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 OF *AMICI CURIAE* CERTAIN PLAINTIFFS IN *IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001* IN SUPPORT OF NEITHER PARTY

STEPHEN A. COZEN
ELLIOTT R. FELDMAN
SEAN P. CARTER
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for the Federal Insurance, Vigilant Insurance, and Pacific Employers Insurance Plaintiffs
Counsel for Amici Curiae

* Counsel of Record
[Additional Counsel Listed On Inside Cover]

June 13, 2012

JAMES P. KREINDLER
JUSTIN T. GREEN
ANDREW J. MALONEY III
KREINDLER & KREINDLER LLP
750 Third Avenue
New York, NY 10017
(212) 687-8181

Counsel for the Ashton Plaintiffs

JERRY S. GOLDMAN
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

Counsel for the O'Neill Plaintiffs

RONALD L. MOTLEY
MICHAEL E. ELSNER
ROBERT T. HAEFELE
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
(843) 216-9000

Counsel for the EuroBrokers and Burnett Plaintiffs

CHRIS LEONARDO
ADAMS HOLCOMB LLP
1875 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 580-8803

Counsel for the Cantor Fitzgerald Plaintiffs

ROBERT M. KAPLAN
FERBER CHAN ESSNER & COLLER, LLP
530 Fifth Avenue
23rd Floor
New York, NY 10036-5101
(212) 944-2200

Counsel for the Continental Casualty Plaintiffs

QUESTION PRESENTED

Amici address the following question: Whether the Alien Tort Statute, 28 U.S.C. § 1350, allows federal courts to recognize a cause of action for violations of the law of nations that are committed outside the United States and that cause or contribute to harm within the United States.

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES

OTHER AUTHORITY

TABLE OF AUTHORITIES – continued

INTERNATIONAL AUTHORITIES Page

INTEREST OF *AMICI CURIAE*[1]

On September 11, 2001, al Qaeda operatives hijacked aircraft that crashed into the World Trade Center, the Pentagon, and a field near Shanksville, Pennsylvania, killing nearly 3,000 U.S. citizens and foreign nationals. *Amici* are certain plaintiffs in several lawsuits initiated between August 2002 and September 2004 (the "September 11th Litigation") who seek to hold accountable the individuals, financial institutions, purported charities, and other parties that knowingly provided material support or resources to al Qaeda for more than a decade before September 11, 2001, intending to harm the United States, and thereby provided al Qaeda with the means to carry out the September 11th attacks. Plaintiffs in the September 11th Litigation include family members of the individuals killed in the September 11th attacks, thousands of individuals severely injured as a result of the attacks, and commercial entities that incurred billions of dollars of property damage and other losses as a result of the attacks. The consolidated lawsuits are pending before Judge Daniels in the United States District Court for the Southern District of New York in the proceeding captioned *In re: Terrorist Attacks on September 11, 2001* (Case No. 03 MDL 1570 (GBD)).

Although most plaintiffs in the September 11th Litigation are U.S. citizens, a substantial number are estates, survivors, heirs and family members of those killed or injured who were citizens of other nations

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both parties have filed letters with the Clerk consenting to the submission of all amicus briefs.

(aliens) at the time of their death or injury. The plaintiffs also include alien corporations that do business in the United States and incurred losses because of the attacks. As a result, the complaints in the September 11th Litigation include claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 – as well as claims under the Anti-Terrorism Act ("ATA"), state common law claims, and other claims.[2]

Amici have alleged that certain defendants have undertaken acts abroad designed and intended to further al Qaeda's attacks directed against the United States. Because *amici*'s ATS claims in the September 11th Litigation seek redress for injuries suffered in the United States and caused in part by acts committed abroad, *amici* have a direct and substantial interest in issues concerning the geographic scope of the ATS. In particular, now that this Court has asked the parties to brief the question of the ATS's extraterritorial application, *amici* have a direct interest in ensuring that – however that precise question is resolved – the Court not limit ATS liability where there is a direct nexus to the United States, especially a nexus created by acts abroad causing harm within this nation's borders.

---

[2] Defendants in the September 11th Litigation include corporate defendants as well as individual defendants. The corporate defendants are alleged to be financiers and providers of material support to al Qaeda and include corporate entities designated by the United States and/or the United Nations as supporters of international terrorism. *Amici* have argued that, with respect to the relevant violations of international law, corporations are appropriate ATS defendants, but because the issue for reargument has moved beyond that question, *amici* will not separately address it here.

SUMMARY OF ARGUMENT

Violations of the law of nations often have a cross-border character. A missile fired from Cuba can target U.S. cities, just as pirate fleets in international waters can launch attacks into U.S. waters and against U.S. shipping interests. Examples arising in recent U.S. litigation include assassinations completed in the United States but initiated and supported abroad, as well as the horrific September 11th attacks themselves. As these examples show, violations of the law of nations that occur abroad can be integrally related to a course of conduct targeting the United States. In any analysis of the ATS's extra-territorial scope, this Court should recognize that ATS liability remains appropriate for acts committed abroad that are directed at and cause harm within the United States – and more broadly whenever there is a significant nexus between the violation of international law and the United States.

