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

SUPPLEMENTAL BRIEF OF PROFESSORS ANTHONY J. BELLIA JR. AND BRADFORD R. CLARK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

This Court has requested supplemental briefing on "[w]hether and under what circumstances the Alien Tort Statute ('ATS'), 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The answer is that courts may hear such actions when—and only when—they are brought against U.S. citizens.

As this Court recognized in *Sosa*, "the ATS is a jurisdictional statute creating no new causes of action." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004). The First Congress enacted the ATS pursuant to Article III's grant of foreign diversity jurisdiction (over controversies between U.S. citizens and foreign citizens) to satisfy the United States' obligation under the law of nations to redress certain torts by Americans against aliens. Properly understood, the ATS is a jurisdictional statute that applies only to suits by aliens against U.S. citizens. Because all of the parties to this case—whether individuals or corporations—are aliens, federal courts lack subject matter jurisdiction under both the ATS and Article III. This provides an independently dispositive, threshold reason to affirm the Second Circuit's dismissal of petitioners' claims.

Congress enacted the ATS to redress injuries to aliens inflicted by American citizens—through ordinary torts involving injury to the alien's person or personal

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than the *amici* and their counsel, contributed money to its preparation or submission. The parties have consented to this filing.

property. Such torts violated the law of nations as understood in 1789, and the law of nations obligated the United States to redress them. If it failed to do so, the United States would have become an accomplice to its citizens' wrongdoing and subjected itself to reprisals by foreign nations. The First Congress enacted the ATS to provide a federal forum for alien tort claims against American citizens, thereby fulfilling the United States' obligation to redress such harms. It did not enact the statute to resolve disputes between non-citizens—even if they happened to touch on matters that, today, might be considered violations of modern international law.

In 1789, most torts capable of triggering jurisdiction under the ATS would have occurred on U.S. soil. It would be a mistake, however, to say that the ATS could never apply "extraterritorially" to injuries inflicted by Americans abroad. The ATS is not a prescriptive regulation subject to extraterritoriality analysis. It is simply a jurisdictional statute. Courts routinely apply jurisdictional statutes to hear tort and other claims arising abroad. When, for example, federal courts hear actions arising abroad under the general foreign diversity statute, no one contends that they are improperly applying the diversity statute "extraterritorially." Like the diversity statute, the ATS is purely jurisdictional and presents no question of whether U.S. substantive law should govern conduct abroad.

The key limitation on ATS jurisdiction was not that the action had to arise in U.S. territory, but that the action had to be against a U.S. citizen. In 1789, the United States was a small nation surrounded by European powers, territorial borders were uncertain and disputed, and violence across borders threatened the security of the new nation. Under the law of nations, the United States had an obligation to redress violence by U.S. citizens

against foreigners regardless of whether it occurred within or outside U.S. territory.

Amici are law professors who, prior to the Court's grant of certiorari in this case, spent several years conducting scholarly research into the original meaning of the ATS. Anthony J. Bellia Jr. is a Professor of Law and Concurrent Professor of Political Science at the University of Notre Dame. Bradford R. Clark is the William Cranch Professor of Law at The George Washington University Law School. Both teach and write in the areas of federal jurisdiction, constitutional law, and foreign relations. Together, they have published important scholarship that sheds new light on the history and meaning of the ATS. Their comprehensive article, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011) (hereafter Bellia & Clark, *Alien Tort Statute*), has been cited by the parties and *amici* in this case, as well as by lower courts construing the statute. Professors Bellia and Clark submit this brief to share their historical research and findings with the Court.

SUMMARY OF ARGUMENT

I. In *Sosa*, this Court made clear that the ATS should be construed according to the understanding of the First Congress. The ATS, as originally understood, extended federal court jurisdiction to suits by aliens against U.S. citizens for intentional torts involving force against their person or personal property. Such torts violated the law of nations and required the United States to redress the harm or become responsible for the violation. Because the ATS is solely a jurisdictional statute, the presumption against extraterritoriality does not apply. The ATS did not confer, however, jurisdiction over actions by one alien against another, regardless of where the tort occurred.

