No. 10-1491

In The Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

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

BRIEF ON REARGUMENT OF PROFESSORS OF LEGAL HISTORY AND FEDERAL JURISDICTION, MARTIN S. FLAHERTY AND JOHN V. ORTH, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of Petitioners, pursuant to Supreme Court Rule 37.[1] *Amici* (listed in the Appendix) are professors who study the modern and historical jurisdiction of the federal courts and have an interest in the proper understanding of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

SUMMARY OF ARGUMENT

The federal courts have jurisdiction over claims filed pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. ATS claims are based on federal common law, and the federal courts have Article III federal question jurisdiction over federal common law claims. The constitutionality of such jurisdiction when the statute was enacted in 1789 is irrelevant to an assessment of its constitutionality today. However, the text of the ATS, the history of the statute, and contemporaneous statements all indicate that an ATS claim arises under federal law without regard to the citizenship of the parties. Such claims fell within the

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

Article III federal question jurisdiction of the federal courts at the time it was enacted. Thus, the congressional grant of subject matter jurisdiction over ATS claims was constitutional in 1789 and remains constitutional today, whether or not the parties are diverse.

ARGUMENT

The federal courts have subject matter jurisdiction over ATS claims for torts in violation of international law. As this Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the ATS, a jurisdictional statute, is based on the assumption that federal courts would use their common law power to recognize causes of action for a limited number of violations of international law. This was the assumption at the time the statute was drafted, and, as *Sosa* held, it remains the correct interpretation of the statute today. As federal common law causes of action, ATS claims clearly fall within constitutionally authorized Article III federal question jurisdiction. This congressional grant of subject matter jurisdiction to the federal courts was constitutional under Article III at the time it was enacted and is constitutional now, as applied to both diverse and non-diverse parties.

I. ARTICLE III AUTHORIZES FEDERAL SUBJECT MATTER JURISDICTION OVER ALIEN TORT STATUTE CLAIMS BECAUSE THOSE CLAIMS "ARISE UNDER" FEDERAL COMMON LAW.

The federal courts properly assert Article III federal question jurisdiction over ATS claims because such causes of action are based in federal common law, which is within the scope of Article III federal question jurisdiction.

The ATS grants the district courts "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.[2] In *Sosa*, this Court recognized that the ATS is jurisdictional, 542 U.S. at 712-14, "addressing the power of the courts to entertain cases concerned with a certain subject," *id.* at 714. After reviewing the history leading up to passage of the ATS, *Sosa* held that Congress enacted the statute with the understanding that the federal courts would recognize common law causes of action for a small number of international law violations. *Id.* at 730. "The First Congress, which reflected the understanding of the framing generation and included

[2] As originally enacted in the Judiciary Act of 1789, the ATS stated that federal district courts "shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts . . . 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." Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.

some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of *§ 1350* jurisdiction." *Id.* The Court rejected the argument that the ATS was "stillborn" because "there could be no claim for relief without a further statute expressly authorizing adoption of causes of action," *id*. at 714:

> It would have been passing strange for . . . Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

Id. at 719. Instead, Congress recognized that "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time." *Id.* at 714. *Sosa* thus concluded that the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time*." Id.* at 724. That is, "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations. . . ." *Id*.

Sosa also emphasized that nothing since 1789 had eroded the federal court power to recognize common law claims for violations of international law. *Id*. at 724-25. In particular, nothing in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), which rejected the general common law, undermined this historic judicial power: "We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism." *Id*. at 730. *Sosa* leaves clear that modern ATS claims, like those envisioned in 1789, are based on common law. *See* William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L. J. 635, 638 (2006) ("*Sosa* squarely holds that ATS litigation is based upon a federal common law cause of action. . . .").

As federal common law causes of action, ATS claims "arise under" federal law for the purposes of both statutory and constitutional federal question subject matter jurisdiction. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("We see no reason not to give 'laws' its natural meaning, and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin." (citation omitted)); 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (2d ed. 1996) ("A case 'arising under' federal common law

presents a federal question and as such is within the original subject-matter jurisdiction of the federal courts. . . ."). "[O]nce *Sosa* recognized a federal right of action, that recognition was sufficient to bring such claims within current understandings of Article III's 'arising under' jurisdiction." Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 33 (2007); *see* William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 664-65 (2007) (*Sosa* made clear that "the federal common law of customary international law is federal law in . . . the jurisdiction-conferring . . . sense. . . . [T]he only basis for the federal court to hear an alien versus alien suit under the ATS is the federal nature of the substantive claim.").

