnote nor international law itself contemplates distinctions between different types of non-state actors. *Id.* 176a. Accordingly, the fact that no international tribunal has imposed civil liability on a *private corporation* is "simply a non sequitur." *Id.* 177a. International law "leaves issues of private civil liability to individual States," *id.* 186a, and corporate civil liability is a staple of U.S. remedial law from which neither the text, history, nor the purposes of the ATS provides reason to depart.

Judge Leval also lamented that the majority's rule would "offer[] to unscrupulous businesses advantages of incorporation never before dreamed of." Pet. App. 142a. In particular, "one who earns profits by commercial exploitation of abuse of fundamental human rights [could] successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form." *Id.*

This Court, as noted above, granted certiorari in *Kiobel* to decide whether the ATS "recognize[s] corporate liability." 133 S. Ct. 1659, 1663 (2013).

The United States thereafter filed a brief expressing the Government's position that it does. *See* Br. for United States Supporting Petrs., *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter U.S. *Kiobel* Br.]. But after ordering supplemental briefing, the Court resolved the case on alternative grounds. The Court held ATS claims must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" of U.S. law. *Kiobel*, 133 S. Ct. at 1669. Under that test, the statute did not apply in *Kiobel* because the defendant's only connection to the United States was a single office in this country. And the office provided services wholly unrelated to the malfeasance at issue in the lawsuit. *Id.* at 1677 (Breyer, J., concurring in the judgment); *see also id.* at 1669 (majority opinion).

4. Once *Kiobel* became final, Arab Bank moved for dismissal of petitioners' ATS claims based on the Second Circuit's bar against corporate liability. Because this Court's *Kiobel* decision had not directly addressed the question of corporate liability and because "[a] decision by a panel of the Second Circuit 'is binding unless and until it is overruled by the Court en banc or by the Supreme Court,'" the district court dismissed the case on the ground that "plaintiffs cannot bring claims against corporations under the ATS." Pet. App. 6a (quoting district court decision, in turn quoting *Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011)).

5. The Second Circuit affirmed. The panel observed that this Court's reasoning in *Kiobel* "appears to suggest that the ATS may indeed allow

for corporate liability." Pet. App. 2a. The panel nonetheless stopped short of rejecting the court of appeals' previously adopted no-corporate-liability rule. *Id.* 26a. Instead, the panel "le[ft] it to either an en banc sitting of [the Second Circuit] or an eventual Supreme Court review to overrule" the holding. *Id.* 26a-27a.

The Second Circuit then denied rehearing en banc, apparently by a vote of eight-to-five. *See* Pet. App. 37a (Jacobs, J., concurring in the denial of rehearing in banc) (referencing vote). Dissenting from that denial, Judge Pooler maintained that the original panel's holding is "almost certainly incorrect" and that it thwarts litigation that "has proven to be an essential tool for victims of egregious human rights abuses perpetrated by both corporations and natural persons." *Id.* 56a, 58a. Judge Chin, joined by Judge Carney, echoed the need to bring the Second Circuit into line with the other courts of appeals to have considered the issue. *Id.* 59a-63a.

Two other judges, each joined by two colleagues, responded with opinions concurring in the denial of rehearing en banc. Judge Cabranes, the author of the original *Kiobel* panel opinion holding that the ATS precludes corporate liability, further defended that holding. Pet. App. 44a. Judge Jacobs maintained that even though a majority of the Second Circuit "do[es] not necessarily endorse" the no-corporate-liability rule, the issue had already caused enough "friction, heat and light" within the bench of that court. *Id.* 37a, 42a. Supreme Court review, Judge Jacobs suggested, would be a better way of settling the question. *Id.* 42a.

6. This Court granted certiorari to resolve "[w]hether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability." Pet. i; *see also* 137 S. Ct. 1342 (2017).[4]

SUMMARY OF ARGUMENT

I. The text, history, and purposes of the ATS make clear that the statute permits corporate liability.

The ATS does not differentiate in any way among potential defendants. Rather, its text confers jurisdiction upon federal courts simply to hear "tort" claims involving violations of the law of nations. The word "tort" is a term of art that Congress would have understood as carrying with it the bedrock rule that corporations may be held liable for acts of their agents.

The history and purposes of the ATS reinforce the propriety of subjecting corporations to liability under the statute. Congress enacted the ATS to ensure federal courts were able to impose liability upon enemies of all mankind and to afford adequate relief to noncitizens injured in ways that could affect foreign relations. When corporate activity violates the law of nations, imposing liability directly upon

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[4] The Bank has included various materials in the Joint Appendix relating to legal issues beyond the question presented, such as whether certain substantive misconduct is actionable under the ATS. The record also contains much material supporting petitioners' positions on those issues. But petitioners have declined to include that material in the Joint Appendix because those issues have not yet been considered by the Second Circuit and are not properly presented here. *See* Cert. Reply at 5.

the corporation serves those objectives. Indeed, courts at the time the ATS was enacted regularly imposed liability on ships themselves (a form of entity liability) when their occupants were found to have violated the law of nations by committing piracy.

II. Contrary to the Second Circuit's contention, nothing in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), negates the signals in the ATS's text, history, and purposes that corporations may be held liable for torts. Footnote 20 of that opinion instructs courts to consult international law to determine whether a given norm requires state action. It does not suggest that international law dictates whether *private corporations* may be held liable for violating the law of nations. International law leaves that question to domestic law. Even if it did not, the international treaty concerning the financing of terrorism requires entities to be held liable for such malfeasance.

To be sure, *Sosa* suggests that federal courts retain "residual common law discretion" to ensure that ATS claims are legally sound and judicially administrable. 542 U.S. at 738. But every common-law guidepost counsels in favor of corporate liability. State common law, this Court's most traditional reference point when fashioning federal common law, universally imposes liability upon juridical persons for torts. Federal tort-like statutory causes of action—including those found in analogous provisions such as the Antiterrorism Act, 18 U.S.C. § 2333 and 42 U.S.C. § 1983—almost always do the same. And international law, in all of its relevant forms, supports holding corporations liable for torts in violation of the law of nations.

