NO. 10-1491

In the

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM 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 FORMER UNITED STATES GOVERNMENT COUNTERTERRORISM AND HUMAN RIGHTS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

This brief *amicus curiae* is respectfully submitted by former officials of the United States government who have exercised responsibilities in the area of counterterrorism – seeking to enforce the universal norms of civilized nations that prohibit the heinous acts of aircraft hijacking, aircraft bombing, attacks on diplomats, terrorist bombings, attacks on civilians, and the international financing of terrorism – together with former United States government officials who have exercised diplomatic responsibilities for the protection of human rights.[1] In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *reh'g* en banc *denied*, 642 F.3d 379 (2d Cir. 2011), the United States Court of Appeals for the Second Circuit erred by holding categorically that no corporation, whether foreign or domestic, ever could be held liable under the Alien Tort Statute – not even for direct and deliberate participation in the most egregious and destructive tort or crimes under the law of nations.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party or any other person other than *amici curiae*, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consents are on file or are being lodged herewith.

Amici assert that the eighteenth century historical context of the Alien Tort Statute, 28 U.S.C. § 1350,[2] as well as the contemporary consensus on the need for effective measures in counterterrorism and protection of human rights provides ample basis to conclude that deliberate corporate misfeasance can, on proper facts, violate the law of nations bringing such conduct within the reach of the Alien Tort Statute and that *per se* exclusion of corporations and other artificial business entities from the reach of the Alien Tort Statute may undermine current efforts to combat international terrorism. The Second Circuit's decision would *per se* immunize business entities from civil tort remedies under the Alien Tort Statute even for participation in, and deliberate assistance to, such heinous acts as maritime piracy, aircraft hijacking, aircraft bombing, attacks on diplomats, terrorist bombings, and the international financing of terrorism. This broad exclusion is inconsistent with the longstanding policies and practices of the United States and would additionally undermine this Court's decision

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[2] The entire text of the Alien Tort Statute reads, "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." 28 U.S.C. § 1350.

in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

SUMMARY OF ARGUMENT

Though the broad effect of its ruling was surely unintentional, the wide-ranging decision of the Court of Appeals in the instant case would allow a criminal enterprise such as a band of pirates or a terrorist conspiracy to shield its ill-gotten gains and multiply its capacity for future harm through the simple device of incorporation. While *bona fide* corporations remain important engines of economic growth, artificial business entities exist that use the forms of partnerships, "charities", foundations, and even for-profit corporations as shields for the funding of violent terrorist activity. The breadth of the decision below would allow international commercial entities to protect themselves from civil liability even when they deliberately take part in terrorist financing, by the simple fact of their corporate form. As a matter of text, history, and logic, this cannot have been the intention of the American Congress in 1789, in a newly-independent nation that was alarmed by the terror tactics of pirates on the high seas, including the widespread taking of hostages for ransom. As such, the decision below should be overturned.

Under the teaching of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), elucidation of the scope of the Alien Tort Statute in the developing jurisprudence of the federal courts requires caution in identifying what rules of international law have sufficient clarity and stability to warrant enforcement in damages. But this exercise is not advanced by ruling out an entire class of defendants – for even the corporate form may be misused by international miscreants to fund and profit from the malevolent activities of terrorism and piracy. Indeed, the international treaties that *amici* have helped to enforce during their government service require participating states to take global action to prevent the misuse of corporate entities for purposes of terrorist action and terrorist financing. One key method of thwarting armed attacks by terrorist groups is by shutting down the financing methods that support their work.

ARGUMENT

I. THE ROLE OF CORPORATE LIABILITY WITHIN THE CONFINES OF INTERNATIONAL LAW AS IT PERTAINS TO COUNTERTERRORISM

Throughout the centuries, terror groups have violated the fundamental rules of human rights and the laws of war – by deliberately killing and maiming civilians, as well as by using methods of attack against public places that cause atrocious and disproportionate suffering by civilians. Such cruel tactics have been condemned by international law authorities as much as by nation states, including in nineteenth century America's writings on the law of war. *See* H. W. Halleck, *International Law; Or, Rules Regulating the Intercourse of States in Peace and War* at chapters 13-35 (1865); Francis Lieber at the request of Major-General Henry W. Halleck, *Guerrilla Parties: Considered with Reference to the Laws and Usages of War* (1862).

Though nineteenth century international law allowed a limited "political crime" exception from bilateral extradition arrangements, there was no protection of suspects when the violence was deliberately and maliciously directed against civilians. *Compare* In re Castioni, [1891] 1 Q.B. 149, *with* In re Meunier, [1894] 2 Q.B. 415; *compare also In re Requested Extradition of*

Doherty, 599 F. Supp. 270 (S.D.N.Y. 1985), *with Abu Eain v. Wilkes,* 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). The old canard that "one man's terrorist is another man's freedom fighter" was shown to have limits in the revulsion at actions by political aspirants who engaged in acts of violence that would constitute war crimes if committed by a state. Even revolutionaries have had to obey the laws of war that seek to protect civilians. *Compare* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 4, 51-54, 57-58, June 8, 1977, 1125 U.N.T.S. 609 (rules of war demanding protection of civilians apply in international armed conflicts and also in conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination").