A recent law review article has suggested that, as understood in 1789, the constitutional authorization of federal question jurisdiction did not encompass claims for international law violations filed by non-diverse parties, such as claims between aliens. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 525-28 (2011); *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 597-98, 626-29 (2002) (making similar argument in a pre-*Sosa* article). As explained in the following section, this argument is wrong as a matter of history: federal court assertions of subject matter jurisdiction over ATS claims filed by non-diverse parties were constitutional in 1789. More significantly,

the argument is irrelevant. The ATS remains in the federal code, having been amended slightly and re-enacted multiple times over the past 225 years. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.4 (1986) (detailing revisions to the statute). *Sosa* leaves no doubt that ATS claims today are based in federal common law, and federal common law claims clearly trigger federal subject matter jurisdiction. That is, as *Sosa* held, federal courts today have the power to recognize federal common law claims for a narrow range of violations of international law and to assert subject matter jurisdiction over those claims pursuant to Article III. Whether they had that power in 1789 under the same or different understandings of causes of action and "arising under" jurisdiction is irrelevant to the constitutionality of that practice today.

II. CONGRESS' RECOGNITION OF FEDERAL SUBJECT MATTER JURISDICTION OVER CLAIMS ASSERTED BY NON-DIVERSE PARTIES FOR TORTS IN VIOLATION OF THE LAW OF NATIONS WAS CONSTITUTIONAL WHEN ENACTED.

Professors Bellia and Clark assert that the ATS grant of subject matter jurisdiction over claims involving non-diverse parties was unconstitutional at the time the statute was enacted. They argue that Congress must, therefore, have intended the statute

to apply only to diverse parties. Bellia & Clark, *supra*, at 525-28; *see* Bradley, *supra*, at 626-29 (making a similar argument in a pre-*Sosa* article). As explained in the prior section, this argument is irrelevant to a modern understanding of the constitutionality of the ATS as applied to non-diverse parties. But the argument is also wrong, because a diversity theory of the ATS is inconsistent with the language and history of the statute and with the holding of *Sosa*, and because the ATS, when enacted as well as today, falls within the constitutionally authorized, Article III federal question jurisdiction of the federal courts.

A. The Diversity Theory of the Alien Tort Statute Ignores the Language and History of the Statute and the Holding of *Sosa*.

The diversity theory ignores the clear language of the Alien Tort Statute, which requires an alien plaintiff, but makes no reference whatsoever to the citizenship of defendants. As this Court has noted, "The Alien Tort Statute by its terms does not distinguish among classes of defendants. . . ." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). The best evidence of the congressional meaning is the statute's text. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[A] court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute

what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (citations and internal quotation marks omitted)). Moreover, the statute applies to "*any* civil action" by an alien for a tort in violation of the law of nations, and, as originally enacted, applied to "*all* causes" where an alien sued for such torts. The text of the ATS is clear and decisive on this issue: the statute provides jurisdiction over such claims regardless of the citizenship of the defendant.

The reference to treaty violations provides further textual support. The ATS provides jurisdiction over torts "committed in violation of . . . a treaty of the United States." This provision relies on Article III's authorization of federal court jurisdiction over claims arising under a treaty, as applies to both diverse and non-diverse parties, with no restrictions on the citizenship of the defendant. U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."). There is no basis in the text of the statute to infer a distinction between the categories of defendants subject to suit under the "law of nations" prong and those subject to suit under the "treaty" prong of the statute.