Several sources of law support this conclusion. Longstanding principles of international law recognize each nation's sovereign interest in redressing harm that occurs within its territory, even when that harm is caused by acts committed within the territory of other sovereigns. In addition, imposing ATS liability would be consistent with U.S. statutes and court decisions, in related areas of law involving foreign and cross-border conduct, that provide redress in U.S. courts for conduct abroad that affects the United States – including especially the Foreign Sovereign Immunities Act. And, because U.S. sovereign interests are so strongly implicated when addressing harm arising in the United States, imposing liability under the ATS is fully consistent with the purposes of the ATS and would present none of the concerns about inter-sovereign conflicts that

arise from extraterritorial applications of the ATS with no nexus to the United States.

The September 11th Litigation illustrates the propriety of recognizing ATS liability for acts committed abroad that are directed against and cause harm in the United States. The gravamen of plaintiffs' complaints is that their injuries suffered in the September 11th attacks have a clear nexus to the defendants' overseas actions, which targeted and were specifically intended to cause harm within the United States. The conduct at the center of the September 11th attacks, hijacking aircraft and providing material support for terrorism, are unquestioned violations of the law of nations that can give rise to liability under the ATS, pursuant to the framework established in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). Because the *Sosa* requirements are satisfied and a direct link exists between defendants' acts committed abroad and the harm plaintiffs suffered in the United States, these claims present a clear case for recovery under the ATS.

Recognition of ATS liability is plainly consistent with the United States' territorial and security interests: the attacks occurred on U.S. soil, just as their supporters abroad intended. In addition, such liability does not regulate acts or perpetrators that lack any U.S. nexus. Moreover, because all nations have a mutual interest in combating cross-border terrorism, other nations benefit from U.S. efforts to hold those who support terrorism responsible for their actions.

For these reasons, ATS claims for acts that have this cross-border character, and implicate core U.S. interests, are different and should be treated differently from ATS claims directed toward matters without a significant nexus to the United States.

Accordingly, even if the Court holds that the ATS's extraterritorial scope is limited, it should make clear that the ATS can support suits directed against acts abroad that cause damage in the United States, particularly where those acts are part of a pattern of conduct targeting the United States.

ARGUMENT

I. VIOLATIONS OF THE LAW OF NATIONS COMMITTED ABROAD CAN CAUSE HARM IN THE UNITED STATES.

In addressing the extraterritorial reach of the ATS, this Court should recognize the special considerations that arise for cross-border tortious activities that violate the law of nations and that have a significant nexus to the United States. While this nexus may arise from actors in the United States that contribute to harm abroad,[3] the clearest case is presented when acts abroad contribute to efforts that target and cause harm in the United States. Any limit on the ATS's "extraterritorial" scope need not, and should not, immunize all "extraterritorial" conduct from the reach of the ATS.

Violations of the law of nations that are committed abroad and that cause harm in the United States might include, for example, a missile fired from Cuba into U.S. territory or pirate activity off the U.S. coast that serves as a launching base for attacks on shipping interests within U.S. territorial waters. See also Restatement (Third) of the Foreign Relations Law of the United States § 402 cmt. d (1987) ("Restatement") (discussing scenarios of "shooting" or

---

[3] *Cf. Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

"sending libelous publications across a boundary" and noting that a nation's jurisdiction in these situations over the "activity outside the state" is "not controversial").

A stark illustration of cross-border attacks is provided by certain assassinations originating abroad and undertaken in the United States that were addressed in *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), and *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980). Both lawsuits involved politically-motivated assassinations that occurred in the United States but were ordered and arranged by foreign governments or foreign officials acting outside the United States. See *Liu*, 892 F.2d at 1421-22 (complaint alleged that the gunmen acted on orders of a senior Chinese intelligence official and that the Republic of China was "involved in the conspiracy" to carry out the assassination); *Letelier*, 488 F. Supp. at 673-74 (the Chilean Republic allegedly "set into motion and assist[ed] in the precipitation of those events that culminated" in the assassination, through acts that were "carried out entirely within" Chile). Both courts concluded that jurisdiction over the foreign sovereigns' acts abroad was certainly proper under the Foreign Sovereign Immunities Act because the acts of assassination occurred on U.S. soil. *Liu*, 892 F.2d at 1433; *Letelier*, 488 F. Supp. at 674. As the *Liu* and *Letelier* courts recognized, acts that cause harm in the United States can be "set in motion" or facilitated by acts that take place abroad.

The September 11th attacks further illustrate the cross-border nature of international law violations committed abroad. The September 11th attacks, of course, harmed individuals and property at the Twin Towers, the Pentagon, and the crash site of United Flight 93 in Pennsylvania. Plaintiffs in the Septem-

ber 11th Litigation allege that such harm directly resulted from violations of the law of nations that were committed overseas, as well as violations committed here. In particular, plaintiffs' lawsuits allege that al Qaeda could not have successfully planned and carried out the September 11th attacks in the United States without a global infrastructure, built over a period of many years in several foreign countries. That infrastructure utilized the financial and logistical support of a vast network of overseas charities, banks, wealthy benefactors, state sponsors, and affiliated terrorist organizations and their operatives – all of whom consciously sought to foster al Qaeda's activities directed against the United States. Of particular note, those defendants who acted abroad did so in violation of the law of nations and with the purpose and intent of harming the United States by supporting al Qaeda's violent activities directed here.