In the modern era, with the achievement of decolonization and the entry of many new states into the world community, there has been a renewed effort to define the limits of permissible violence. The incendiary terrorist movements that have bombed and hijacked aircraft, kidnapped and attacked diplomats, attacked civilians, and attempted to acquire nuclear weapons, have been countered by a series of United Nations treaties

that require states to prosecute or extradite suspects accused of those universal crimes, including aircraft hijacking, aircraft bombing, attacks on diplomats, and terrorist bombing.[3]

[3] Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941 (*entered into force* Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641 (*entered into force* Oct. 14, 1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 1641 (*entered into force* Jan. 26, 1973); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167 *(entered into force* Feb. 20, 1977); International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205 (*entered into force* June 3, 1983); Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 101 (*entered into force* Feb. 8, 1987); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304 (*entered into force* Mar. 1, 1992); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb 24, 1988, 1589 U.N.T.S. 474 (*entered into force* Aug. 6, 1989); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 (*entered into force* Mar. 1, 1992); Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359 (*entered into force* 21 June 1998); International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284 (*entered*

Notably, the United Nations framed a landmark treaty in the late 1990's that forbids the deliberate or knowing financing of terrorism – in particular when a financial entity knows that the funded activity will breach the rules of international law that are supposed to protect civilians against the deliberate use of violence against them.

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into force May 23, 2001); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229 (*entered into force* Apr. 10, 2002); International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2149 U.N.T.S. 256 (*entered into force* July 7, 2007); Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Oct. 14, 2005, available at: http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx (*entered into force* July 28, 2010); Protocol of 2005 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Oct. 14, 2005, available at: http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx (*entered into force* July 28, 2010); Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Sept. 10, 2010, available at: http://legacy.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf (*not yet in force*); Protocol to the 1971 Hague Convention on the Suppression of Unlawful Seizure of Aircraft, Sept. 10, 2010, available at: http://legacy.icao.int/DCAS2010/restr/docs/beijing_protocol_multi.pdf (*not yet in force*).

The premeditated and purposeful funding of terrorist attacks on civilian sites violates the treaty, whether by natural persons or an entity in corporate form. *See* International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 229 ("Any person commits an offence within the meaning of this Convention if that person...provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act"). This key provision is specifically applicable to "entities" under the Convention. *See id.* art. 5(1) ("[e]ach State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a *legal entity* located in its territory or organized under its laws *to be held liable* when a person responsible for the management or control of that *legal entity* has, in that capacity, committed an offence set forth in

article 2. Such liability may be criminal, *civil* or administrative" (emphasis added)).

In addition, with the rise of al Qaeda, the international community has acted through the United Nations to mandate that member states must investigate and freeze the assets of financial entities and individuals that are engaged or have been engaged in terrorist financing. These imperative measures are taken under Chapter VII authority – namely, by Articles 25, 39 and 41 of the U.N. Charter. Such decisions of the Security Council are legally binding on all U.N. member states. *See Flores v. So. Peru Copper Corp.*, 414 F.3d 233, 261 (2d Cir. 2003) ("Under the Charter of the United Nations, the Security Council was afforded the power (in circumstances where no veto is exercised by a 'permanent member') to issue binding resolutions, United Nations Charter, ch. VII"). Furthermore, under Article 103, obligations imposed by the U.N. Charter are deemed superior to any other treaty or source of international law. *See* U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail").

International financial sanctions were initially put in place against the Taliban in Afghanistan by U.N. Security Council Resolution 1267. The Security Council condemned the Taliban "for the sheltering and training of terrorists and planning of terrorist attacks" and deplored the Taliban's provisions of "safe haven to Usama bin Laden" that allowed "him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." *See* S.C. Res. 1267, preamble, U.N. Doc. S/RES/1267 (Oct. 15, 1999). Resolution 1267 was also enacted, in part, as a result of the shocking August 1998 truck bombings of the American embassies in Kenya and Tanzania that killed over 200 civilians and wounded thousands more and the Taliban's refusal to surrender bin Laden and others for their role in those bombings. *Id.* The Security Council instructed all States to "[f]reeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established in paragraph 6." *Id.* at ¶ 4(b). The Committee that was established, which is also known as the "1267 Committee", remains in operation to this day and

was initially created to monitor and interrupt financial flows to the Taliban. *Id.* at ¶ 6.

Following the bombing of the U.S.S. Cole, a U.S. Navy destroyer, on October 12, 2000, in Aden, Yemen, the Security Council issued Resolution 1333 which, in addition to the requirements set forth in Resolution 1267, instructed all States "to take further measures ... [t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the [1267] Committee, including those in the Al-Qaida organization." S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000). Furthermore, the Security Council instructed the 1267 Committee "to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization." *Id.* It is clear that "entities" were specifically targeted by the U.N. Security Council as support mechanisms for the heinous acts committed by bin Laden and his Al Qaeda organization.

And then, with renewed surprise, on September 11, 2001, the conspirators of Al Qaeda caused the deaths of thousands of Americans and foreign citizens in the mass murder attacks

mounted in Washington and New York with three hijacked airplanes, and the crash of a fourth plane in Shanksville, Pennsylvania. The Security Council met on September 28, 2001 to approve a new resolution, adopted under Chapter VII, to mandatorily direct all States to "[p]revent and suppress the financing of terrorist acts." *See* S.C. Res. 1373, ¶ 1(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001). Resolution 1373 further directed all States to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice...." *Id.* at ¶ 2(e). The Security Council also declared that "acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations." *Id.* at ¶ 5.

The task of monitoring compliance with these sanctions was delegated to the 1267 Committee and to the Counter-Terrorism Committee established by Resolution 1373.[4] In the

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[4] In June 2011, the Security Council issued two additional resolutions which separated the 1267 Committee's designation list so that designated Al Qaeda and related entities would be placed on a separate list and designated Taliban and related entities would be placed on another separate list. *See* S.C. Res. 1988, U.N. Doc. S/RES/1988 (June

judgment of the Security Council, cutting off funds was key in quelling the depraved violence of Al Qaeda, the Taliban, and related entities. One may conclude that the logic of the eighteenth century Alien Tort Statute was again vindicated – that imposing grave financial penalties for tortious (indeed criminal) misconduct was one effective way to deter and suppress repetition of the behavior.