The diversity theory also ignores the historical evidence that the ATS was conceived, in part, as a response to high-profile cases involving assaults on

foreign diplomats, at least one of which involved two aliens. In the 1784 Marbois affair, which is discussed at length in *Sosa*, 542 U.S. at 716-17, a French citizen assaulted a French diplomat. The French government filed a formal protest and its minister threatened to leave unless the French received "full satisfaction." *Id.* at 717 n.11. Members of the administration wrote about the incident and about their concern over its potential repercussions, in dozens of letters. Casto, 18 CONN. L. REV. at 492 n.143 (listing multiple references to the Marbois affair in correspondence among the framers). The incident was clearly on the minds of the delegates to the Constitutional Convention as well as the members of Congress who enacted the ATS as part of the First Judiciary Act. *Id.* at 493-95. This history suggests that a jurisdictional statute limited to diverse parties would not have responded to the concerns underlying the ATS. As *Sosa* recognized, the ATS was enacted to further the goal of offering a federal forum for resolution of issues involving the law of nations. 542 U.S. at 717-18. Indeed, this Court has long described the ATS as one of a series of constitutional and statutory provisions "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Surely Congress did not intend to leave alien-alien claims for violations of the law of nations to the general jurisdiction of the state courts.

Moreover, if ATS jurisdiction were intended to apply only to cases involving diverse parties, contemporary cases involving alien-alien complaints surely would have triggered some discussion. But the surviving references to the Alien Tort Statute contain no reference to a requirement that the parties be diverse. Indeed, no historical statements at any point support the claim that the statute was limited to alien vs. citizen claims.[3] By contrast, two cases from the 1790s discuss the application of the ATS to claims involving foreign citizens, but neither opinion contains any indication that they considered the citizenship of the parties relevant to the jurisdictional analysis. In *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), British ship-owners sued the French privateer who had captured the ship. The court rejected ATS jurisdiction because the claim

[3] Professors Bellia and Clark do provide historical evidence that the framers and the members of Congress who enacted the ATS were concerned about the detrimental foreign affairs impact of violations of the law of nations committed by U.S. citizens against aliens. Bellia & Clark, *supra*, at 494-507. The ATS responded to this concern by affording an alien injured by a citizen the right to sue in federal court without meeting the amount-in-controversy requirement for diversity jurisdiction. But they provide no evidence that this was the sole factor motivating Congress to enact the statute. And, as discussed in what follows, there is ample evidence that Congress was focused on several additional concerns: minimizing the foreign policy repercussions of alien-on-alien violations; ensuring that federal courts – not state courts – heard cases requiring application of international law; and providing broad remedies for violations of the law of nations.

sought restitution as well as damages and, therefore, was not a suit "for a tort only." *Id*. at 948. The opinion did not mention that the parties were both aliens. Similarly, *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), involved a French privateer's capture of a Spanish ship carrying enslaved persons "mortgaged" to a British citizen. After the British mortgagee's agent seized and sold the slaves, the French privateer sued for the proceeds. The real party in interest – the British mortgagee – was an alien, and the opinion makes no mention of the citizenship of the agent. In these two decisions discussing the jurisdictional reach of the ATS, neither court indicated that the citizenship of the parties might be relevant to the jurisdictional issue.

Finally, importing a diversity of citizenship requirement into the ATS would conflict with this Court's holding in *Sosa*. *Sosa* discussed the history of the statute at length and concluded that Congress intended the ATS to apply to the "modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. Such torts, of course, could have been committed by aliens or citizens. *Sosa* held that the torts actionable under the ATS were and are limited by the potential for personal liability and by the clarity of definition and degree of acceptance of the international law violations, not by the citizenship of the parties.

B. The Alien Tort Statute, When Enacted, Implemented Article III Federal Question Jurisdiction.

The crux of the diversity-only argument is an ill-founded, reverse-logic argument. Bellia and Clark begin with the presumption that the ATS grant of federal court jurisdiction over claims based on international law could not have been constitutional in 1789 under any theory except diversity jurisdiction. *See* Bellia Jr. & Clark, *supra*, at 525-28. Working from that (erroneous) assumption, they distort the language of the statute to force it to meet the requirements of diversity; that is, they conclude that Congress must have intended the ATS to apply only to claims between aliens and U.S. citizens, because they insist that statute was constitutional only if so limited. The initial presumption, however, is wrong. In 1789, as now, a congressional grant of federal subject matter jurisdiction over common law claims based on the law of nations fell comfortably within the reach of the Article III definition of federal question jurisdiction.