The September 11th attacks also illustrate how violations of the law of nations committed overseas can be integrally related to harm occurring in the United States. The September 11th attacks were the culmination of a complex international scheme that involved years of planning and preparatory activities overseas, including raising, laundering, and distributing funds; recruiting and training operatives; procuring weapons and supplies; and planning the attacks themselves. Accordingly, the attacks were merely the final act in a lengthy chain of planning, support, and logistical activities – virtually all of which took place overseas – that were undertaken to harm the United States.

II. THE ATS ENCOMPASSES VIOLATIONS OF THE LAW OF NATIONS COMMITTED ABROAD AND CAUSING HARM WITHIN THE UNITED STATES.

Violations of the law of nations abroad often have a significant nexus to acts in the United States. While that nexus can take various forms,[4] U.S. sovereign interests and the ATS's legitimate scope are broadly implicated where acts abroad cause intended harm within the United States. The United States' compelling interest in bringing to account persons who cause such injuries is recognized by longstanding principles of international law, the United States' recognition and reconciliation of sovereign immunity principles, and U.S. laws and court decisions that provide redress in U.S. courts for acts abroad that are linked to harm in the United States. Moreover, because U.S. sovereign interests are so strongly implicated when violations of the law of nations cause harm in the United States, liability under the ATS for such acts presents none of the concerns that arise from extraterritorial application of the ATS with no nexus to the United States.

A. International Law Principles Recognize A Sovereign's Interests In Redressing Harm Caused Within Its Borders, Including Harm Caused In Part By Acts Committed Abroad.

Longstanding principles of international law provide that a state has strong interests in redressing harm actually occurring within that state's territory, even when acts giving rise to that harm occur beyond its borders. Most fundamentally, these principles

---

[4] *See* Restatement § 421.

recognize that nations have broad jurisdiction over matters arising in and affecting their territory. See *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812); E. de Vattel, *The Law of Nations* 174, § 245 (N.Y., Samuel Campbell, 1st Am. ed. 1796) ("sovereignty gives . . . the right of command in all the places of the country belonging to the nation. . . . Every thing that happens there is subject to [a sovereign's] authority."); Restatement § 206(a) (a "state" has "sovereignty over its territory"); see also *id.* cmt. b (sovereignty implies a state's lawful "authority to govern in [its] territory, and authority to apply law there"). Indeed, territoriality is not merely a permissible basis for a nation to exercise jurisdiction: it is one of the principal bases. 1 *Oppenheim's International Law* 458 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("Oppenheim") ("[t]erritoriality is the primary basis for jurisdiction"); Restatement § 402 cmt. c ("The territorial principle is by far the most common basis for the exercise of jurisdiction . . . .").

Moreover, a sovereign's interest in events and injuries that occur within its territory is so strong that it may also exercise jurisdiction over conduct *outside* its territory that has or is intended to have substantial effect *inside* its territory. See 1 Oppenheim at 472-78; Restatement § 402(1)(c) (a state has jurisdiction over "conduct outside its territory that has or is intended to have substantial effect within its territory"). This principle of jurisdiction, known as the "effects principle," is "an aspect of jurisdiction based on territoriality." Restatement § 402 cmt. d. And, a state may address conduct within its borders that affects parties in other nations.

Beyond acting based on territoriality, a state also may exercise jurisdiction over conduct abroad that threatens its security. 1 Oppenheim at 470-71; Sir Ian Brownlie, *Principles of Public International Law* 302-03 (6th ed. 2003); Restatement § 402(3) (a state has jurisdiction over "certain conduct outside its territory by persons not its nationals that is directed against the security of the state"). This "protective principle" of jurisdiction is designed to enable nations to address "offenses directed against the security of the state or other offenses threatening the integrity of governmental functions." Restatement § 402 cmt. f.

Violations of the law of nations that cause harm within the United States squarely implicate these sovereign interests, wherever the violations originate. They implicate the United States' territorial interests by causing injuries to persons or property within its borders. Even when the violations occur outside of the United States, they implicate the United States' territorial interests – by operation of the "effects principle" – when they are linked to U.S. harm. And, when the actions threaten U.S. security or the integrity of U.S. government functions, they implicate some of the most fundamental sovereign interests of all, including the nation's very survival.

When such sovereign interests are at stake, a state's jurisdiction includes not only the authority to enact laws, but also the power to provide judicial redress in its courts. 1 Oppenheim at 456 (a state's jurisdiction includes the power to "regulate conduct . . . through its courts"); Vattel, *supra*, at 228, § 84 ("The empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it. It is that, or its sovereign, who is to exercise justice in all the places under his obedience, to take cognizance of the crimes com-

mitted, and the differences that arise in the country."); Restatement, pt. IV, Jurisdiction and Judgments, Introductory Note at 230 (states' jurisdiction includes the authority "to subject persons and things to adjudication in their courts and other tribunals"). Thus, under established international law principles, a nation has authority to provide judicial redress for violations of the law of nations that cause injuries within its borders. Recognizing ATS liability for acts committed abroad that cause intended harm within the United States would be fully consistent with these principles.

B. U.S. Statutes And Court Decisions Addressing Sovereign Interests Impose Liability For Acts Committed Abroad That Cause Harm In The United States.