In January 2002, the Security Council strengthened its sanctions program against "Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them" by directing all States to: "[f]reeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities;" "[p]revent the entry into or the transit through their territories of these individuals" subject to certain caveats; and "[p]revent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities ... of arms and related materiel of all types ... and technical advice, assistance, or training related to military activities." *See* S.C. Res. 1390, ¶ 2, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

17, 2011); S.C. Res. 1989, U.N. Doc. S/RES/1989 (June 17, 2011).

In multiple resolutions, the Security Council has requested U.N. member states to investigate and report any individuals or entities engaged in or financing terrorist activities. *See, e.g.*, S.C. Res. 1390, ¶ 8, U.N. Doc. S/RES/1390; S.C. Res. 1455, ¶ 7, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004). The names and aliases of these individuals and entities designated by the 1267 Committee – which include associations, companies and corporations, as well as so-called charities or foundations – are published on a list and periodically updated.[5] Under the legally-binding decisions of the Security Council, member states are required to freeze the financial assets of these proscribed individuals and entities, and prohibit any financial transactions with them.

The legal action of the U.N. Security Council unquestionably reflects U.N. member states' wide agreement that the sources of terrorist financing must be intercepted and extinguished, in order to prevent endless repetition of the terrorist attacks that have horrified the world in Mumbai, Jakarta,

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[5] *See* http://www.un.org/sc/committees/1267/pdf/AQList.pdf (last updated December 15, 2011). "The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them" includes in excess of 90 separate "Entities and other groups and undertakings associated with Al-Qaida." *Id.*

London, Madrid, Moscow, New York, Washington, and elsewhere.[6] Federal court competence under the Alien Tort Statute to entertain claims for damages arising out of terrorist attacks is thus fully complementary to the decision of the United Nations community that terrorist entities must be incapacitated. And indeed, the Alien Tort Statute has the advantage of providing a full judicial procedure in which the evidence concerning the financing or commission of a terrorist act can be disclosed and challenged.

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[6] Procedural challenges to the Security Council's listing authority have been offered on the argument that designees, including corporations, deserve an opportunity to question the basis for their inclusion on the sanctions list. The most notable challenges were offered in the *Kadi* case in the European Court of Justice and the *Sayadi* case in the U.N. Human Rights Committee. *See* Joined Cases C-402/05P & C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Comm'n, 2008 E.C.R. I-6351; U.N. Human Rights Committee, Sayadi v. Belgium, U.N. Doc. CCPR/C/94/D/1472/2006 (Oct. 22, 2008). Those cases questioned whether the summary process of multilateral sanctions is consistent with developed norms of due process and human rights. The international conversation is ongoing – with the recent naming of an ombudsperson on the U.N. Sanctions Committee to receive exculpatory information from affected individuals. In any civil proceeding regarding terrorist financing under the Alien Tort Statute, the court would have ample opportunity to address and apply appropriate standards of due process in regard to the prohibited nature of a financial transfer, as well as whether the illicit nature of the transfer was known to the defendant.

So, too, the criminal penalties mandated by the U.S. Congress under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") work in parallel with the civil damages remedies provided under the Alien Tort Statute. The AEDPA was enacted pursuant to Congress' power to "punish crimes in violation of the law of nations" under Art. I, Sec. 8 of the Constitution. *See* AEDPA, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996). Its criminal sanctions affect any American business entity that deliberately assists in the financing of terrorism. It would not make sense to suppose that entities violating a criminal rule should nonetheless be saved from available civil remedies. Congress' declaration that the provision of "material support or resources" to foreign terrorist organizations constitutes a crime in violation of the law of nations, regardless of the identity of the purveyor, indicates the difficulties with the Second Circuit's view that corporate entities engaged in such activities deserve shelter from civil liability.

The AEDPA forbids providing material support or resources to a "foreign terrorist organization" ("FTO") and requires all financial institutions that gain possession or control of the funds of an FTO to retain the funds and report their existence to the Secretary of the Treasury. *See* 18 U.S.C. § 2339B. The scope of the AEDPA is

extraordinarily broad, authorizing "extra-territorial jurisdiction" and covering conduct "outside the United States" so long as the offender is later found in the United States or assists a covered person. *See* 18 U.S.C. § 2339B(d).

The robust commitment of Congress to thwart international terrorist activity reflected in the AEDPA is thus fully consistent with the use of the Alien Tort Statute to permit suits by foreign victims against entities that assist in terror activities. Indeed, the AEDPA itself proceeds on a parallel track, providing for suits by American victims against persons or entities that contribute to terrorist attacks.[7] The architecture of the AEDPA and the Alien Tort Statute are similar, in

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[7] The AEDPA amended the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, to permit civil suits by United States nationals against state sponsors of acts of terrorism that caused "personal injury or death ... by an act of ... extrajudicial killing ... or the provision of material support or resources ... for such an act." *See* 110 Stat. at 1241 (codified at 28 U.S.C. § 1605(a)(7)). Under an amendment to Section 1605(a)(7) which is often called the "Flatow Amendment", a state sponsor can be held responsible for "money damages which may include economic damages, solatium, pain and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." *See* Pub. L. No. 104-208 (Sept. 30, 1996); 110 Stat. 3009, 3009-172. Section 1605(a)(7) has since been amended (*see* 28 U.S.C. § 1605A), but this basic statutory premise remains unchanged. It would be puzzling indeed to read the Alien Tort Statute to exclude effective civil recovery against private entities sponsoring the same acts of terror.

seeking to quell the sources of funding that sustain terrorism, as well as compensating the victims of terrorism's heinous violence.