In 1789, the United States was a weak nation seeking to avoid conflict with foreign powers. At the time, the law of nations required a nation whose citizen committed an intentional tort of force against a friendly alien to redress the injury in one of three ways: by criminal prosecution, by extradition, or by providing a civil remedy. The failure to redress a tort in violation of the law of nations gave the offended nation just cause for war. Americans committed numerous acts of violence against aliens immediately following the War of Independence. The states proved unable or unwilling to redress such violence, leaving the United States responsible and vulnerable to reprisals.

As a consequence, the Founders authorized federal jurisdiction over several categories of cases likely to implicate the law of nations. The First Congress enacted criminal and civil statutes to redress harms inflicted by American citizens against diplomats and other foreigners, and gave federal courts jurisdiction over cases involving ambassadors and admiralty matters, as well as diversity cases involving an alien where the claim exceeded $500. Had Congress stopped there, however, the amount-in-controversy requirement would have denied ordinary aliens who suffered intentional harms at the hands of Americans access to federal court. The United States' consequent responsibility for such harms would have subjected the weak and embryonic nation to reprisals or wars that it could ill afford.

The ATS filled this gap by extending federal jurisdiction to "all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," without regard to the amount in controversy. Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77. The ATS operated as a fail-safe provision: It permitted foreign nationals to sue American citizens in federal court for torts

that, if not redressed, would provide other countries with a *casus belli* against the United States. By authorizing a self-executing method of civil redress in federal court, the United States avoided military reprisals for the misconduct of its citizens and signaled its intent to comply with its obligations under the law of nations.

The First Congress had no similar incentive to authorize federal courts to adjudicate tort suits between aliens. Unlike violence against aliens by American citizens, violence by aliens against other aliens was not imputed to the United States under the law of nations. Indeed, if a claim between aliens arose outside the United States, adjudication by federal courts could have interfered with the territorial sovereignty of other nations—itself a violation of the law of nations. Reading the ATS to authorize suits between aliens in federal court—especially where, as here, the conduct occurred on foreign soil—would undermine the statute's objectives by impinging on the territorial sovereignty of other nations and risking serious foreign relations consequences.

II. The original meaning of the ATS is consistent with Article III's limits on the federal judicial power. In arguing over extraterritoriality, the parties erroneously assume that the ATS created a federal rule of decision. The ATS, however, "is a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. This jurisdictional statute was "enacted on the understanding that the common law would provide a cause of action," *id.*, and in 1789 Congress specifically directed federal courts to apply *state* common law. Accordingly, the ATS provides no basis for "arising under" jurisdiction, and can only plausibly be understood as a jurisdictional grant pursuant to Article III's foreign diversity clause. Such jurisdiction requires that at least one party to the case be a U.S. citizen; it provides no authority to hear suits be-

tween aliens. This reading of the ATS avoids many of the concerns raised by the Court in *Sosa* in connection with with an expansive reading of the statute.

Both historical evidence and this Court's precedent make clear that constitutional authorization for the ATS must be found in the foreign diversity clause. This Court has never considered the "law of nations" to qualify, in and of itself, as federal law. Rather, when the ATS was enacted, the law of nations was understood to be either general law or part of the common law received by the states. Nor did the ATS itself create a new body of substantive federal law capable of supporting "arising under" jurisdiction. Plaintiffs invoking ATS jurisdiction looked to other sources of law to find the cause of action and governing rules of decision—specifically, the Process Act of 1789 and section 34 of the Judiciary Act of 1789, which instructed federal courts to apply the procedural and substantive common law of the state in which they sat. State law does not support "arising under" jurisdiction.

III. This case is the proper vehicle for deciding whether the ATS covers cases solely between aliens. *Sosa* did not address this question and does not foreclose a holding that the ATS extends only to suits against U.S. citizens. The Court did not consider or decide whether the statute confers, or Article III permits, jurisdiction over suits between aliens. A court's mere assumption of jurisdiction without discussion has never been entitled to precedential effect. Moreover, because *Sosa* originally included claims against U.S. defendants, federal courts had supplemental jurisdiction over related claims between aliens.