Recognizing an ATS cause of action for violations of the law of nations abroad that cause harm in the United States also would be consistent with U.S. statutes and court decisions addressing cross-border conduct and designed to reflect international legal principles while accommodating the sovereign interests of the United States and other nations.

1. Through the Foreign Sovereign Immunities Act ("FSIA"), Congress has sought to apply international legal principles and has provided that U.S. courts can assert jurisdiction even over a foreign state when a sufficient nexus exists between the state's acts and the United States – and especially to provide redress for damages caused in the United States by acts that occur abroad. See 28 U.S.C. §§ 1330, 1602 *et seq*. The principles embodied in the Act apply with even greater force to acts of private parties undertaken abroad.

The Act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," *id.* § 1604, unless one of several statutorily-defined exceptions applies. See *id.* § 1605. Two of these statutory exceptions, the "commercial activity" exception and the "non-commercial tort" exception, reflect Congress's view that U.S. courts should provide redress for acts of foreign states that are committed abroad but have a nexus to the United States, including those that affect or cause damages in the United States. See *id.* § 1605(a)(2), (5). This is so even when allowing a remedy directly implicates the foreign sovereigns.

The FSIA's commercial activity exception, *id.* § 1605(a)(2), provides that a foreign state shall not be immune from suits based upon its acts "*outside* the territory of the United States in connection with a commercial activity of the foreign state elsewhere," where those acts "*cause[] a direct effect in the United States*" (emphases added). This provision reflects Congress's view that U.S. territorial interests and international legal principles justify and permit a remedy in U.S. courts for activities beyond U.S. borders, notwithstanding the sensitivities involved in haling foreign sovereigns into U.S. courts.

Similarly, the FSIA's non-commercial tort exception, *id.* § 1605(a)(5), provides that a foreign state is not immune from damages suits "for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or omission of that foreign state" (emphasis added). This provision also illustrates that Congress reconciled U.S. and foreign sovereign interests by providing a remedy in U.S. courts for injuries that "occur[] in the United States" and are caused by the torts of

foreign states, regardless of where the tortious conduct occurs.[5]

2. Congress likewise has acknowledged and reconciled sovereign interests by providing redress in U.S. courts for damages caused in the United States by acts of trade and commerce that occur outside the United States. For example, in 1982, Congress adopted the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which amended the Sherman Act to provide that it "shall not apply to conduct involving trade or commerce . . . with foreign nations," 15 U.S.C. § 6a, *unless* such conduct "has a direct, substantial, and reasonably foreseeable effect" on domestic commerce, imports, and American exporters, *id.* § 6a(1).[6] This exception provides further evidence of Congress's recognition that injuries that occur in the United States provide a legitimate basis for enforcement and redress in U.S. courts, even with respect to commerce and trade activities that occur outside the United States. See generally *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 159 (2004).

In addition, various international trade laws provide remedies for overseas conduct that causes

---

[5] Some courts have held that the FSIA's tort exception only applies where the "entire tort" – both act and injury – occurs in the United States. *See*, *e.g.*, *O'Bryan* v. *Holy See*, 556 F.3d 361, 385 (6th Cir. 2009). The plain language of the provision, however, requires only that the injury or damage occur in the United States, and in many cases such as the September 11th Litigation, acts abroad are linked to a course of conduct, as a matter of primary or secondary liability, that includes tortious acts undertaken in the United States.

[6] The FTAIA also added similar language to the Federal Trade Commission Act, which prohibits unfair methods of competition in commerce. 15 U.S.C. § 45(a)(3).

economic injury to U.S. industries or markets. For example, the countervailing duty provision of the Tariff Act of 1930, 19 U.S.C. § 1671(a), authorizes the Department of Commerce to impose a countervailing duty on imported goods when it determines that a foreign government is providing a subsidy with respect to the goods and "an industry in the United States" is "materially injured" or "threatened with material injury" by reason of the importation of the goods. Similarly, the anti-dumping provision of the Tariff Act, *id.* § 1673, authorizes the Department of Commerce to impose an antidumping duty on foreign merchandise that it determines is being sold in the United States for less than its fair value (*i.e.,* less than the price in its home market), causing "an industry in the United States" to be "materially injured" or "threatened with material injury" by reason of the importation of the goods.

3. This Court and other federal courts, in addressing due process issues in the personal jurisdiction context, have similarly emphasized a jurisdiction's interest in redressing harm arising from acts directed toward it from beyond its borders. This is so because "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 473 (1985) (quoting *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

For example, this Court's cases consistently have recognized that a forum's exercise of jurisdiction over a defendant is consistent with due process when the defendant has "purposefully directed his activities at residents of the forum" and the litigation "arise[s] out of or relate[s] to those activities." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted). The

"purposeful direction" requirement is readily met even in the absence of physical contacts with the forum where the defendant's "intentional conduct [beyond the forum is] calculated to cause injury" within the forum. *Calder* v. *Jones*, 465 U.S. 783, 791 (1984). More recently, the plurality in *J. McIntyre Machinery Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2787 (2011), indicated that a lesser standard applies for non-commercial activity because "in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." Though the immediate facts of *Nicastro* concerned inter-state American disputes, the same principles hold true for international cross-border disputes.