Furthermore this Court, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), determined that it is constitutional to impose liability on juridical entities, such as charities, that provide material support or resources to designated foreign terrorist organizations. This Court held that "[p]roviding foreign terrorist groups with material support in any form also furthers terrorism by *straining the United States' relationships with its allies and undermining cooperative efforts between nations* to prevent terrorist attacks." 130 S. Ct. at 2726 (emphasis added). Complementary remedies were certainly within Congressional intention as the Court noted: "We see no reason to question Congress's finding that 'international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts....'" *Id.*

Aware that "the financing of terrorism is a matter of grave concern to the international community as a whole," *see* preamble to the International Convention for the Suppression of the

Financing of Terrorism, President George W. Bush issued Executive Order 13224 on September 23, 2011 to block the sources of terrorist financing – acting under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.* The Executive Order found "that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists." *See* Exec. Order No 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001). The Executive Order blocked access to "all property and interests in property" of designated persons who support international terrorism – including individuals, partnerships, associations, corporations, and other organizations, groups, and subgroups – and commanded the appropriate federal agencies to "make all relevant efforts to cooperate and coordinate with other countries, including through technical assistance, as well as bilateral and multilateral agreements and arrangements, to achieve the objectives of this order, including the prevention and suppression of acts of terrorism, the denial of financing and financial services to terrorists and terrorist organizations, and the sharing of intelligence about funding activities in support of terrorism." *Id.*

In short, the provision of effective civil remedies against international terrorism – including by sanctioning business or commercial entities that deliberately countenance terrorist financing – is fully consistent with the views of the Congress and consonant with the plain text of the Alien Tort Statute. The broad holding of the Second Circuit in the *Kiobel* case would preclude foreign citizens who are victimized by terrorism from seeking remedies in the federal courts against corporate entities – whether halawa informal banking arrangements, formal commercial banks, foreign "charities", or foreign corporations – even in cases where the assistance to terrorist schemes was purposeful and malicious. This is not a plausible reading of the Alien Tort Statute.

II. THE CONGRUITY BETWEEN MODERN-DAY TERRORISM AND PIRACY AND THE ROLE OF CORPORATE LIABILITY

Declining to allow suits against complicit business entities under the Alien Tort Statute would have a second perverse consequence – namely, making it harder to protect innocent civilians and international commerce against the persistent phenomenon of piracy, one of the oldest scourges of mankind. In the early American Republic, as now, the need to shut down the

scourge of maritime piracy was a primary goal of American foreign policy. As with terrorism, it would again make no sense to read the Alien Tort Statute as intending special protections for piratical schemes that use the corporate form as a safe haven.

The common law and international law have long considered pirates to be "hostis humani generis" – namely, enemies of all mankind. The exercise of universal jurisdiction was pioneered in the fight against piracy – allowing the trial of a pirate wherever he was captured, regardless of the nationality of the pirate or the victims.[8] Indeed,

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[8] *See, e.g.,* 1 Richard Wildman, *Institutes of International Law* 201 (1849) ("A pirate is a rover and a robber upon the sea, and an enemy of the human race. ... Bynkershoek defines them to be those, who commit depredations on the high seas without the authority of any sovereign. ... As every man by the usage of European nations is justiciable in the place where the crime is committed, pirates, being reputed out of all laws and privileges, are to be tried in what ports soever they are taken. Any pirate may be tried in any country to which he is brought or in which he is found; being an enemy of all mankind he is subject to the jurisdiction of any sovereign with whose power he is brought.")(footnotes omitted). *See also* 10 *Encyclopaedia Americana: A Popular Dictionary of Arts, Sciences, Literature, History, Politics, and Biography* 151 (Francis Lieber ed., 1832) ("Piracy is the crime of robbery and depredation committed upon the high seas. It is an offence against the universal law of society, a pirate being, according to Sir Edward Coke, Hostis Humani Generis. As, therefore, he has renounced all the benefits of society and government, and has reduced himself to the savage state of nature, by declaring

piracy was the model used for the U.N. counter-terrorism treaties that permit even third party states to try or extradite a captured terrorist.

The early years of the American Republic, as a sea-faring commercial nation, were accompanied by grave alarm about the activity of pirates off the Barbary Coast of the Mediterranean Sea, and with hostage taking and ransoms serving as an alternate source of income for the beys of North Africa. The Marine Hymn speaks of sending American forces "to the shores of Tripoli" for just this reason – as part of an attempt to quell these attacks against American commerce and merchant sailors. Piracy also remained a scourge to American shipping in the Caribbean. At the dawn of the republic, piracy was condemned as a universal crime under the law of nations, as well as American law.

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war against all mankind, all mankind must declare war against him; so that every community has a right, by the rule of self-defence, to inflict that punishment upon him which every individual would, in a state of nature otherwise have been entitled to do, for any invasion of his person or personal property.... In the U[nited] States, pirates are tried before the circuit court of the U[nited] States").

See also Natalie Klein, *Maritime Security and the Law of the Sea* 118 (2011) ("universal jurisdiction has been recognized due to the threat to commerce posed by acts of piracy. Pirates are objects of international law inasmuch as their conduct is regarded as so heinous as to forfeit their right of protection of their state of nationality and an accusing state may therefore proceed directly against them") (footnote omitted).

But piracy's dangers are not antique, and the opening decades of the twenty-first century have seen a burgeoning of piracy in the approaches to the Suez Canal in the Gulf of Aden, with piratical activity extending hundreds of miles into the Indian Ocean, as well as off the coast of East Africa. Cargos worth many millions of dollars have been seized, and the ransoms paid by shippers to gain the release of their vessels have amounted to millions of dollars. Sailors and passengers have been held hostage for long periods under dangerous circumstances in Somalia and like areas in East Africa. A multinational maritime task force has been deployed with U.S. naval leadership, but intercepting pirate attacks occurring over such a vast area has proved to be difficult indeed.

Thus, one of the key ways to thwart piracy – the quintessential offense against international law – is to shut down its financial flows.[9] Ransoms of many millions of dollars have been coerced from shipping companies to gain the release of captured sailors, civilians and cargoes[10], and it would make

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[9] *See generally Contemporary Piracy: Consequences and Cures, Report of the Conference on Piracy*, A.B.A. Standing Comm. on Law and Nat'l Security (Oct. 2009).