Finally, basic fairness demands corporate accountability in this context. A business should not be allowed to reap the benefits of incorporation while claiming immunity from liability for noxious acts such as terrorism, slavery, or genocide. If a particular ATS lawsuit arising from such malfeasance threatens to cause significant international friction, courts have ample tools—for example, international comity and the *forum non conveniens* doctrine—to deal with that concern. There is no need or justification for a categorical bar against corporate liability.

ARGUMENT

I. Corporate liability flows from the text, history, and purpose of the ATS.

The Alien Tort Statute is, first and foremost, a *statute*. In *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), therefore, this Court used traditional tools of statutory interpretation to determine whether the "presumption against extraterritorial application" limits the reach of the ATS. *Id.* at 1664. After examining "the text, history, and purposes of the ATS," *id.* at 1665, the Court concluded that "nothing in the statute rebuts that presumption," *id.* at 1669.

That same interpretive methodology establishes that the ATS allows lawsuits against corporations.

A. The text of the ATS supports corporate liability.

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28

U.S.C. § 1350. Two elements of this text signal that the ATS allows corporate liability.

1. The text expressly confers jurisdiction on federal district courts to hear civil actions involving "tort[s]." 28 U.S.C. § 1350. The word "tort" is a common-law term of art. And where Congress uses such a term, "it presumably knows and adopts the cluster of ideas that were attached" to the word it deployed. *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). In particular, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Corporate liability has always been one of the bedrock principles that attaches to tort actions. As this Court has explained, "[a]t a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Phila., Wilmington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210-11 (1859); *see also Chestnut Hill & Spring House Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts."); *Mayor of Lynn v. Turner* (1774) 98 Eng. Rep. 980 (KB).

Consequently, when Congress enacted the ATS, it was "unquestionable" that corporations could be held liable for torts. *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); *see also* 1 William Blackstone, *Commentaries on the Laws of England* *463 (1768) (corporations may "sue or be sued" and "do all other acts as natural persons may"); 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793) (corporations are capable of "suing and being sued").

Nothing has changed since the ATS was first enacted. In fact, the rule that tort actions presumptively may be brought against corporations has become "so well settled as to not require the citation of any authorities in its support." *Balt. & Potamac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883). It continues to hold full sway today. *See, e.g.*, *Meyer*, 537 U.S. at 285-86; 9A William M. Fletcher, *Cyclopedia of Corporations* § 4521 (2016 rev. ed.); Restatement (Third) of Agency § 7.03 (2006). The rule effectuates deterrence and accountability, ensuring that entities responsible for misconduct make their victims whole. *See* Restatement (Second) of Torts § 901 (1979).

Given the strength of the presumption that statutes providing for "tort" liability allow for corporate liability, this Court should "take it as a given"—absent contrary statutory text—that "Congress has legislated with an expectation that the principle will apply." *Astoria*, 501 U.S. at 108. Recall that in *Kiobel*, this Court held that the ATS did not apply extraterritorially because "nothing in the statute" overcame the presumption against extraterritoriality. 133 S. Ct. at 1669. The same

approach applies here, with the same result: A time-honored principle of construction (here, the presumption of corporate liability for torts) is all but dispositive.

2. It is similarly significant that while the text of the ATS specifies the class of permissible *plaintiffs* (it grants jurisdiction only over suits by "an alien," 28 U.S.C. § 1350), it "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). This silence as to defendants mirrors the text of the provision in the very same Act in which Congress established federal admiralty jurisdiction. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (enacting the precursors to both 28 U.S.C. § 1333 (admiralty) and 28 U.S.C. § 1350 (ATS)).[5] The statute creating jurisdiction to hear maritime tort cases has long been construed—consistent with the common-law presumption—to allow corporate liability. *See, e.g.*, *Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718, 734 (1914); *Panama R.R. Co. v. Napier Shipping Co.*, 166 U.S.

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[5] The portion of the Judiciary Act that created maritime jurisdiction provided that the federal courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ." Judiciary Act of 1789 ch. 20, § 9, 1 Stat. 73, 77.

280, 288 (1897). The ATS should be construed in the same manner.

Other language in the Judiciary Act and later-enacted statutes reinforces the inference that Congress's failure in the ATS to specify any particular class of defendants means that the statute accepts corporate liability. For starters, Congress explicitly restricted classes of defendants elsewhere in the Judiciary Act. In Section 9—again, the same section that included the ATS—Congress provided that the district courts "shall also have jurisdiction exclusively of the courts of the several States, of all suits *against consuls or vice-consuls*." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added). Congress has limited the range of defendants in subsequent enactments as well. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a) ("any debt collector . . . is liable"); Jones Act, 46 U.S.C. § 30104 (allowing "a civil action at law . . . against the employer").

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks and citation omitted). That general principle applies here. When Congress has wanted to limit the range of permissible plaintiffs or defendants, it has placed words in the statute that do so. The absence of any limiting language in the ATS—from the First Congress or any subsequent Congress by way of amendment—shows that the statute does not exempt corporations from liability.

B. The history and purposes of the ATS reinforce the statute's acceptance of corporate liability.

Nothing in "the historical background against which the ATS was enacted," *Kiobel*, 133 S. Ct. at 1666, rebuts the presumption that Congress intended to incorporate the background common-law principle of corporate liability for tortious conduct. To the contrary, corporate liability is consistent with the history and purposes of the ATS.

1. The First Congress enacted the ATS to provide a federal forum to redress law-of-nations violations. Under the Articles of Confederation, the Continental Congress lacked authority to "cause infractions of treaties, or of the law of nations to be punished." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) (quoting James Madison, *Journal of the Constitutional Convention* 60 (E.H. Scott ed., 1893)). Moreover, state courts could refuse to provide redress for violations of the law of nations—or, if they allowed such suits, they might display bias against foreigners and in favor of their own citizens. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 697 (2002). This created the possibility that "any indiscreet [state]" could "embroil the Confederacy with foreign nations." *See The Federalist No. 42*, at 265 (James Madison) (Clinton Rossiter ed., 1961).