The *Sosa* Court's dispositive holding that the plaintiff had not alleged a tort "in violation of the law of nations"

within the meaning of the statute obviated the need to examine party-alignment limitations on subject matter jurisdiction. Moreover, the Court stressed that ATS jurisdiction "should be undertaken, if at all, with great caution" over suits that "claim a limit on the power of foreign governments over their own citizens" and that seek "to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727–28.

This case squarely presents the question whether ATS jurisdiction extends to claims solely between aliens. The plaintiffs and defendants are all aliens; no U.S. citizen or corporation has ever been a party to the case. Because the issue of party alignment under the ATS is a question of subject matter jurisdiction, the parties cannot waive it, and either the Court or a party may raise it anytime. And the question whether the ATS covers suits between aliens is likely to recur; indeed, the issue is squarely presented by the Ninth Circuit's recent ruling in *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), which this Court has held pending disposition of this case.

If the Court decides that the ATS does not confer jurisdiction over suits between aliens, then it will likely never have to decide the question of corporate liability under the statute. Today, unlike in 1789, suits by aliens against U.S. defendants can easily satisfy the amount-in-controversy requirement for foreign diversity jurisdiction. Because almost all lawsuits against U.S. corporations would fall within such jurisdiction, foreign plaintiffs would almost never have to rely on the ATS.

ARGUMENT

I. The History Of The ATS Demonstrates That It Was Understood to Confer Jurisdiction Only Over Suits By Aliens Against United States Citizens, And Not Over Suits Between Aliens.

Recovering the original meaning of the ATS requires an examination of the legal and historical context in which it was enacted. As enacted in 1789, the ATS provided that "the district courts * * * shall [] have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, 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 1789, § 9, 1 Stat. at 76–77. The statute's text specifies that the plaintiff must be an alien, but does not mention the defendant's nationality. Nevertheless, read in light of the diplomatic concerns faced by the First Congress and the background law of nations principles that give meaning to its text, the statute confers jurisdiction only over lawsuits by aliens against American citizens for torts in violation of the law of nations. Such lawsuits were most likely to involve conduct that occurred within the United States, but the ATS also granted jurisdiction over lawsuits involving torts of violence by U.S. citizens that occurred abroad. Because the ATS is solely a jurisdictional statute, the presumption against extraterritoriality does not apply.

A. The ATS was intended to redress violations of the law of nations committed by United States citizens against aliens.

1. "In 1789, every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens." Bellia & Clark, *Alien Tort Statute* 448. Such violations

included interfering with the rights of ambassadors, violating safe conducts, and impeding neutral use of the high seas. They also included private intentional torts against the person or personal property of a citizen of a friendly nation. *Ibid.* Failure to provide redress for such misconduct by a citizen against a foreign citizen—whether through criminal punishment, extradition, or civil liability—provided the offended nation with just cause for war. The ATS was enacted to remedy this kind of private misconduct against ordinary aliens.

As Emmerich de Vattel, the most cited authority on the law of nations during the Founding period, explained:

> [T]he nation or sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries; but also because nations ought mutually to respect each other, to abstain from all offense, from all abuse, from all injury, and, in a word, from every things that may be of prejudice to others.

1 Emmerich de Vattel, *The Law of Nations* 144 (1759).

A nation that approved or ratified an injury by one of its citizens against an alien, either by authorizing it or—critically—*by failing to redress it after the fact*, could be held responsible for that injury: "The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it." *Id.* at 145.

This obligation applied whether the injury was inflicted at home or abroad. *Ibid.* A nation could redress an injury that its citizen inflicted upon a foreigner abroad by extraditing the offender to the nation where the offense occurred. Or it could allow the injured foreigner to bring a transitory civil action in its own courts where the defendant was domiciled. *Ibid.*

According to Vattel, a nation's failure to redress injuries by its citizens against foreigners through one of these means violated the "perfect rights" of the other nationand gave it just cause for reprisals or war. Such a right was "perfect" because it was "accompanied with the right of using force to make it observed." *Id.* at 143. As Blackstone put it, once the injured nation demanded "satisfaction and justice to be done on the offender," the failure of "the state to which he belongs" to provide redress rendered that state "an accomplice or abettor of [its] subject's crimes," and drew it into "the calamities of foreign war." 4 William Blackstone, *Commentaries on the Law of England* 68 (1765); see generally Bellia & Clark, *Alien Tort Statute* 471–77.