[10] *See* Robin Geiss & Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* 9 (2011) ("Initially, Somali pirate groups were only loosely organized, partially ill-equipped and fluid in membership. However,

sense to interrupt this financial flow by identifying the entities that have knowingly cooperated with the pirates, whether a foreign bank or corporation, or even an entity that is part of a "halawa" informal banking system.[11] Yet a narrow restriction of the

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according to the [United Nations] Monitoring Group on Somalia, the extraordinarily lucrative nature of piracy has transformed rag-tag, ocean-going militias into well-resourced, efficient and heavily armed syndicates, employing hundreds of people in north-eastern and central Somalia. ... External financiers typically provide the boats, fuel, arms and ammunition, communication equipment and pirate salaries."). *See also id.* at 161 ("The driving force behind the commission of piracy and armed robbery at sea is not of a political character, but rather of a private and economic nature. In fact, political acts were traditionally excluded from the definition of piracy.").

[11] *See* Rep. of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 1916 (2010), transmitted by letter dated July 18, 2011 from the Chairman of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, 228-29, Annex 4.3, U.N. Doc. S/2011/433 (July 18, 2011) ("Case study: pirates and finances – the Hobyo-Harardheere 'business model' ... Piracy financing is more complex than widely believed. The notion that ransom payments disappear straight into pirates' pockets and are then transferred to Dubai, Nairobi and Mombasa to invest [in] real estate and commerce, is simplistic and in some ways misleading. ... A large proportion of the ransom money is invested by pirate leaders in the *'qaad'* or *'miraa'* trade through Somali businessmen in Nairobi. ... The symbiotic dynamic between piracy and the *qaad* trade clearly offers some pirate leaders a way both to invest their proceeds and to generate additional profits which can be invested outside Somalia").

See also Rep. of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008), transmitted by

Alien Tort Statute to exclude suits against corporations and other artificial entities would serve to undermine any of these remedies.[12]

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letter dated Mar. 10, 2010 from the Chairman of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, Annex III, U.N. Doc. S/2010/91 (Mar. 10, 2010) ("Although leadership of pirate networks remains anchored in Puntland and central Somalia, participation in maritime militias and investment in pirate operations is open to a broad cross-section of Somali society. The refined business model guarantees every participant in the operation, if successful, a well-defined percentage or share of the ransom money."); *id.* at Annex VIII ("The battle against piracy can most effectively be advanced by holding the current leaders of Puntland individually and collectively responsible for their complicity in the piracy phenomenon ...").

[12] *Compare* Exec. Order No. 13,536, "Blocking Property of Certain Persons Contributing to the Conflict in Somalia," 75 Fed. Reg. 19,869 (April 15, 2010) (issued under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701 *et seq.*) ("the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia ... constitute an unusual and extraordinary threat to the national security and foreign policy of the United States"). The limited scope of the IEEPA order was noted by a United States Treasury official. *See* David Clarke & Mohamed Ahmed, *Hijacking the law: Somali pirate ransoms skirt American sanctions*, The Daily Star (Lebanon), August 9, 2011 (the "executive order prohibits transactions by U.S. citizens, permanent residents, or entities organized under U.S. law with the 11 people named on the list and Somalia's Al-Qaeda-linked Al-Shabaab rebels ... 'That's where it stops for us, at OFAC' said the official [of the Treasury Department's Office of Foreign Assets Control]. 'From a

III. THE HISTORICAL CONTEXT OF THE ALIEN TORT STATUTE SUPPORTS CORPORATE LIABILITY AND THE PROTECTION OF ALIENS FROM SUCH HEINOUS ACTS AS TERRORISM

The origin of the Alien Tort Statute as part of the Judiciary Act of 1789 further strengthens the view that corporations and other artificial business entities can be sanctioned with civil damages for the deliberate and intentional financing of terrorism. First, the corporate form was widely used in the conduct of commerce and business in the new Republic and corporations' potential tort liability was an established part of American jurisprudence. Second, the provision of a civil damages remedy for harms caused to aliens was seen as an incident of the national duty owed to foreign powers.

A. CORPORATE TORT LIABILITY IN THE EARLY AMERICAN REPUBLIC

First, corporations were, without question, subject to suit in state and federal courts in the early Republic and enjoyed no special form of immunity. As detailed by Joseph Stancliffe Davis,

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sanctions perspective ... we have jurisdiction only to the extent that there's a U.S. person involved'").

business corporations were well-established in the young United States:

> By the end of the eighteenth century, the business corporation, in one form or another, was a familiar figure in all the large towns and through much of the country, notably so in thrifty, enterprising New England. The legislatures were beginning to weary of pressure for special incorporating acts and a beginning had been made in establishing general acts of incorporation for business purposes.

2 Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* (1917), no. IV, at 330. The rights of incorporation were accompanied by incident liability. *See, e.g.*, Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 386 (7th ed., 1861) ("An action on the case will lie against a corporation for a neglect of a corporate duty"); *cf. id.* at 390 ("Numerous as corporations have become, and constantly multiplying as they are, it would be unjust to society, as well as unreasonable in itself, to permit them to escape the consequences of direct injuries inflicted upon citizens by their agents, in the course of their business.") (emphasis omitted).[13]