Calder, a case addressing inter-state disputes, illustrates the propriety of exercising jurisdiction over a defendant based on the defendant's acts outside the forum targeted at and causing harm in the forum. *Calder* involved a libel suit brought in California against a writer and an editor who acted outside the forum by contributing to an article for an organization that routinely distributed its magazine in California and other states. This Court rejected the defendants' due process challenge to California's exercise of jurisdiction. It found that the defendants' personal actions in support of the organization were "expressly aimed" at California because they knew of the organization's activities directed toward California and of the "potentially devastating impact" of an article published there. 465 U.S. at 789-90. Because California was the "focal point" of the enterprise's activities and the harm suffered by the plaintiff, *id.* at 789, this Court concluded that the defendants must "reasonably anticipate being haled into court there," *id.* at 790 (internal quotation marks omitted).

Drawing on *Calder*'s logic, several courts have held that U.S. courts can certainly exercise personal jurisdiction over alleged terrorists for acts they committed abroad when those acts were "calculated to cause injury" within the United States. *Id.* at 791; see, *e.g.*, *Mwani* v. *bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005) (finding personal jurisdiction over overseas defendants who "engaged in unabashedly malignant actions directed at [and] felt in this country") (internal quotation marks omitted; alteration in original); *United States* v. *Yousef*, 327 F.3d 56, 112 (2d Cir. 2003) (due process test applied to a defendant charged with terrorism offenses who bombed a Philippine Airlines jet abroad, injuring only non-U.S. persons – but who did so in preparation for an attack on U.S. airlines that never came to pass); *Wultz* v. *Islamic Rep. of Iran*, 755 F. Supp. 2d 1, 35 (D.D.C. 2010) (finding personal jurisdiction over overseas financial services provider because the terrorist organization "purposefully directed terrorist activities toward the United States with the allegedly knowing support of" the financial services provider). Harm to the United States caused by acts abroad gives rise to jurisdiction and justifies the imposition of liability on those who cause that harm.

4. Finally, federal civil and criminal laws that address terrorism and material support for terrorism reflect Congress's determinations that U.S. courts should be available to address injuries resulting from conduct that occurs outside of the United States when it threatens U.S. citizens and security interests. For example, Congress enacted the Anti-Terrorism Act ("ATA") pursuant to its Constitutional authority to define and punish violations of the law of nations. See AEDPA, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996) (note following 18 U.S.C.

§ 2339B (Findings and Purpose)). That Act provides a damages action for U.S. nationals injured by acts of international terrorism and directly addresses cross-border activity. 18 U.S.C. § 2331(1)(C) ("international terrorism" defined as "activities that . . . occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries").

Related criminal provisions reflect these same Congressional determinations. See, *e.g.*, 18 U.S.C. § 2339A (prohibiting material support to terrorists); *id.* § 2339B (prohibiting material support or resources to foreign terrorist organizations); and *id.* § 2339C (prohibitions against the financing of terrorism). These provisions, too, provide for U.S. criminal jurisdiction in regard to overseas conduct that harms U.S. interests, here or abroad. See, *e.g.*, § 2339C(b)(2)(C)(ii) (jurisdiction exists over any offense that "takes place outside the United States" and was "directed toward" any "person or property within the United States"); see also *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (citing additional federal criminal statutes that "contemplated the assertion by a United States court of jurisdiction over a foreign national for terrorist activities committed abroad").

C. Imposing ATS Liability For Acts Committed Abroad That Cause Harm In The United States Is Consistent With The Purposes Of The ATS.

This Court held in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), that the drafters of the ATS were principally concerned with creating a judicial remedy for those violations of the law of nations that "threaten[ed] serious consequences in international affairs." *Id.* at 715. That is, the principal purpose of the ATS is to make U.S. courts available to redress

injuries to aliens in circumstances where doing so is necessary to avoid conflict with other nations or to promote international comity. See *id.* at 715-18. Recognizing an ATS cause of action for violations of the law of nations that cause harm in the United States, even if the violations are committed abroad, is consistent with this purpose.

As the Court explained in *Sosa*, under the Articles of Confederation, the Continental Congress was "hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Id.* at 716 (quoting J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893)). The federal government's inability to "vindicat[e] . . . the law of nations," *id.* at 717, in turn caused friction with foreign governments. This was illustrated by two incidents involving injuries to foreign ambassadors in Philadelphia and New York that prompted formal requests for redress from their governments – requests the federal government was powerless to honor. *Id.* at 716-17 & n.11. Because the newly-formed nation could ill-afford to provoke disputes with stronger nations, the drafters of the Constitution and the First Congress undertook to ensure that the new federal judiciary could redress harm to foreign nationals, including by enacting the ATS. *Id.* at 717-18.