Two incidents highlighted this concern. First, in what has come to be known as the "Marbois incident," a French adventurer, the Chevalier De Longchamps, assaulted the Secretary of the French Legion, Francis Barbe Marbois, on the streets of

Philadelphia. *See Sosa*, 542 U.S. at 716-17 & n.11. In response, a French Minister "lodge[d] a formal protest with the Continental Congress and threaten[ed] to leave the country unless an adequate remedy were provided." *Kiobel*, 133 S. Ct. at 1666. Second, during the Constitutional Convention itself, a "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred when a New York City constable entered the home of the Dutch ambassador and arrested one of his servants. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467, 494 (1986). The ambassador protested to Secretary of State John Jay, who reported to Congress that "the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." *Sosa*, 542 U.S. at 717 (quoting Casto, 18 Conn. L. Rev. at 494 & n.152).

The ATS is designed to supply federal jurisdiction over lawsuits alleging such transgressions. And there is no good "reason to conclude that the First Congress was supremely concerned with the risk that [the misconduct of] natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so." *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 47 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). If, for example, an individual in 1789 assaulted a foreign ambassador while acting as an agent of "a private process service company," it seems plain that the First Congress would have wanted to allow recovery "against the company on whose behalf he was

acting." U.S. *Kiobel* Br. at 24. The same problems that made it insufficient to leave suits against natural-person defendants to the vagaries of potential state-court jurisdiction would have plagued putative suits against corporate defendants.

An early opinion from the Executive Branch bolsters this conclusion. In 1794, several U.S. citizens joined a French privateer fleet to attack and plunder the British colony in Sierra Leone. In response, Attorney General William Bradford made clear his understanding that the ATS allowed companies, as well as individuals, to bring a civil suit. He wrote that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States." 1 Op. Att'y Gen. 57, 59 (1797). Given that corporations were understood to be able to "sue *or* be sued," 1 Blackstone, *Commentaries* *463 (emphasis added), Congress would not have empowered corporations to sue under the ATS while exempting them from being sued.

A later Attorney General confirmed as much. Addressing a boundary dispute over the diversion of water from the Rio Grande, Attorney General Charles Bonaparte stated that citizens of Mexico could bring a claim under the ATS against the "American Rio Grande Land and Irrigation Company." 26 Op. Att'y Gen. 250, 252 (1907) (Charles J. Bonaparte).

2. Corporate liability is also necessary to effectuate the more general purposes of the ATS: to provide effective compensation for, and deterrence respecting, violations of the law of nations. When an individual acts on behalf of an entity, it often is necessary to hold the entity accountable to provide an "adequate remedy," *Kiobel*, 133 S. Ct. at 1666, and to meaningfully deter future misdeeds.

One of the three classic violations of the law of nations—piracy—illustrates the point. Long before the formation of the United States, English law expressly recognized that corporations could be held liable for piracy. In 1666, Thomas Skinner sued the East India Company for "robbing him of a ship and goods of great value"—an act of piracy committed by the company's agents abroad. *Skinner v. East India Co.*, (1666) 6 State Trials 710, 711 (HL). The House of Lords determined that the "Company should pay unto Thomas Skinner, for his losses and damages sustained." *Id.* at 724.

Early American courts likewise imputed losses to ships, as entities, for piracy. *See The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826). In *The Malek Adhel*, 43 U.S. (2 How.) 210 (1844), this Court explained that ship liability was often necessary for "insuring an indemnity to the injured party." *Id.* at 233. The crew of a pirate ship was likely to be judgment-proof and perhaps even beyond the jurisdiction of U.S. courts. By contrast, a captured ship had substantial value and by virtue of having been captured would be physically present in the United States.

What is more, entity liability for piracy provided "the only adequate means of suppressing the offence

or wrong." *Id.* "By rendering the owners responsible for the captains," the law deterred malfeasance and encouraged owners "to employ none but men of skill, capacity and integrity to navigate their vessels." *Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (High Ct. Err. & App. Pa. 1786) (Rush, J., dissenting).

The considerations animating corporate liability continue to apply with full force today. Statutory tort actions—now, as in 1789—are "designed to provide compensation for injuries arising from the violation of legal duties and thereby, of course, to deter future violations." *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted). Individual perpetrators of human rights violations—now, as in 1789—are frequently judgment-proof, and often beyond the personal jurisdiction of U.S. courts. And corporations—now, as in 1789—are more likely to avoid committing grave misdeeds if they are subject to suit for damages for corporate actions that cause injury.

II. *Sosa v. Alvarez-Machain* does not preclude corporate liability.

The Second Circuit in *Kiobel* did not seriously examine the text, history, or purposes of the ATS to analyze the question presented here. Instead, the panel majority asserted that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), dictates that the ATS categorically forecloses corporate liability.

The Second Circuit was wrong. In *Sosa*, the Court announced a two-step framework for determining whether a "claim based on the present-day law of nations" is cognizable under the ATS. *Id.*

at 725. The first step requires plaintiffs to identify a present-day "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724-25. Once plaintiffs have identified such a norm, the second step permits courts to exercise their "residual common law discretion" to define the bounds of the "private cause of action" under the ATS. *Id.* at 738.

The question whether corporations may be held liable under the ATS does not implicate the first step of *Sosa*'s framework. Nor does any aspect of *Sosa*'s second step justify a blanket exemption for corporations from ATS liability.

A. The corporate identity of an actor is irrelevant to *Sosa*'s first step of identifying a norm that supports an ATS claim.

In *Sosa*'s footnote 20—the passage upon which the Second Circuit pinned its reasoning—this Court stated that a question that is "related" to the question "whether a norm is sufficiently definite to support a cause of action" is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 & n.20. The Second Circuit acknowledged that "the Court in *Sosa* was not addressing the question of corporate liability under the ATS." Pet. App. 96a n.31. Nevertheless, it interpreted "footnote 20's fundamental point" to be that courts must "look to *international law* to determine [their] jurisdiction over ATS claims

against a particular class of defendant, such as corporations." *Id.* 93a, 96a n.21. Therefore, absent evidence of a norm of "corporate liability" that is "'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS," the Second Circuit reasoned, ATS plaintiffs cannot sue corporations. *Id.* 99a (quoting *Sosa*, 542 U.S. at 725). And conducting that inquiry, the Second Circuit further concluded that "corporate liability is not a norm of customary international law." Pet. App. 100 (capitalization removed).