2. The prospect that misconduct by U.S. citizens against foreigners would draw the United States into war was more than just a theoretical concern for the First Congress. The new nation's survival depended on maintaining peace with the European powers with which it shared its original borders. The Founders recognized that "maintaining peace required the United States to redress private offenses to other nations." Bellia & Clark, *Alien Tort Statute* 494.

Under the Articles of Confederation, however, the newly-independent states often failed to meet their obligations under the law of nations. States committed particularly egregious violations of the law of nations by in-

terfering with the rights of ambassadors. For example, in the famous Marbois incident, a Pennsylvania state court convicted a French citizen of assaulting a French diplomat in Philadelphia, but refused to extradite the perpetrator as demanded by the French government. See *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Terminer 1784). Similarly, in 1787, a New York city constable created an international incident by entering the residence of Dutch ambassador van Berckel with a warrant to arrest a member of his household. The ambassador protested to John Jay, the American foreign affairs secretary, who reported to Congress that "the foederal Government does not appear * * * to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." 34 *Journals of the Continental Congress 1774–1789* 109–111 (Roscoe R. Hill ed. 1937).

Cases affecting ambassadors were important, but they were not the only—or most frequent—offenses during the Confederation era. More routine incidents involved the states' failure to redress ordinary tort injuries inflicted by their own citizens on aliens:

> In the 1780s, state citizens increasingly made violent attacks upon the persons and property of British subjects in America. Indeed, the president of the Continental Congress, Elias Boudinot, feared that postwar acts of violence by New York Whigs against the British were so extreme as possibly to "involve us in another War."

Bellia & Clark, *Alien Tort Statute* 501 (quoting Oscar Zeichner, *The Loyalist Problem in New York after the Revolution*, 21 N.Y. Hist. 284, 289 (1940)).

Faced with these continuing breaches of the law of nations, the Continental Congress in 1781 passed a reso-

lution imploring states to enact laws to protect foreigners—and specifically to "authorize suits * * * for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." Bellia & Clark, *Alien Tort Statute* at 496 (quoting 21 *Journals of the Continental Congress, 1774–1789* 1136–37 (Gaillard Hunt ed. 1912)). This plea fell largely on deaf ears. Connecticut was the only state to enact a civil remedy for injuries caused by its citizens to foreign subjects. *Id.* at 504–506.

3. As the Founders gathered in Philadelphia in 1787, one of their top priorities was to design a new constitution that would enable the United States to meet its obligations under the law of nations. Indeed, when Edmund Randolph opened the Federal Convention, he lamented the Confederation's inability to prevent or redress "acts against a foreign power contrary to the law of nations." He concluded that the Confederation "therefore [could not] prevent a war" and was fundamentally flawed. 1 *Records of the Federal Convention of 1787* 24–25 (Max Farrand ed., rev. ed. 1966).

The Framers sought to remedy this problem not only by centralizing power over foreign relations in the federal government, but also by establishing an independent federal judiciary that could hear cases likely to implicate the law of nations. Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 Colum. L. Rev. 1, 37–46 (2009) (hereafter Bellia & Clark, *Common Law of Nations*). Article III of the new Constitution extended the federal judicial power to "Cases * * * arising under Treaties"; "Cases affecting Ambassadors, other public Ministers and Consuls"; "Cases of admiralty and maritime Jurisdiction"; and "Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2.