Sosa also held that the drafters of the ATS recognized piracy as an offense against the law of nations that "admitt[ed] of a judicial remedy and at the same time threaten[ed] serious consequences in international affairs" if no such remedy were available. *Id.* at 716. The Court explained that customary international law required nations to prosecute and provide redress to victims of piracy because pirates are "*hostis humani generis*, an enemy

of all mankind." *Id.* at 732 (internal quotation marks omitted); see also *id.* at 749 (Scalia, J., concurring) (pirates are "hostile to all nations and beyond all their territorial jurisdictions"); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (pirates are "enem[ies] of the human race"). Because pirates operate outside the jurisdiction of any state, nations came to the mutual agreement that any nation that obtained custody of pirates could assert jurisdiction over them. See *Smith*, 18 U.S. (5 Wheat.) at 162-63 (noting that pirates are "not under the acknowledged authority, or deriving protection from the flag or commission of any government" and describing "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity"). As a result, ATS actions that provide redress for harm caused by piracy promote, rather than threaten, international comity because they are consistent with the "general practice" that all nations follow and have come to expect. Indeed, the United States "performs something of an international public service by supplying a customary international law cause of action in federal court against illegal conduct on the high seas." *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 79 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Recognizing ATS actions where foreign nationals are harmed in the United States, even when the defendants' acts causing that harm occurred elsewhere, would be consistent with the purposes of the ATS. Like the injuries suffered by foreign ambassadors that prompted Congress to enact the ATS, harm suffered by aliens within the United States is certainly of concern to their home nations. Whether or not the United States is formally obliged

under international law to provide the aliens with judicial remedies, other nations would naturally expect the United States – the sovereign over the locus of injury – to take the lead in holding the offenders responsible for the injuries caused by their actions. At the very least, the foreign policy interests of the United States identified in *Sosa* are furthered by its taking robust measures to permit aliens to seek redress for injuries occurring while they are within our borders.

Moreover, in situations where the overseas acts harm aliens in the United States as well as the citizens of other nations – as in the case of international terrorism or other cross-border activities that nations have a mutual interest in combating – the ATS's purpose to promote international comity would be furthered by recognizing claims under that statute where there is a nexus to the United States. As with piracy, allowing private damages actions under the ATS in such cases would be "something of an international public service." *Exxon*, 654 F.3d at 79 (Kavanaugh, J., dissenting). At least where a significant nexus exists with the United States, allowing ATS actions for overseas conduct that is universally condemned would be appropriate because "[i]t is no infringement on the sovereign authority of other nations" for the ATS to "provide[] a domestic forum for claims based on conduct that is illegal everywhere." *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (en banc), *petition for cert. filed*, 80 U.S.L.W. 3335 (Nov. 23, 2011) (No. 11-649).

D. Imposing ATS Liability For Acts Committed Abroad That Cause Harm In The United States Would Not Give Rise To The Concerns Presented By Claims That Involve No U.S. Harm.

Liability under the ATS for violations of the law of nations that cause harm in the United States is fully supported by international law, principles recognized in U.S. statutes and court decisions, and the purposes of the ATS, and also does not implicate the diplomatic and foreign relations sensitivities potentially presented by suits that do not involve such harm. Judges, commentators, and foreign states have expressed concerns about ATS suits that assertedly have "no American nexus."[7]

Whatever concerns are raised by ATS suits that have "no American nexus," they do not arise with respect to claims brought by aliens that seek compensation for damages they suffered in the United States. This is equally so when acts abroad contribute to a course of conduct that targets the United States and has cross-border effects. As shown in Section IIA, *supra*, the exercise of U.S. court jurisdiction over such claims is not "illegitimate"; to the contrary, it is fully consistent with well-established principles of sovereign jurisdiction. As a result, ATS suits that seek to redress injuries suffered in the United States fit comfortably within the established international law framework and pose no risk of

---

[7] *Sarei*, 671 F.3d at 817 (Kleinfeld, J., dissenting); *see also Exxon*, 654 F.3d at 78 (Kavanaugh, J., dissenting); Br. for Respondents at 55 (Jan. 27, 2012); Br. of *Amici Curiae* BP America, et al. at 5-24 (Feb. 3, 2012); Br. of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents at 3-4 (Feb. 3, 2012).

regulating conduct exclusively occurring in and affecting a foreign state. When ATS claims are brought to redress injuries that occur in the United States, no foreign state can legitimately argue that the United States is improperly intruding into purely internal affairs or overstepping U.S. jurisdiction by addressing matters unrelated to the United States.

III. THE SEPTEMBER 11th LITIGATION SHOWS WHY ATS LIABILITY EXISTS FOR ACTS COMMITTED ABROAD THAT ARE DIRECTED AGAINST AND CAUSE HARM IN THE UNITED STATES.

As noted, the plaintiffs in the September 11th Litigation include aliens (or their survivors and representatives) who have brought ATS claims against numerous individuals and organizations alleged to have facilitated and provided material support to the international terrorists who perpetrated the September 11th attacks. The gravamen of plaintiffs' complaints is that the injuries they suffered in the September 11th attacks were a direct result of defendants' overseas actions targeted at and specifically intended to cause harm within the United States. This case thus illustrates how violations of international law committed abroad that are directed against the United States and integrated into cross-border activities can cause harm in the United States, and therefore fall squarely within the concerns of the ATS.