The Second Circuit misinterpreted *Sosa.* Footnote 20 is concerned solely with when state action is an element of a norm of customary international law. It does not bear at all on the question whether, if private persons may be sued for violating a particular norm, those private persons can include juridical persons such as corporations.

1. *Sosa*'s footnote 20 observes that some international-law norms of conduct do not require state action, while others do. *Sosa*, 542 U.S. at 732 n.20. This distinction is well established in international law. Genocide, war crimes, crimes against humanity, and many other norms do not require state action. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]; Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

In contrast, torture generally requires state action. The Torture Convention defines "torture" as certain conduct done "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention]. This is because torture by a state actor "affect[s] the relationship between states or between an individual and a foreign state . . . for their common good." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (quotation marks and citation omitted); *see also Sosa*, 542 U.S. at 715. Torture by a private actor, while reprehensible, does not rise to that level.[6]

Footnote 20 provides no basis to distinguish corporations from other non-state actors as potential ATS defendants. To the contrary, the footnote groups private corporations together with other private actors, stating that "if the defendant is a private actor *such as* a corporation or an individual," a court must consider whether private actors are capable of violating the international-law norm at issue. *Sosa*, 542 U.S. at 732 n.20 (emphasis added).

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[6] Similar dichotomies, of course, exist under U.S. law. The prohibitions in the Bill of Rights, for example, apply to state actors but not to private actors. By contrast, the Thirteenth Amendment's prohibition against slavery applies both to governmental and private actors. *See United States v. Kozminski*, 487 U.S. 931, 942 (1988).

In a concurring opinion, Justice Breyer likewise treated private individuals and private corporations as interchangeable, explaining that the norm on which an ATS claim rests must "extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id.* at 760 (Breyer, J., concurring in part and concurring in the judgment).

The cases cited in footnote 20 confirm that the Court was concerned only with the distinction between state and private action (and not with drawing distinctions among classes of culpable private actors). The footnote cites two cases: (1) *Kadic v. Karadžic*, 70 F.3d 232, 239 (2d Cir. 1995), where the Second Circuit held (in this Court's words) that there *was* a "sufficient consensus in 1995 that genocide by private actors violates international law"; and (2) *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), in which Judge Edwards concluded (again, in this Court's words) that there was an "insufficient consensus in 1984 that torture by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20. Whereas the defendant in *Kadic* was a natural person, 70 F.3d at 237, the defendants in *Tel-Oren* were juridical persons, 726 F.2d at 775. Yet when referencing the defendants in the cases, the *Sosa* Court simply called both "private actor[s]." *Sosa*, 542 U.S. at 732 n.20.

This lack of any distinction between natural and juridical persons is not surprising. There is no international-law norm "that requires, or necessarily contemplates, a distinction between natural and juridical actors." U.S. *Kiobel* Br. at 20. Rather, most norms specify only the conduct prohibited, not the

identity of the perpetrator. This implies that any actor who engages in that conduct violates the norm. For instance, the Genocide Convention defines genocide to include "any of the following acts" committed with intent to destroy a group, making no mention of the identity of the malefactor. Genocide Convention art. 2. And Common Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War similarly prohibits "the following acts" against persons taking no active part in hostilities, without specifying the identity of the perpetrator. Common Article 3(1).

Nor would there be any reason for a norm to distinguish between natural persons and juridical entities. Corporations can violate international-law norms just as natural persons can. For example, one of the Nuremberg Military Tribunals explained that "juristic persons" can "violat[e] international law" when they "exploit the military occupancy by acquiring private property against the will and consent of the former owner." 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1132 (1952). Similarly, entities are capable of committing piracy: Somali pirates operate like limited partnerships in which investors contribute money, weapons, and equipment in exchange for a share of the profits from illicit operations. *See* United Nations, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853* (2008), U.N. Doc. No. S/2010/91, at 99 (Mar. 10, 2010); *see also* Pet. App. 154a-159a & 157a n.10 (Leval, J., concurring only in the judgment in *Kiobel*).

In the end, therefore, the question of corporate liability under the ATS is really just a remedial question. And while international law requires consensus on the content of substantive norms, "[i]nternational law itself . . . does not require any particular *reaction* to violations of law." Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) (emphasis added). It leaves remedial questions instead to domestic law. *See* 2 Restatement (Third) of United States Foreign Relations Law §§ 901-07 (1987); Eileen Denza, *The Relationship Between International and National Law*, *in International Law* 411, 411 (Malcolm D. Evans ed., 3d ed. 2010); *see also The Mary Ford*, 3 U.S. (3 Dall.) 188, 190 (1796) (Lowel, J.) (plaintiff in lawsuit involving law of nations should be "compensated . . . in such pecuniary satisfaction, as the laws of particular States have specially provided"). That being so, U.S. courts may, *as a matter of U.S. law*, "impose civil liability on corporations for . . . violations of customary international law." William S. Dodge, *Corporate Liability Under Customary International Law*, 43 Geo. J. Int'l L. 1045, 1050 (2012).

2. Even if *Sosa* required a plaintiff to show that corporate liability itself is part of a given international-law norm, there would still be no basis for categorically barring corporate liability under the ATS. One central thread running through petitioners' claims here, the financing of terrorism, demonstrates the point.

The International Convention for the Suppression of the Financing of Terrorism—which has been ratified by 188 countries, including the

United States—expressly addresses the liability of legal entities that support terrorism. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197. The Convention explicitly requires each signatory state to "take the necessary measures" in its domestic laws "to enable a *legal entity* located in its territory or organized under its laws to be held liable" for violating the Convention. *Id.* art. 5 (emphasis added). Accordingly, even the corporate respondents in *Kiobel* conceded before this Court that "international law holds corporations liable for some international law violations," such as offenses under "the convention on the suppression of the financing of terrorism, which speaks about legal entities." Tr. of (First) Oral Arg. at 28, *Kiobel*, 133 S. Ct. 1659 (2013) (No. 10-1491).