In the Judiciary Act of 1789, the First Congress gave the newly-established federal courts jurisdiction over important civil cases implicating the law of nations. It granted the Supreme Court original jurisdiction over cases affecting ambassadors, in order to preclude state adjudication in cases like the Marbois and van Berckel incidents. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80–81. It also granted the federal courts jurisdiction over admiralty and maritime cases, *id.* § 9, 1 Stat. at 77, and suits where an alien was a party and the amount in controversy exceeded $500, *id.* § 11, 1 Stat. at 78.

4. Had Congress stopped there, it would have left a significant gap: Federal courts could not have heard claims for personal injuries suffered by aliens at the hands of U.S. citizens resulting in less than $500 in damages.[2] The ATS filled this gap by extending jurisdiction to certain tort claims by aliens with no amount in controversy requirement. "By authorizing federal court jurisdiction over claims by 'an alien * * * for a tort only in violation of the law of nations or a treaty of the United States,' the First Congress ensured that the United States would provide aliens with at least one form of redress for its citizens' violations of the law of nations." Bellia & Clark, *Alien Tort Statute* 515 (quoting Judiciary Act of 1789, § 9, 1 Stat. at 77).

The ATS's reference to torts "in violation of the law of nations" thus referred to certain ordinary torts that, when committed by American citizens against aliens, would trigger the United States' duty under the law of

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[2] At the time, most tort claims would not have satisfied the $500 amount in controversy requirement for foreign diversity jurisdiction. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 900 (2006).

nations to provide redress or become responsible for the violation. This narrow grant of diversity jurisdiction with no amount-in-controversy requirement was intended to redress any incident which, if mishandled by a state court, might trigger international conflict.

In light of this historical context, the ATS is best read to confer jurisdiction only over intentional tort claims by aliens against United States citizens. The phrase "a tort only in violation of the law of nations" most reasonably referred to an intentional injury by an American citizen to an alien's person or personal property.[3] "When US citizens committed torts against such aliens, they violated the law of nations by threatening the peace of nations. In such cases, the victim's nation would have expected the United States—in accordance with the law of nations—to redress the injury or become responsible itself for the violation." Bellia & Clark, *Alien Tort Statute* 516.

Because the United States had few extradition treaties in 1789, and because the apparatus for federal criminal prosecutions was yet to be established, the First Congress chose to satisfy the United States' obligation in the only remaining way permitted by the law of nations—by giving federal courts jurisdiction to provide civil rem-

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[3] Commentators like Blackstone and Vattel distinguished between forceful, violent misconduct, such as battery and false imprisonment, and private wrongs committed without force, such as slander. Bellia & Clark, *Alien Tort Statute* 517. Because only the former were considered "violations of the peace" giving rise to a duty of redress, "'a tort in violation of the law of nations' most reasonably would have been understood to mean an intentional act of force against an alien's person or property that subjected the transgressor's nation to justified retaliation under the law of nations if it failed to provide appropriate redress." *Ibid.*

edies to aliens without regard to the amount in controversy.

5. This reading of the phrase "a tort only in violation of the law of nations" is both broader and narrower than that put forward in *Sosa*, where this Court concluded that the ATS encompassed a narrow class of intentional torts closely analogous to the three international crimes recognized by Blackstone—violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 724.

To be sure, the three Blackstone crimes were important means by which England sought to comply with its various obligations under the law of nations. The First Congress likewise criminalized the three offenses Blackstone identified. Act of April 30, 1790, 1 Stat. 112. The ATS, however, was designed to provide a civil forum to satisfy a distinct obligation: to redress violence committed by Americans against ordinary foreigners. English courts used their common law jurisdiction to redress such torts in violation of the law of nations committed by British subjects. The states received the common law, but bias against aliens prevented state courts from sufficiently redressing torts of this kind. The First Congress enacted the ATS in order to give federal courts the ability to do so. See generally Bellia & Clark, *Alien Tort Statute* 477–84, 510–24.

In another sense, our reading of the ATS is narrower than that put forward in *Sosa*. If torts corresponding to the three Blackstone offenses included claims by one alien against another, then they would fall outside the jurisdiction conferred by the ATS (although they might fall within admiralty or ambassadorial jurisdiction). Because the United States was responsible only for certain torts

committed by U.S. citizens against aliens, jurisdiction under the ATS was limited accordingly.