Asserting federal control over foreign affairs, including the interpretation and enforcement of international law, was one of the needs driving the decision to reformulate the Confederation. *See generally* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010). As *Sosa* noted, a number of incidents, including the Marbois

affair, summarized above, "intensified" concerns over "the Continental Congress' incapacity to deal with" cases involving violations of the law of nations. 542 U.S. at 716. "[C]oncern over the inadequate vindication of the law of nations persisted through the time of the constitutional convention." *Id.* at 717. The framers of the Constitution, several of whom were members of the Congress that enacted the ATS, repeatedly stated that the Constitution responded to that need, in part by granting federal courts jurisdiction over cases raising international law issues.

Shortly before the start of the Constitutional Convention, Virginia delegate George Mason wrote that with regard to the courts "[t]he most prevalent idea [was] . . . to establish . . . a judiciary system with cognizance of all such matters as depend upon the law of nations, and such other objects as the local courts of justice may be inadequate to." Letter from George Mason to Arthur Lee (May 21, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24 (Max Farrand ed., 1911) ("Farrand"). Fellow Virginian Edmund Randolph complained in his opening speech of the inability under the Articles of Confederation to "cause infractions of treaties or of the law of nations to be punished," 1 Farrand, *supra*, at 19, and laid before the Convention the Virginia Plan, creating federal courts with jurisdiction over "questions which may involve the national peace and harmony." 1 Farrand, *supra*, at 22. On the same day, Charles Pinckney of South Carolina proposed his own plan expressly providing for a federal court to hear

appeals from the "*Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U.S. – or on the Law of Nations*. . . ." 3 Farrand, *supra*, at 608.[4] As Edwin Dickinson has noted, "The Convention was in substantial agreement that there must be a national judiciary and that it must have, at least in the last resort, a paramount authority with respect to the Law of Nations and treaties." Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 38 (1952).

In the Committee of Detail draft reported to the Convention, the federal question jurisdiction of the federal courts was limited to "cases arising under laws passed by the Legislature of the United States." 2 Farrand, *supra*, at 186. On August 27, however, the delegates voted without explanation to strike the words "passed by the Legislature." *See* 2 Farrand, *supra*, at 423-24, 431. This introduced a difference in text between what would become Article III and what would become the Supremacy Clause of Article VI, which refers to "the Laws of the United States *which shall be made in Pursuance* [*of the Constitution*]." U.S. Const. art. VI, cl. 2 (emphasis added). As

[4] In June, a third plan was introduced – the New Jersey Plan – which made no reference to the law of nations in its proposal for the judiciary. *See* 3 Farrand, *supra*, at 242. A Committee of Detail draft based on the New Jersey Plan, however, provided for federal appellate jurisdiction "in all Cases . . . which may arise . . . *on the Law of Nations*." 2 Farrand, *supra*, at 157.

Michael Ramsey has noted, reading Article III's "Laws of the United States" to include the law of nations "accounts for the difference in phrasing." Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 200 (2001).[5]

During the ratification debates, both Federalists and Anti-Federalists read Article III to include cases arising under the law of nations. *See generally* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 707-09 (2002). John Jay wrote that "[u]nder the national government, treaties and articles of treaties, *as well as the laws of nations*, will always be expounded in one sense and executed in the same manner. . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended." THE FEDERALIST NO. 3, at 41, 43 (John Jay) (Clinton Rossiter ed., 1961) (emphasis added); *see also* THE FEDERALIST NO. 80, at 475-76 (Alexander

[5] Supreme Court Justice William Patterson concurred in the view that the law of nations fell within the jurisdiction of Article III, because, in his view the law of nations "arose under" the Constitution. *See Draft Opinion of William Patterson*, *reprinted in* Casto, 18 CONN. L. REV. at 526. The important point here is that, at the time the Constitution was drafted and the ATS was enacted into law, key jurists agreed that a claim for a violation of the law of nations triggered the "arising under" jurisdiction of the federal courts.