It is no mystery why corporate liability is necessary to effectively enforce the international norms that are implicated by financing terrorist activity. Financing virtually by necessity involves actors that are juridical, rather than natural, persons. Furthermore, "corporate entities, particularly financial and charitable institutions, are often knowingly exploited to finance or aid in the financing of terrorist groups." S. Exec. Rep. No. 14695, at 26-27 (2001) (statement of Michael Chertoff, Assistant Att'y Gen.); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 30-31 (2010) (explaining that terrorist groups often "systematically conceal their activities behind charitable, social, and political fronts") (quoting M. Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* 2-3 (2006)). Yet, given the "complexities inherent in investigations and

prosecutions relating to terrorist financing," it will ordinarily be impossible to identify the particular individual responsible for maintaining accounts for terrorist organizations or transferring funds to and from those accounts. *See* S. Exec. Rep. No. 14695, at 26. And even if individual wrongdoers could typically be identified, securing jurisdiction and collecting judgments against them would be even more difficult. Corporate liability is the only meaningful option.

B. The corporate identity of an actor provides no basis under *Sosa*'s second step for exempting it from liability as a matter of "residual common law discretion."

Sosa's second step affords federal courts "residual common law discretion" to ensure that causes of action under the ATS are legally sound and judicially administrable. 542 U.S. at 738. None of the guideposts relevant to this Court's common-law-making authority counsels a blanket corporate exemption from liability under the ATS. To the contrary, the touchstones all support enforcing the ATS according to what its statutory text, history, and purposes direct.

1. State common law

In shaping a tort cause of action under federal common law, this Court often looks to how state common law deals with comparable issues. *See, e.g., Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-85 & n.11 (1980) (adopting rule of "clear majority of States"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 (1979) (adopting general Restatement test). That inquiry points unambiguously here toward allowing corporate

liability. Corporate liability is ubiquitous throughout state common law. *See* Restatement (Third) of Agency § 7.03 (2006); Restatement (Second) of Torts § 219 (1965) (surveying states). Regardless of whether the tort involved is an everyday slip-and-fall or a dramatic transgression of public mores, corporations may be held liable under state common law for the misconduct of their agents. *See, e.g.*, *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (Cal. App. Ct. 1981) (corporate liability for failing to cure design defect in Ford Pinto that company had learned would kill numerous people); *Tetuan v. A.H. Robins Co.*, 738 P.3d 1210 (Kan. 1987) (corporate liability for marketing the Dalkon Shield device, which corporation knew would cause infertility in women).

The basic reason for this rule of state common law is simple: "The losses caused by the torts of employees"—particularly where, as here, those employees are acting with management's knowledge and assent—should be "placed upon the enterprise itself." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 69 (5th ed. 1984). As the Supreme Judicial Court of Maine put it in a much-cited decision, dealing not only with compensatory but also exemplary damages for egregious conduct:

> A corporation . . . has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. . . . All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the

> punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment.

Goddard v. Grand Trunk R.R., 57 Me. 202, 223-24 (1869). In sum, when employees commit a tort in service of a corporation, the corporation should be held accountable.

Deviating in the context of ATS litigation from the universal common-law principle of corporate liability for torts would be perverse. As Judge Leval noted: "Adoption of the corporate form has always offered important benefits and protections to business—foremost among them the limitation of liability to the assets of the business, without recourse to the assets of its shareholders." Pet. App. 142a. Therefore, exempting corporations from ATS liability would allow "one who earns profits by commercial exploitation of abuse of fundamental human rights [to] successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form." *Id.* "So long as they incorporate (or act in the form of a trust)," businesses operating in this country would "be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims." *Id.* In short, exempting corporations from ATS liability would effectively grant them a special federal civil immunity for the very worst sorts of conduct.

The Second Circuit shrugged off this counterintuitive result on the ground that granting federal immunity for corporations would still leave them subject to "the domestic laws of any State." Pet. App. 81a. But this putative safety valve gets things exactly backwards. As explained above, the First Congress enacted the ATS precisely because it did not wish for foreign citizens suffering injuries with "potential implications for the foreign relations of the United States" to have to try to bring suit in state court. *Sosa*, 542 U.S. at 727; *see supra* at 22-23. This Court should use its common-law discretion to "fashion[] a remedy that will effectuate that policy," not frustrate it. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 29-30 (1990) (federal common law should avoid "anomal[ies]" respecting state-law remedies).

2. Comparable legislation

This Court also looks to legislation as an "important source" of legal principles that shape the common law. *Miles*, 498 U.S. at 24; *see also Sosa*, 542 U.S. at 726 (noting relevance of "legislative guidance"). Federal statutory causes of action almost always allow corporate liability.

Start with the Antiterrorism Act (ATA), 18 U.S.C. § 2333(a)—the statute under which the U.S.-national plaintiffs in this case sued Arab Bank, alleging substantially the same wrongdoing. *See Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287

(E.D.N.Y. 2015).[7] Like the ATS, the ATA identifies a particular class of plaintiffs—"[a]ny national of the United States"—that may bring suit. 18 U.S.C. § 2333(a). Also like the ATS, the ATA does not limit the class of private defendants that may be held liable. *See* 18 U.S.C. § 2333(a).

As Arab Bank acknowledges, the ATA "creates liability for *anyone*—including corporations—who commits 'acts of international terrorism.'" BIO 30. And this case vividly illustrates why the ATS should follow the same rule. Terrorist bombings can kill U.S. and foreign nationals dining together at the same restaurant or sitting side-by-side on the same commuter bus. *See* J.A. 106-07, 125, 134-35, 144-45. So long as the bombings arise from activities touching and concerning the United States and the foreign nationals satisfy the ATS's other requirements, they should be able to sue the same responsible parties that American victims may.

42 U.S.C. § 1983 is also informative. Congress adopted Section 1983, like the ATS, because state courts had proven "inadequate." *See Wilson v. Garcia*, 471 U.S. 261, 276-77 (1985); *see also Sosa*, 542 U.S. at 716-17. And a critical purpose of Section 1983, like the ATS, is to provide appropriate "compensation to the victims of past abuses." *Owen v. City of Indep.*, 445 U.S. 622, 651 (1980); *see also*

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[7] Section 2333(a) provides: "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States . . . ."