Plaintiffs' complaints allege in detail the clear nexus between the harm they suffered in the United States and the defendants' overseas acts. For example, plaintiffs allege and describe in the pleadings how defendants conspired with Osama bin Laden and al Qaeda to "murder and injure United States citizens throughout the world, including in the

United States" by, among other things, "establishing front companies, providing false identity and travel documents, [and] financing terrorist operations." Sixth Amended Consolidated Master Complaint ¶ 35, *Ashton*, et al. v. *Al Qaeda Islamic Army*, et al., 03 MDL 1570(RCC) (S.D.N.Y. Sept. 30, 2005). Plaintiffs likewise allege that defendants "conspired with [bin Laden and al Qaeda] to raise, launder, transfer, distribute and hide funds . . . in order to support and finance their terrorist activities, including, but not limited to, the September 11th attacks." *Id.* ¶ 22. Furthermore, plaintiffs plainly allege that "[t]he September 11th Attack was a direct, intended and foreseeable product of a larger conspiracy among the defendants, to commit acts of international terrorism against the United States, its nationals and allies." First Amended Complaint With Incorporated More Definite Statements, RICO Statements and Rule 15(d) Supplemental Pleadings, Filed In Accordance With Paragraph 13 Of Case Management Order Number 2, ¶ 72, *In re: Terrorist Attacks on Sept. 11, 2001*, No. 03 MD 1570 (GBD) (S.D.N.Y. Sept. 30, 2005). This coordinated action included "the provision of material support and resources" by each defendant to al Qaeda, which was intended to foster that organization's efforts targeted at the United States. *Id.* ¶ 73.[8]

Such allegations state claims under the ATS for redress of violations of customary international law under the framework that this Court established in

---

[8] Plaintiffs in the September 11th Litigation assert both theories of primary liability (based on defendants' own actions that facilitated al Qaeda's attacks) and secondary liability (based on defendants' aiding and abetting of al Qaeda's specific terrorist acts – airplane hijackings – that caused damages in the United States).

Sosa. This Court held in *Sosa* that the ATS permits tort claims "based on the present-day law of nations" as long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of infringement on the rights of ambassadors, violation of safe conducts, and piracy. 542 U.S. at 724-25. Courts applying *Sosa* typically have looked to three factors to determine whether a claim adequately alleges a violation of a norm of customary international law that is cognizable under the ATS: the violated norm must be "(i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern [to States.]" *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 177 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010).

The conduct at the center of the September 11th attacks, aircraft hijacking, has long been recognized as a violation of international law that meets these criteria and can give rise to tort claims under the ATS. See, *e.g.*, *Viet. Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*, 517 F.3d 104, 116 (2d Cir. 2008); *Kadic* v. *Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). Aircraft hijacking often occurs outside of the United States and, indeed, outside the territory of any nation.

In addition, petitioners' claims in the September 11th Litigation are cognizable under the ATS because providing material support to terrorism is a violation of a customary international law norm that is universal, obligatory, specific and of mutual concern to states, even if the relevant acts do not occur in the United States. In assessing an international legal norm, courts consider whether the conduct is condemned by binding United Nations Security Council resolutions, banned by international conventions and

treaties ratified by an overwhelming majority of states, and repudiated by individual nations. See, *e.g.*, *Flores* v. *S. Peru Copper Corp.*, 414 F.3d 233, 256-57, 261-62 (2d Cir. 2003). In addition, because the Constitution specifically gives Congress the power to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, courts also accord deference to Congress's determination of what conduct constitutes an offense under the law of nations. See, *e.g.*, *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

That an international law norm exists, for purposes of meeting *Sosa*'s standard, against the commission of and material support of terrorism is shown through: (1) U.N. Security Council resolutions that condemn international terrorism and support for international terrorism;[9] (2) numerous international conventions and treaties that condemn specific forms of international terrorism and obligate nations to take steps to combat these acts;[10] (3) the domestic

---

[9] *See, e.g.*, S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (condemning the terrorist bomb attacks on the U.S. embassies in Kenya and Tanzania); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (condemning the use of Afghan territory for the sheltering and training of terrorists); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); *see also* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (*"[r]eaffirming*" that all acts of international terrorism "constitute a threat to international peace and security").

[10] *See*, *e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; and International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284. In

laws of numerous individual nations that "prohibit conduct that is similar to providing material support for terrorism," *United States* v. *al Bahlul*, No. 09-001, 2011 U.S. CMCR LEXIS 3, at *138 (C.M.C.R. Sept. 9, 2011); see also *id.* at *138-48 (collecting laws); and (4) Congressional determinations and the conclusions of U.S. courts.[11]

In this regard, international terrorism shares many of the attributes of piracy – a congruence that further reinforces the conclusion that plaintiffs' ATS claims in the September 11th Litigation are squarely within the scope of that statute, indeed at its core. Terrorism has been described as "basically piracy on a global scale, both on and off the water." Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 Rutgers L.J. 159, 217 (2008). Like piracy, international terrorism is universally condemned and all nations share a mutual interest – and mutual obligation – to combat it. See, *e.g.*, 1999 Financing Terrorism Convention, Preamble ("the financing of terrorism is a matter of grave concern to the international community as a whole"); S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) ("the suppression of acts of international terrorism is essential for the maintenance of international peace and security" and, therefore, "*reaffirming* the determination of the

---

addition, the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 ("1999 Financing Terrorism Convention"), broadly prohibits the provision or collection of funds with the intention that they will be used to carry out terrorists acts.