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[13] The amenability of corporations to suit, including suits in tort, was widely acknowledged by American courts in

the early republic. *See, e.g.*, 1 Nathan Dane, *General Abridgment and Digest of American Law* 468-69, § 39 (1824) ("no case is found in the books to shew that trespass on the case does not lie against a corporation in which no capias lies, and no process to take the body. ... Hence, our court observed, that some actions of trespass lie against an aggregate corporation at common law, as in them no capiatur was entered ... Thus it is clearly settled a corporation is liable in case for a tort in a nonfeasance ... and so it seems it is liable for a misfeasance"); 1 Henry St. George Tucker, *Commentaries on the Laws of Virginia, Comprising the Substance of a Course of Lectures delivered to the Winchester Law School* 153 (1831) ("Corporations we have seen may sue and be sued. ... The statutes of Virginia have simplified the proceeding. The service of a summons on certain officers of the corporation at law has the effect of a capias returned executed, and in chancery of a subpoena returned executed, and the subsequent proceedings are then to go on as in other cases."); William Wetmore Story, *A Treatise on the Law of Contracts Not Under Seal* 244, § 313 (2nd ed., 1847) ("Again, a corporation may sue and be sued for its acts, or upon its contracts, in like manner as if it were a natural person. ... corporations are liable to a special action on the case for neglect and breaches of duty, – and to actions of trespass and *trover* for damages occasioned by the trespasses and torts committed by their agents, under their authority"). *See also* Francis Hilliard, *The Elements of Law: Being a Comprehensive Summary of American Jurisprudence for the Use of Students, Men of Business and General Readers* 45 (1848) ("The ordinary incidents to a corporation are, first to have perpetual succession, and of course the power of electing new members; second to sue and be sued ...."), and *id.* at 46-47, note a ("It was once held, that corporations could not be sued, as such for torts or wrongs but the members must be declared against by name. 1 Chit. 66. But where a corporation is authorized to construct a road, canal, &c., although it may accept or refuse the charter, after acceptance it is bound by the terms of such charter, and an action by individuals injured lies for a breach of them, though not

Specific enumeration of corporate powers in a corporate charter was often "dispensed with by the use of such clauses as 'all privileges and franchise incident to a corporation'" – including the right "to sue and be sued in the corporate name". *See* Joseph Stancliffe Davis, *supra*, no. IV, at 316-17. Even when potential liability for damages was not enumerated, "[w]hen a corporation [was] duly created all other incidents [were] tacitly annexed ... as ... 'To sue and be sued, implead and be impleaded'". Samuel Williston, *History of the Law of Business Corporations before 1800*, 2 Harv. L. R. 105, 116-117 (1888). *See also*, *id.* (citing William Blackstone's adoption of the same conclusion that "incidents which are tacitly annexed to every

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specially provided ... And either trespass or case now lies against a corporation"). *Accord* Edwin Baylies, *Questions and Answers for Law Students* 41, ¶ 36 (1873) (*"Does the law make any distinction between natural persons and corporations, so far as liabilities are concerned?* It does not. ... Whenever any officer or agent of a corporation commits any wrongful act, while in the discharge of his duties as such officer or agent, the corporation is liable to respond in damages for the injury done.*")*, and *id.*, at p. 45-46, ¶ 54 *("Are corporations liable for torts committed by their officers or agents?* They are, if committed while acting within the scope of their business or duties. Thus ... trespass will lie against a corporation aggregate for an act done by their agent within the scope of his authority").

corporation as soon as it is duly erected" include, *inter alia*, "To sue or be sued ...").[14]

Thus, the proper caution urged by Justice Souter in *Sosa* fully allows a remedy in damages for torts that are committed by corporations, or in which corporations are actively complicit. *See Sosa*, 542 U.S. at 725 (calling for "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute," but noting that there may be "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized").

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[14] *Compare* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 Harv. L. R. 105, 123-24 (1888) ("It has often been questioned whether a corporation could commit a tort or a crime. The better opinion in the Roman law seems to have been that the question should be answered in the negative, at least whenever *dolus* or *culpa* was necessary to make the act under consideration wrongful. In England, however, it was very early held that corporations might be liable in actions on the case or in trespass, and afterwards in trover") (footnotes omitted).

B. PROTECTIONS PROVIDED BY THE ALIEN TORT STATUTE FIT WITHIN THE CONTEXT OF EIGHTEENTH AND NINETEENTH-CENTURY AMERICAN LEGAL CULTURE

The reach of the Alien Tort Statute in protecting aliens was not an anomaly in the context of eighteenth and nineteenth century American legal culture. Rather, as the Supreme Court has recently noted, "courts of the United States have traditionally been open to non-resident aliens." *Rasul v. George W. Bush*, 542 U.S. 466, 484 (2004), citing *Discontonto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.")

Indeed, the concern for the protection of aliens was evident in the Judiciary Act of 1789 passed by the first Congress elected under the new Constitution. The Act provided also for alien diversity jurisdiction, that the federal circuit courts could exercise jurisdiction "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity" where an alien was a party and the amount in controversy was over $500. *See* Judiciary Act of 1789, § 11. This

was accompanied by a right of removal of alien cases from state courts to federal circuit court (or to federal district court if the suit was in Maine or Kentucky) at the instance of any alien defendant who was sued for more than $500.

With this evident concern that federal jurisdiction was necessary to protect the rights of aliens in the new republic, it is not surprising that the first Congress also endowed the federal district courts – "concurrent with the courts of the several States, or the circuit courts, as the case may be" – with jurisdiction "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* at § 9.

Indeed, the evident basis for the Alien Tort Statute is fortified by the early tenets of public international law concerning state responsibility, both direct and vicarious. As the famed Lassa Oppenheim stated at the opening of the twentieth century, during his long tenure as Whewell Professor of International Law at Cambridge University, "International Law imposes the duty upon every State to prevent as far as possible its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other States. ... But it is practically impossible for a State to prevent all injurious acts which a private person might commit against a

foreign State. It is for that reason that a State must, according to International Law, bear vicarious responsibility for such acts of private individuals as are incapable of prevention." 1 Lassa Oppenheim, *International Law: A Treatise* 221, § 164 (1912).