Kiobel, 133 S. Ct. at 1673 (Breyer, J., concurring) (describing the ATS's purposes as including "provid[ing] compensation"). This Court, therefore, has long recognized that corporations may be held liable under Section 1983. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

Corporate liability is a fixture of other federal statutes as well. Corporations, like natural persons, are liable for: maritime torts under the Jones Act, 46 U.S.C. § 30102, and the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302; intellectual-property infringement under the Lanham Act, 15 U.S.C. § 1114, Copyright Act, 17 U.S.C. § 501, and the Patent Act, 35 U.S.C. § 281; fraud under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e, 1692k; retaliation under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, and the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 660(c); housing discrimination under the Fair Housing Act (FHA), 42 U.S.C. § 3613; and defrauding the Government under the False Claims Act (FCA), 31 U.S.C. § 3729.[8]

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[8] For cases addressing the issue of corporate liability under these statutes, see *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014) (SOX); *Cook Cty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125-27 (2003) (FCA); *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (FHA); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 214-15 (1986) (DOHSA); *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 950-51 (8th Cir. 2006) (FDCPA);

Arab Bank tries to compare the ATS to two exceptions to the overwhelming rule that corporations may be held liable in tort: (1) this Court's refusal to create a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for corporate malfeasance committed under the authority of the federal government; and (2) the Torture Victim Protection Act's limitation of liability to individuals. Pub. L. 102-256, § 2, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note); *see* BIO at 29-30. But the reasons for those particular exceptions do not apply to the ATS.

In *Bivens*, this Court created an implied private cause of action against federal officers who violate at least certain provisions of the Bill of Rights. 403 U.S. at 410. (Sovereign immunity forecloses any damages liability against those officers' employer, the United States Government, unless there is a waiver.) But, given the "absen[ce of] statutory authorization" for *Bivens* lawsuits, this Court has for decades refused to extend *Bivens* liability on several dimensions, including to add any "new category of defendants." *Ziglar v. Abassi*, 582 U.S. ___, ___, ___ (2017) (slip op. at 7, 11) (quotation marks and citation omitted). Accordingly, this Court held in *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), that it lacked the authority to subject private corporations to *Bivens* liability. *Id.* at 74.

Karvelis v. Constellation Lines S.A., 806 F.2d 49, 52 (2d Cir. 1986) (Jones Act).

The ATS, by contrast, does not arise from a judicially implied right of action without express statutory authorization. The ATS expressly confers jurisdiction on the district courts to "recognize private causes of action" for "torts in violation of the law of nations." *Sosa*, 542 U.S. at 724. In terms of laying the foundation for causes of action, therefore, the ATS is much more like 28 U.S.C. § 1333. In that statute, Congress also granted jurisdiction on district courts to develop federal common law to adjudicate a particular class of claims (including maritime torts). And this Court has never hesitated under that statute's common-law-making authority to allow corporate liability. *See supra* at 20.

One further factor distinguishes *Bivens* claims from ATS claims. Fully "effective" "alternative state tort remedies" make it unnecessary to extend *Bivens* liability to corporations. *Malesko*, 534 U.S. at 72-74; *see also Minneci v. Pollard*, 565 U.S. 118, 120 (2012). Yet Congress adopted the ATS for the same reason it later adopted Section 1983: because state courts had proven "inadequate." *See Sosa*, 542 U.S. at 717; *Wilson*, 471 U.S. at 276-77. Barring corporate liability under the ATS would thwart the statute's objective.

Respondent's analogy to the Torture Victim Protection Act (TVPA) is even less apposite. The TVPA limits liability to an "individual" acting under color of law of any foreign nation. § 2, 106 Stat. 73. The "plain text" of the statute, therefore, forecloses entity liability of any kind. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 457-58 (2012). That is not so with respect to the text of the ATS, which does not exclude corporate defendants.

At any rate, Congress's reasons for limiting TVPA liability to natural persons do not apply here. The TVPA applies only to violations of international norms that occur under the real or apparent imprimatur of some foreign government. Yet the Foreign Sovereign Immunities Act (FSIA) generally prohibits lawsuits against foreign states. Therefore, Congress limited liability in the TVPA to "individuals" to ensure that the TVPA did not provide a backdoor for suits against foreign sovereigns. H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 4 (1991); S. Rep. No. 249, 102d Cong., 1st Sess. at 7 (1991).

Congress did not confront the same concern when enacting the ATS. The ATS was enacted long before the FSIA occupied the field of foreign sovereign immunity. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-38 (1989). And the ATS, in contrast to the TVPA, allows claims to be brought against state *or* private actors. *See* U.S. *Kiobel* Br. at 27 n.16. Indeed, petitioners' claims here—just like their co-plaintiffs' ATA claims—will not require them to show that the Bank committed the acts that give rise to its liability under the imprimatur of a foreign government.

3. International law

Even though international law does not dictate whether corporations may be held liable for violations of the law of nations, *see supra* at 28-32, it may inform this Court's exercise of its residual common-law discretion. *See, e.g.*, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 403-04, 407 (1975); *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623,

628-29 n.20 (1983) (noting that federal common law respecting international matters is "necessarily informed" by international-law principles). International law, in all its relevant forms, supports corporate liability under the ATS.

a. *General principles.* This Court has frequently consulted "general principle[s] of international law" to determine international-law rules. *Factor v. Laubenheimer*, 290 U.S. 276, 286-88 (1933). "[A] general principle becomes international law by its widespread application domestically by civilized nations." *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *see also* 1 Restatement (Third) of United States Foreign Relations Law § 102(1)(c) (1987). Indeed, to the extent this Court relies here on international law, general principles are particularly informative because, as noted *supra* at 32, international law leaves it to domestic law to determine appropriate remedies for violating international law.

Corporations, like individuals, are subject to liability under domestic tort systems throughout the world. *See* J.A. 464-72 (declaration of expert Ralph G. Steinhardt). Indeed, every comprehensive comparative survey has confirmed that corporate liability is the rule. *See, e.g.*, M. Cherif Bassiouni, *Crimes Against Humanity*, *in International Criminal Law* 379 (2d rev. ed. 1999) ("[A]ll positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages . . . ."). These systems

recognize around the globe "that corporate legal responsibility is part and parcel of the privilege of corporate personhood." *Doe VIII*, 654 F.3d at 53.