Hamilton) (Clinton Rossiter ed., 1961) (noting that "cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction"). Anti-Federalist William Grayson, on the other hand, complained at the Virginia ratifying convention that "[t]here is to be one Supreme Court – for chancery, admiralty, common pleas, and exchequer, . . . to which are added criminal jurisdiction and *all cases depending on the law of nations* – a most extensive jurisdiction!" 10 THE DOCUMENTARY HISTORY OF THE CONSTITUTION 1445-46 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (emphasis added).[6] "None of the speakers who followed Grayson at the Virginia Convention controverted his assertion that the judicial power granted by Article III would include 'all cases depending on the law of nations.'" Dodge, *supra*, at 708-09.[7]

The framers considered the law of nations to be part of the general common law, binding on both the federal and state governments. *See* William A.

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[6] Grayson referred to the Supreme Court because Article III did not require Congress to create inferior courts. *See* U.S. Const. art. III, § 1.

[7] James Madison did argue that "[w]ith respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to." 10 THE DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra*, at 1413. But this is consistent with Grayson's reading, for Congress had legislative power under the Define and Punish Clause "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.

Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557-58 (1984). As Attorney General Randolph wrote in 1792, "[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation. . . ." 1 U.S. Op. Att'y Gen. 26, 27 (1792) (Edmund Randolph). During the 1790s, the Washington Administration brought a series of common law prosecutions against Americans for having violated the law of nations on neutrality. During one of these prosecutions, Chief Justice John Jay expressly defined "Laws of the [U]nited States" to include "[t]he law of nations." *See* John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793) *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 381 (Maeva Marcus ed., 1988).

When Congress enacted the ATS as part of the Judiciary Act of 1789, it required that the plaintiff be an alien but did not require that the defendant be a U.S. citizen. Oliver Ellsworth, who drafted the ATS, had served on the Committee of Detail at the Constitutional Convention and must have thought such a limitation unnecessary in light of the breadth of Article III. Moreover, Congress had the power to enact laws defining and punishing "Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, and

the federal courts would have had jurisdiction over claims under such laws pursuant to Article III. *See* Bradley, *supra*, at 600 (acknowledging that congressional statutes authorizing claims for violations of international law would fall within Art. III). Given that the First Congress did not intend the ATS to "l[ie] fallow," *Sosa*, 542 U.S. at 719, surely its members would have enacted a statute authorizing specific claims if they thought common law claims for violations of the law of nations were not within the reach of Article III. The absence of any such legislation supports the view that they thought this step unnecessary in light of their understanding of Article III.[8]

The framers' understanding that the language of Article III implemented their intent to afford federal courts jurisdiction over cases founded on the law of nations is consistent with this Court's historically expansive interpretation of Article III's grant of federal question jurisdiction. The constitutional test

[8] As discussed in the previous section, the possibility that ATS suits between two aliens might exceed the bounds of Article III apparently did not occur to courts applying the ATS during the 1790s. *See Moxon*, 17 F. Cas. 942; *Bolchos*, 3 F. Cas. 810. If it was clear that ATS suits between two aliens fell outside the bounds of Article III, as Bradley, Bellia, and Clark suppose, it is odd that neither the attorneys nor the court mentioned the citizenship of the parties. In fact, there is no historical record that the diversity theory occurred to anyone until it was raised in law review articles more than two hundred years after ratification of the Constitution and passage of the ATS, and more than 20 years after the *Filártiga* decision. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

for "arising under" jurisdiction is, of course, significantly broader than that required by 28 U.S.C. § 1331, the statutory grant of federal question jurisdiction.[9] As interpreted by Chief Justice Marshall early in the nineteenth century, Article III jurisdiction requires only that a federal issue "forms an ingredient of the original cause. . . . Whether it be in fact relied on or not, . . . it is still a part of the cause. . . ." *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738, 823, 824 (1824). "*Osborn* thus reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983). The framers understandably assumed that claims based on the law of nations would involve multiple issues that "might call for the application of federal law," and thus would fall within the expansive reach of Article III. *Id.*[10] *Osborn*'s broad

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[9] Statutory federal question jurisdiction under § 1331 generally requires that a plaintiff state a cause of action created by federal law. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 311-12 (2005) (stating cause of action requirement and recognizing narrow exception to this rule).