The wrongs of private actors did not require direct state compensation, Oppenheim wrote, but a state was well advised to provide a private remedy in damages, in other words, the gravamen of the Alien Tort Statute.[15] *Id.* Wrongs including violation of an ambassador's privileges by arrest or imprisonment, or (in an earlier age) "libels on heads of foreign States" were among the "injurious acts" for which a private remedy was appropriately provided.[16] It was as "a consequence of the vicarious responsibility of States for acts of private persons that ... the Civil Courts of Justice of the

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[15] Lassa Oppenheim, *International Law: A Treatise*, *supra*, at 222, § 165 ("whereas the vicarious responsibility of States for official acts of administrative officials and military and naval forces is unlimited and unrestricted, their vicarious responsibility for acts of private persons is only relative. For their sole duty is to procure satisfaction and reparation for the wronged State as far as possible by punishing the offenders and compelling them to pay damages where required. Beyond this limit a State is not responsible for acts of private persons ...").

[16] *Id.* at 222, § 166. Oppenheim references the list of torts and wrongs under the law of nations as provided in article 96 through 103 in James FitzJames Stephen, *Digest of the Criminal Law of England* (1875).

land must be accessible for claims of foreign subjects against individuals living under the territorial supremacy of such land."[17]

The same reasoning was offered a century earlier by Chancellor James Kent in his celebrated Commentaries on American Law. Chancellor Kent notes in Lecture IX – a discussion entitled "Of Offences against the Law of Nations" – that

> The law of nations is likewise enforced by the sanctions of municipal law; and the offences which fall more immediately under its cognizance, and which are the most obvious, the most extensive, and most injurious in their effects are the violations of safe conduct, infringements of the rights of ambassadors, and piracy.[18]

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[17] *Id.* at 222. *Cf.* Rudiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, in *International Responsibility Today: Essays in Memory of Oscar Schachter* 431 (Maurizio Ragazzi ed., 2005) ("an obligation of the State concerned to intervene" is "established under customary international law in respect of the protection of aliens").

[18] 1 James Kent, *Commentaries on American Law* 170 (1st ed., 1826) ("To these," noted Kent, "we may add the slave trade, which may now be considered, not, indeed, as a piratical trade, absolutely unlawful by the law of nations, but as a trade condemned by the general principles of justice and humanity, openly professed and declared by the powers of

1 James Kent, *Commentaries on American Law* 170 (1st ed., 1826). In plain reference to the circumstances preceding the Alien Tort Statute, Chancellor Kent further noted that

> The congress of the United States, during the time of the American war, discovered great solicitude to maintain inviolate the obligations of the law of nations, and to have infractions of it punished in the only way that was then lawful, by the exercise of the

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Europe"). Chancellor Kent noted the halting debate in the United States as to the nature of the prohibition on the slave trade:

> In the case of La Jeune Eugenie, it was decided in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave trade was prohibited by universal law. But subsequently, in the case of the *Antelope*, the Supreme Court of the United States declared that the slave trade had been sanctioned in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered as contrary to the law of nations, which had been authorized and protected by the usages and laws of all commercial nations.

1 James Kent, *Commentaries on American Law* 187 (1st ed., 1826) (footnotes omitted).

> authority of the legislatures of the several states. They recommended to the states to provide expeditious, exemplary, and adequate punishment, for the violation of safe conducts or passports, granted under the authority of Congress, to the subjects of a foreign power in time of war; and for the commission of acts of hostility against persons in amity or league with the United States; and for the infractions of treaties and conventions to which the United States were a party; and for infractions of the immunities of ambassadors, and other public ministers.

Id. at 171. One may compare the consonant views of Kent's contemporary, the renowned German diplomat and international law scholar, Georg Friedrich von Martens:

> Among an infinity of objects of internal police, we may reckon the care that ought to be taken that no one does nor publishes any thing that may be injurious to a foreign state, whether it be in the person of the sovereign or of the subject. This

> obligation is acknowledged by all the powers of Europe.

Georg Friedrich von Martens, *A Compendium of the Law of Nations, founded on the Treaties and Customs of the Modern Nations of Europe* 88 (William Cobbett trans., 1802).

As such, the origins of the Alien Tort Statute are not so obscure as one might suppose from Judge Henry Friendly's witticism in *IIT v. VENCAP, Ltd*, about the statute's reputation as a "kind of legal Lohengrin." *IIT v. VENCAP, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).[19] Rather, the Congressional debates concerning the Judiciary Act of 1789 focus on the difficulties that foreign plaintiffs had faced in seeking remedies in local state courts for violations of treaty obligations soon after the war of independence. Congressman Theodore Sedgwick of Massachusetts noted that some states' courts refused to enforce the terms of the treaty of peace that ended the seven-year war for independence against Great Britain. "[F]acts have already

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[19] Judge Friendly's *bon mot* was accompanied by the sober observation that "a violation of the law of nations arises only when there has been 'a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se." 519 F.2d at 1015 (citing *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 297 (E.D. Pa. 1963)).

occurred to prove to us how dangerous it would be to make the State Legislatures the sole guardian of the national faith and honor. Already have the United States been hurled down by those arms from a pinnacle of glory to the lowest state of degradation. ... a single concession was the price of an honorable peace. The discharge of bona fide debts due from the citizens of America to the subjects of Britain was all that Britain required. ... Yet, what was the event? State after State, Legislature after Legislature, made laws and regulations in positive opposition to the treaty; and the State Judiciaries could not, or did not, decide contrary to their State ordinances."[20]

The need for federal jurisdiction was also made plain by Massachusetts Congressman Elbridge Gerry, later Vice President of the United States, in his complaint that "the laws and constitutions of some States expressly prohibit the State Judges from administering, or taking cognizance of foreign matters,"[21] a difficulty compounded by the fact that there was no secure tenure of office for state judges in rendering unpopular judgments. "All Judicial officers in Massachusetts," noted Gerry, "must be appointed

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[20] 1 *The Debates and Proceedings in the Congress of the United States* 837 (Gales & Seaton 1834) (debate of August 29, 1789).