This general principle holds firm where, as here, plaintiffs are foreign nationals seeking relief for misconduct that arguably violates the law of nations. *See, e.g.*, *Prosecutor v. TotalFinaElf et al.*, Cour de cassation de Belgique, Arrêt, 28 March 207 Pas. No. P.07.0031.F (2007) (Belg.) (suit in Belgium by Myanmar refugees against an oil company for complicity in crimes against humanity committed in Myanmar); *Dagi v BHP* (1997) 1 VR 428 (Austl.) (suit in Australia by natives of Papua New Guinea against a mining company for damage to their lands in Papua New Guinea); *Caal v. Hudbay Minerals Inc.*, [2011] O.J. No. 3417 (Can. Ont. Sup. Ct.) (QL) (suit in Canada by Guatemalan women against a mining company for negligence resulting in assaults and gang rapes in Guatemala).

b. *Treaties.* To the extent international agreements require particular remedies to be made available, many treaties—including some the United States has ratified—require state parties to adopt measures to establish corporate liability for proscribed actions. The most pertinent example, the International Convention for the Suppression of the Financing of Terrorism, is discussed above. *See supra* at 32-34. Others speckle the landscape. *See, e.g.*, Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. (2004), 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 43, 105th

Cong., 2d Sess. (1998), 37 I.L.M. 1 (1998); International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. I(2), 1015 U.N.T.S. 243; *see also Doe VIII*, 654 F.3d at 48-49 & n.35. *No* such agreements provide special exemptions for corporations from otherwise applicable rules.

Intergovernmental organizations created pursuant to treaties also have addressed states' responsibility to protect against business-related human rights abuses. For example, in 2011, the Human Rights Council of the United Nations approved *The Guiding Principles on Business and Human Rights*, which outlines the respective duties and responsibilities of states and enterprises on human rights. This interpretive guide makes clear that the state duty to protect human rights "can be rendered weak or even meaningless" unless states "take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur." United Nations, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* 22, A/HRC/17/31 (2011). States may discharge this duty by providing for "civil, administrative or criminal liability for enterprises." *Id.* at 11.[9]

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[9] For other authority to this effect, see Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human Rights and Business (2 March 2016), ¶¶ 1, 31-46 (explaining that "Member States should effectively implement the UN Guiding Principles on Business and Human Rights as the current globally agreed

c. *International tribunals.* Downplaying all of the foregoing international-law authority, the Second Circuit in *Kiobel* deemed it "particularly significant" that "no international tribunal of which [it was] aware has *ever* held a corporation liable for a violation of the law of nations." Pet. App. 104a. That observation, even if true at the time, is irrelevant because international tribunals have been authorized to adjudicate only *criminal* liability, and there are important distinctions between civil and criminal liability. In any event, the Second Circuit's understanding was incomplete: other countries' domestic laws, as well as international tribunals, have begun to extend criminal liability to corporations.

i. The reasons international tribunals have withheld criminal liability for juridical entities derive from peculiarities of criminal law and have nothing to do with the question presented here: whether those entities may face civil liability for violating the law of nations.

While U.S. courts generally "see no good reason why corporations may not be held [criminally] responsible for and charged with the knowledge and

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baseline in the field of business and human rights" and recommending as part of this implementation that member states allow civil and criminal liability against business enterprises for violations of international human rights standards); *Case of the Kaliña and Lokono Peoples v. Suriname* Int.-Am. Ct. H.R. (ser. A) No. 12.639 ¶¶ 223-26 (taking note of U.N. Guiding Principles in finding violation of American Convention on Human Rights in case involving activities of private mining companies).

purposes of their agents," *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492-94 (1909), some countries do not see things that way. Criminal law is premised upon "the notion of the individual human being as a conscious being exercising freedom of choice, thought, and action." 2 Int'l Comm'n of Jurists, *Corporate Complicity & Legal Accountability* 57-58 (2008); *see also* 4 William Blackstone, Commentaries *27 ("Punishments are . . . only inflicted for that abuse of that free will, which God has given to a man."). And some countries take the position that corporations cannot possess the *mens rea* necessary to commit crimes because they are artificial entities without individual consciousness or free will. *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1490 (1996).

Still other countries have concerns about the limits on their ability to impose criminal punishment on abstract entities. *See* L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 Mich. L. Rev. 1508, 1523 (1982). A corporation cannot be put in jail; it is "an artificial being, invisible, intangible, existing only in contemplation of law." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 514, 636 (1819) (Marshall, C.J.). Of course, corporations can be the subject of monetary sanctions. But criminal fines are not, in and of themselves, meaningfully different from liability that can already be imposed in civil actions.

These differing approaches to criminal liability—not any doubt about whether corporations

can violate international law—explain why the international community has limited the jurisdiction of international criminal tribunals to natural persons. Take, for example, the International Criminal Court (ICC). The Rome Statute, which established the ICC, is based on the principle of complementarity. The Rome Statute of the International Criminal Court, preamble ¶ 10, art. 1, July 17, 1998, 2187 U.N.T.S. 90. Under that principle, the ICC assumes criminal jurisdiction only when domestic courts are "unwilling or unable genuinely to carry out the investigation or prosecution." *Id.* art. 17(1). Because some countries do not criminally prosecute corporations under their domestic laws, bringing corporate defendants within the ICC's criminal jurisdiction would render complementarity unworkable. *See* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 Berkeley J. Int'l L. 334, 368 (2011).

No such obstacle exists to imposing civil liability. As explained above, civilized countries across the globe agree that corporations may be held liable in tort. *See supra* at 43-44. That type of consensus is enough to confirm the legitimacy of using the ATS to impose civil liability against corporations—just as all agree it is enough to legitimize ATS liability against natural persons, even though no international court has ever imposed civil liability against a natural person. Pet. App. 141a (Leval, J., concurring only in the judgment in *Kiobel*); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1010 (7th Cir. 2011).

ii. Even if corporate criminal liability were relevant, a growing collection of international-law sources indicate that corporations may be held criminally accountable for violating the law of nations.