[10] "The possibility that an issue of federal law will arise in a suit involving customary international law (even assuming that customary international law is not itself federal) – for example, issues about the allocation of powers relating to foreign relations – is hardly remote." Carlos M. Vazquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate*

(Continued on following page)

reading of Article III reflects the jurisdictional understandings of the founding generation, and its application to cases raising questions of international law is consistent with the views expressed by the framers.[11]

Further, the argument that at the time the ATS was enacted, claims based on the law of nations did not "arise under the laws of the United States" because the law of nations constituted general common law, not federal common law, is based on an ahistorical understanding of the common law. In the late eighteenth century, the law of nations was considered part of the general common law, shared by the federal and state courts, and including the law merchant and other bodies of law. But from the beginning, courts and scholars recognized pockets of common law, such as norms governing state-to-state relations, that were treated as federal law, and that, over time, provided the basis for the federal common law recognized by *Erie*. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L.

Positions and a Defense of the Modern Position, 86 NOTRE DAME L. REV. 1495 (2011).

[11] As Professor Vazquez has explained, additional theories of federal question jurisdiction would also explain the framers' understanding that cases alleging violations of international law fell within federal question jurisdiction. *See* Vazquez, *supra,* at 1506-07 (citing Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 224-25 (1948), and Paul J. Mishkin, *The Federal "Question" in the District Courts,* 53 COLUM. L. REV. 157, 192 (1953)).

REV. 1 (2009) (distinguishing certain norms of international law governing state-to-state relations from other norms of the law of nations); Vazquez, *supra,* at 1600-02 (discussing the implications of the Bellia and Clark approach); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 418-25 (1997) (discussing the pre-*Erie* development of federal common law). The *Erie* decision rejected the concept of general federal common law, but cleared the way for a genuine federal common law. Later cases re-categorized aspects of the old general common law, recognizing in retrospect that they actually constituted – and functioned as – federal common law. Stephens, *supra*, at 440-43.[12] As discussed above, ample evidence indicates that the framers understood that claims based on the law of nations fell within the subject matter jurisdiction of the federal courts. Labeling such claims "general common law" does not undermine this history, because the broad range of norms encompassed by the general common law

[12] Some scholars point to two pre-*Erie* cases, *New York Life Insurance Co. v. Hendren,* 92 U.S. 286 (1875), and *Ker v. Illinois,* 119 U.S. 436 (1886), to support the view that the general common law at the time the ATS was enacted was not jurisdiction granting. *Hendren*, however, turned on interpretation of a particular jurisdictional statute. And *Ker* contains a one-line, unexplained statement on an issue that was not argued by the parties. *See* discussion in Vazquez, *supra*, at 1529-32. Together, these ambiguous precedents constitute a weak foundation for an interpretation of a statute enacted over 100 years earlier.

included norms that the courts and Congress treated as part of federal law.

* * *

The diversity theory of the ATS conflicts with the plain language of the statute, with the historical records explaining Congress' purpose in enacting the ATS, and with the holding of *Sosa*. The theory rests on the erroneous assumption that no other approach explains the constitutionality of the provision at the time it was enacted.

The diversity theory also conflicts with the holdings of dozens of federal courts applying the ATS to claims between aliens, starting with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), and continuing unabated for the ensuing 32 years. This Court said eight years ago in *Sosa* that Congress had "expressed no disagreement" with the interpretation of the ATS adopted by *Filártiga* and followed by other federal courts. 542 U.S. at 730-31. Similarly, Congress has "expressed no disagreement" with the courts' application of the ATS to alien-to-alien claims. Congress, as always, has the power to repeal or amend the ATS, and has failed to do so since 1980.

CONCLUSION

For the foregoing reasons, this Court should reject any claim that the ATS is unconstitutional as applied to claims between non-diverse parties.

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APPENDIX

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Constitution (2006), and *Reappraisals in the Law of Property* (2010), as well as numerous scholarly articles. He was an associate editor (for law) of the *American National Biography* and contributed to that series, as well as to *The Oxford Companion to the Supreme Court of the United States*, *The Oxford Companion to American Law*, *The Oxford International Encyclopedia of Legal History*, and *The Yale Dictionary of Legal Biography*. His publications have been cited by federal and state courts, including the United States Supreme Court.