[21] *Id.* at 860 (debate of August 31, 1789).

by the Governor, with the advice of council, and may be removed by the same power, upon the address of both Houses of the Legislature," which was "contrary to the indispensable tenure required by the constitution of the United States."[22]

James Madison plucked the same string of skepticism, noting that "a review of the constitution of the courts in many States will satisfy us that they cannot be trusted with the execution of the Federal laws. In some of the States it is true they might, and would be safe and proper organs of such a jurisdiction; but in others they are so dependent on State Legislatures, that to make the Federal laws dependent on them, would throw us back into all the embarrassments which characterized our former situation. In Connecticut the Judges are appointed annually by the Legislature, and the Legislature is itself the last resort in civil cases."[23]

Thus, the Alien Tort Statute was created to allow foreign plaintiffs a dispassionate federal forum in which to plead serious torts violating the law of nations and treaty obligations. In the current era of globalization, the immediate harms may differ, but the role of a federal forum to hear the complaints of alien plaintiffs remains the same. *Sosa* prescribes caution in discerning which duties

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[22] *Id.*

[23] *Id.* at 844 (debate of August 29, 1789).

may rise to the level of clarity and seriousness to warrant the exercise of this jurisdiction, but it does not change the duty that the Founders of the American Republic concluded we owed to alien victims.

CONCLUSION

While asserting that the Second Circuit's decision in *Kiobel* regarding corporate liability under the Alien Tort Statute is incorrect, *amici* herein propose that this is even more evident when looking at the global landscape of the present day – vis-à-vis maritime piracy, aircraft hijacking, aircraft bombing, attacks on diplomats, terrorist bombings, and the international financing of terrorism – through the lens of history. *Amici* respectfully submit that the Second Circuit's decision which immunizes corporations from any liability under the Alien Tort Statute, regardless of setting or circumstance, is incompatible with congressional intent, historical views on corporate liability for torts, and the law of nations especially regarding the areas of *amici*'s expertise of countering terrorism and other human rights abuses. Therefore, *amici* respectfully submit that the Court should reverse the Second Circuit's decision in favor of petitioners in this case.

Respectfully submitted.

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APPENDIX

APPENDIX – LIST OF *AMICI*

The *amici curiae* joining this brief include:

Victor D. Comras – Mr. Comras has had an extensive international law and diplomatic career with the U.S. Department of State, the United Nations, and in private law practice. He was appointed in 2002 by UN Secretary General Kofi Annan to serve as one of five international monitors charged with evaluating and making recommendations concerning the implementation of Security Council measures against Al Qaeda and the Taliban, and again, by Secretary General Ban Ki-Moon to evaluate and report on the implementation of Security Council measures directed at North Korea. He has also been actively engaged, both inside and outside the U.S. government, in advising government agencies, international organizations, foreign governments, and private clients concerning matters related to international sanctions, trade and financial regulations, and political risk assessment.

Jimmy Gurule – Professor Gurule is currently a tenured member of the law faculty at Notre Dame Law School, located in South Bend, Indiana, where he teaches courses in Criminal Law, White Collar Crime, International Criminal Law, and the Law of Terrorism. Prof. Gurule served as Under Secretary

(Enforcement), U.S. Department of the Treasury, from 2001-2003. In his role as Under Secretary of the Treasury, he played a central role in developing and implementing the U.S. Government's anti-terrorist financing strategy.

Malvina Halberstam – Professor Halberstam is a professor of law and a member of the founding faculty of the Benjamin N. Cardozo School of Law. She currently teaches International Law, U.S. Foreign Relations Law, and Constitutional Criminal Procedure. She has also taught courses on International Criminal Law, Terrorism and the Law, and International Protection of Human Rights. She served as Counselor on International Law, U.S. Department of State, Office of the Legal Adviser. In that capacity, she headed the U.S. delegation to negotiations on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a treaty dealing with terrorism on the high seas. She has lectured and published articles on various aspects of international law, including terrorism.

Matthew Levitt – Dr. Levitt is the Director of the Stein Program on Counterintelligence and Terrorism at the Washington Institute for Middle East Policy in Washington, DC. He has held numerous positions within the U.S. Government

over the past two decades. From 2005 to early 2007, he served as deputy assistant secretary for intelligence and analysis at the U.S. Department of the Treasury. In that capacity, he served both as a senior official within the department's terrorism and financial intelligence branch and as deputy chief of the Office of Intelligence and Analysis, one of sixteen U.S. intelligence agencies coordinated under the Office of the Director of National Intelligence. Previously, he provided tactical and strategic analytical support for counterterrorism operations at the FBI, focusing on fundraising and logistical support networks for Middle Eastern terrorist groups.

Ambassador Richard Schifter – Ambassador Schifter has held numerous positions within the United States Government addressing issues of human rights and national security. From 1983 to 1985, he was the United States Representative to the United Nations Commission on Human Rights. From 1986 to 1992, Ambassador Schifter served as Assistant Secretary of State for Human Rights and Humanitarian Affairs. From 1993 to 2001, Ambassador Schifter served successively as Special Assistant to the President, Counselor and Senior Director on the staff of the United States National Security Council and Special Adviser to the Secretary of State.

Lee Wolosky – Mr. Wolosky served as Director for Transnational Threats on the National Security Council under Presidents Clinton and George W. Bush. During his tenure, the Directorate for Transnational Threats coordinated U.S. counterterrorism policy, including illicit finance impacting national security. Mr. Wolosky, a graduate of Harvard Law School and Harvard College, is an attorney in private practice in New York, New York.