For starters, the Second Circuit found it "notable" that the charter establishing the Nuremberg Tribunal "granted the Tribunal jurisdiction over *natural persons only*." Pet. App. 106a. But the absence of corporate prosecutions at Nuremberg was "not because of any legal determination that it was impermissible under international law." Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009). In fact, the Nuremberg Tribunal *was* authorized to declare "organization[s]" criminal, even if it lacked the authority to punish them. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the "London Charter"), art. 9, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. And in the trials of executives of the German corporation I.G. Farben—which worked closely with the Nazis as they invaded other countries and seized chemical plants—the Tribunal found "beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben." 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1140 (1952); *see also* J.A. 511-53 (declaration of experts Jennifer Green and Michael Bazyler explaining that Nuremberg-era jurisprudence supports corporate liability).

The Second Circuit ignored this history, focusing instead on the Nuremburg Tribunal's statement that individuals could be criminally punished because "[c]rimes against international law are committed by men, not by abstract entities." Pet. App. 75a (quoting The Nuremburg Trial (*United States v. Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946). But in light of the Tribunal's authority and actions, it is clear that this statement communicated simply that actors other than states could be held liable for crimes against humanity and other violations of international law—the Nuremberg Trials' epochal innovation. It was not meant to lay down any distinction as among non-state actors.

Since Nuremberg, countries have increasingly included corporate criminal liability in their domestic laws implementing norms of customary international law of the sort that give rise to ATS claims. Several nations, including Australia, Belgium, Canada, the Netherlands, and the United Kingdom, impose criminal liability on corporations for genocide, crimes against humanity, and war crimes through legislation incorporating Rome Statute crimes into their domestic laws. Br. of Ambassador David J. Scheffer as Amicus Curiae in Support of Petrs. at 18-19, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Other countries, including Austria, Luxembourg, Spain, and Switzerland, have introduced forms of corporate criminal liability outside the context of human rights violations. *Id.* at 19. Even countries such as Germany and Italy that continue to resist criminal liability for corporations allow sanctions in connection with civil and administrative proceedings that "whilst technically

not criminal in nature, may have similar practical effects." *Prosecutor v. New TV S.A.L. & Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶ 54 (Oct. 2, 2014).

Finally, at least one international tribunal has recently imposed a form of corporate criminal liability. In 2014, the Special Tribunal for Lebanon held that its criminal contempt jurisdiction extended to legal entities. *New TV S.A.L.* at ¶ 74; *see also* Nadia Bernaz, *Corporate Criminal Liability Under International Law: The* New TV S.A.L. *and* Akhbar Beirut S.A.L. *Cases at the Special Tribunal for Lebanon*, 13 J. Int'l Crim. Just. 313, 325-26 (2015). Explaining in a detailed opinion that "[t]he omission of legal persons from the Rome Statute should not be interpreted as a concerted exercise that reflected a legal view that legal persons are completely beyond the purview of international criminal law," the Appeals Panel of the Special Tribunal held that "international human rights standards and the positive obligations arising under therein are equally applicable to legal entities." *New TV S.A.L.* at ¶¶ 46, 60.

4. Foreign relations

Sosa noted that "the possible collateral consequences of making international rules privately enforceable argue for judicial caution" in crafting causes of action under the ATS. 542 U.S. at 727. But even if the Bank is right that this admonition applies in the context of crafting remedies, BIO 23, "caution" does not mean abdication. The ATS was enacted to provide a cause

of action against "common enemies of all mankind [for whom] all nations have an equal interest in . . . apprehen[ding] and punish[ing]." *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring in the judgment) (quoting 1 Restatement (Third) of United States Foreign Relations Law § 404 (1987)). Participating in the type of terrorist activity at issue here fits that description.

Furthermore, there are myriad ways of addressing potential adverse foreign policy consequences in ATS suits without barring corporate liability. To begin, precluding extraterritorial application of statutes "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). And it is now clear that an ATS claim must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669.

"[M]ere corporate presence" in the U.S. does not satisfy this requirement. *Kiobel*, 133 S. Ct. at 1669. Consequently, U.S. courts may now assert jurisdiction over ATS claims against corporations only when the corporations' actions sufficiently affect our national interests.

Indeed, *refusing* to exercise jurisdiction in such circumstances could itself trigger international discord. Here, for example, Israel could justifiably be upset if the United States stood by idly after a bank on our soil—indeed, our currency and banking system in general—were used in furtherance of organized violence directed at that nation's innocent

civilian population. *Cf. Al Rushaid v. Pictet & Cie*, 68 N.E.3d 1, 4, 13 (N.Y. 2016) ("[P]urposeful availment of New York's dependable and transparent banking system" and "the dollar as a stable and fungible currency" to facilitate terrorist activity is "an issue of great importance to the State") (quoting *Licci v. Lebanese Can. Bank, SAL*, 948 N.E.2d 893, 900 (N.Y. 2012)).

Other tools at federal courts' disposal further obviate any claimed need for a categorical bar against corporate liability. The Due Process Clause personal-jurisdiction requirement precludes suing corporate defendants in this country unless (i) they are incorporated or have their principal place of business here or (ii) their activities giving rise to the lawsuit occurred at least partly here. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). Courts have also dismissed ATS actions for reasons of international comity, especially when the State Department has requested such action. *See, e.g.*, *Mujica v. AirScan, Inc.*, 771 F.3d 580, 596-608 (9th Cir. 2014); *cf. Sosa*, 542 U.S. at 733 n.21 (suggesting that courts may exercise "case-specific deference to the political branches"). Courts have the power to dismiss ATS on *forum non conveniens* grounds. *See, e.g.*, *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 384 (S.D.N.Y. 2006). Finally, the political question doctrine forbids the federal judiciary from adjudicating cases if doing so would require resolving sensitive matters committed to the other, politically accountable branches. *See, e.g.*, *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C Cir. 2006).

All told, ATS litigation against corporations is, and will continue to be, rare. But when meritorious

claims arise that are justiciable, it is extremely important that the normal principle of corporate liability apply. Any other rule would undermine the integrity of the common law, as well as the equity of the bargain that gives rise to corporate personhood.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael E. Elsner
John M. Eubanks
Jodi Westbrook Flowers
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Mark Werbner
SAYLES WERBNER P.C.
4400 Renaissance Tower
1201 Elm Street
Dallas, TX 75270

Jeffrey L. Fisher
Counsel of Record
David T. Goldberg
Pamela S. Karlan
Jenny S. Martinez
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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