[11] *See*, *e.g.*, Anti-Terrorism Act, 18 U.S.C. § 2333 *et seq.* (creating a civil cause of action for U.S. nationals injured by acts of international terrorism); *Almog* v. *Arab Bank, PLC*, 471 F. Supp. 2d 257, 284-85, 291-94 (E.D.N.Y. 2007) (finding that plaintiffs stated ATS claims based on allegations that defendants committed acts of international terrorism).

international community to eliminate international terrorism in all its forms and manifestations"); *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010) ("'international cooperation is required for an effective response to terrorism'") (quoting AEDPA, Pub. L. No. 104-132, § 301(a)(5), 110 Stat. at 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)).

International terrorism is also closely analogous to piracy because it is an inherently cross-border activity that is often perpetrated by individuals or organizations – al Qaeda being a prime example – that act outside of any nation's jurisdiction. See Swanson, *supra*, at 214 ("Like pirates, modern terrorists live in a world with few boundaries. Modern travel and communications systems make it easy for terrorists to strike across traditional boundaries and problematic for states to capture and try them."); Thomas M. Pohl, *From Blackbeard to Bin Laden: The Re-emergence of the Alien Tort Claims Act of 1789 and its Potential Impact on the Global War on Terrorism*, 34 J. Legis. 77, 92 (2008) (pirates and international terrorists have "strong parallels," including that they are "rogue nomads" who do "not consider themselves to be citizens of a particular nation"). In addition, piracy and terrorism are both "major impediment[s] to trade among 'civilized' states." Swanson, *supra*, at 214. Thus, terrorism, like piracy, has prompted widely-adopted international agreements, such as those cited above, that commit nations to take cooperative measures to suppress and punish it.

Because plaintiffs' ATS claims in the September 11th Litigation satisfy the requirements of *Sosa* and a direct nexus exists between defendants' acts committed abroad and the harm that plaintiffs

suffered in the United States, these claims present a clear case for recovery under the ATS. Recognition of ATS liability is consistent with the United States' traditional sovereign interests discussed in Section IIA, *supra*, because the September 11th attacks plainly violated U.S. territorial interests. After all, they involved the hijacking of U.S. airplanes in New York, Pennsylvania, and Washington D.C. and the use of those airplanes to damage and destroy buildings in New York and near Washington, D.C. The egregious, resulting loss of life and property within the nation's territory justified the United States' use of existing criminal and civil laws, including the ATS, to prosecute and obtain complete redress from those responsible for the attacks. Indeed, those effects fully justified the use of military force.

In addition, imposing ATS liability for the overseas conduct of those responsible for the September 11th attacks is appropriate based on the United States' international legal authority to address conduct that has or is intended to have substantial effects within the United States. The devastating attacks on September 11th had substantial effects within the United States, just as was intended by al Qaeda and by those who provided material support to that terrorist organization, which had publicly declared its objective to direct its violent conduct toward the United States. For the same reasons, the United States' sovereign interest in exercising jurisdiction over overseas conduct directed against its security is also implicated here.

The United States' provision of judicial redress for the injuries caused within its own borders by the September 11th attacks does not illegitimately infringe on the sovereign interests of other nations.

Applying the ATS to acts abroad in these circumstances is not regulating conduct of concern only to other nations or unrelated to the United States: instead it reaches inherently cross-border conduct with effects within the United States. Indeed, other nations have an interest in the protection of their nationals while they are in the United States, see Restatement § 402(2), and providing those nationals with a cause of action under the ATS to redress injuries that they suffered from the September 11th attacks confers a benefit on them. And, all nations share a mutual interest in combating terrorism and holding those who support terrorism responsible for their actions, as evidenced by the numerous international treaties and conventions that condemn terrorism. See *supra* at 25-28.

CONCLUSION

For the foregoing reasons, however this Court resolves the general issue of the ATS's extra-territorial scope, it should ensure that ATS claims can be maintained against defendants whose acts create a significant nexus to the United States. That nexus clearly exists when a defendant's acts committed abroad cause or contribute to harm occurring in the United States.

Respectfully submitted,

STEPHEN A. COZEN
ELLIOTT R. FELDMAN
SEAN P. CARTER
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
(215) 665-2000

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for the Federal Insurance, Vigilant Insurance, and Pacific Employers Insurance Plaintiffs

JAMES P. KREINDLER
JUSTIN T. GREEN
ANDREW J. MALONEY III
KREINDLER & KREINDLER LLP
750 Third Avenue
New York, NY 10017
(212) 687-8181

Counsel for the Ashton Plaintiffs

JERRY S. GOLDMAN
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

Counsel for the O'Neill Plaintiffs

RONALD L. MOTLEY
MICHAEL E. ELSNER
ROBERT T. HAEFELE
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
(843) 216-9000

Counsel for the EuroBrokers and Burnett Plaintiffs

CHRIS LEONARDO
ADAMS HOLCOMB LLP
1875 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 580-8803

Counsel for the Cantor Fitzgerald Plaintiffs

ROBERT M. KAPLAN
FERBER CHAN ESSNER & COLLER, LLP
530 Fifth Avenue
23rd Floor
New York, NY 10036-5101
(212) 944-2200

Counsel for the Continental Casualty Plaintiffs

Counsel for Amici Curiae

June 13, 2012

* Counsel of Record