B. The ATS was not intended to cover lawsuits by aliens against other aliens.

1. Understood in its original context, the language of the ATS did not encompass claims between aliens, because such claims did not involve "violation[s] of the law of nations" from the perspective of the United States. The First Congress used that phrase to refer to wrongs by the United States or its citizens that triggered U.S. responsibility under the law of nations to provide redress or risk retaliation by the victim's nation.

The First Congress had no reason to extend federal jurisdiction to tort claims between two aliens, especially claims arising outside the United States. The law of nations not only did not impute such torts to the United States; it arguably prohibited adjudication of alien-alien tort claims arising abroad as an infringement on the territorial sovereignty of other nations. Extending the ATS to suits between aliens would have contradicted the First Congress's goal of minimizing diplomatic conflict.

The law of nations as understood in 1789 did not attribute to a nation a tort committed by one alien against another alien, even if the tort occurred within its territory. Bellia & Clark, *Alien Tort Statute* 519. Consequently, the United States did not have the same obligation to redress such violence as it did to redress violence by its own citizen. At most, the United States had an obligation to provide a fair hearing for claims between aliens arising in the United States so as to avoid a denial of justice. See *id.* at 476. Adjudication of such claims in state court fully satisfied this obligation. *Ibid.* Whereas state courts were notorious for discriminating against aliens when they sued Americans, there is no evidence that states failed to

adjudicate suits between aliens fairly or that foreign nations raised any objections in diplomatic discussions with the United States. *Id.* at 520. Thus, authorizing federal jurisdiction over alien-versus-alien suits was both unnecessary and potentially dangerous.

2. Indeed, extending the ATS to include tort claims between aliens arising on foreign soil—a routine scenario in modern ATS cases—would affirmatively undermine the statute's original objectives.

The law of nations imposed no obligation on the United States to provide aliens with a forum for adjudicating claims against one another that arose in foreign territory. Failure to adjudicate such claims would have neither placed the United States in breach of the law of nations nor subjected it to reprisals by foreign nations. Bellia & Clark, *Alien Tort Statute* 529.

To the contrary, vesting jurisdiction in federal courts over claims with no connection to the United States or its citizens would have risked violating the territorial sovereignty of the nation in which the acts occurred—inviting the very diplomatic conflict or military reprisals that the ATS was designed to prevent.

Under the law of nations, as understood by the First Congress, every nation had sovereign authority within its own territory:

> It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.

1 Vattel, *supra*, at 138. As a consequence, Vattel explained, a dispute arising on foreign soil should be resolved only by courts of the place where the action arose or where the defendant was domiciled. *Id.* at 154.

Under the law of nations as understood in 1789, "nations declined to exercise jurisdiction over actions that were local to another nation—in other words, within that nation's exclusive territorial sovereignty." Bellia & Clark, *Alien Tort Statute* 484–85. This principle was especially important because infringing on another nation's territorial sovereignty gave that nation just cause for war. *Ibid.*

English cases from this time confirmed this principle.[4] In 1859, a New York court observed that "no case will be found in the whole course of English jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court." *Molony* v. *Dows*, 8 Abb. Pr. 316, 329–30 (N.Y. Ct. Com. Pleas 1859).

In light of these background principles, construing the ATS to confer jurisdiction over suits between aliens for conduct that occurred abroad would turn the statute on its head. The United States had no responsibility under the law of nations to provide redress for such wrongs, and adjudicating foreign conflicts could infringe on the territorial sovereignty of other nations and provoke the

[4] See *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021, 1030 (K.B. 1774) (Lord Mansfield opines that English courts had no jurisdiction over action arising abroad between foreigners); *Vernor* v. *Elvies*, 6 Dict. of Dec. 4788 (1610) (Scot.) (Scottish court refuses to hear action between two Englishman arising outside Scotland).

very type of diplomatic conflict that the ATS was designed to avoid.[5]

3. The concern about infringing another nation's territorial sovereignty did not apply to ATS jurisdiction over claims by aliens against U.S. citizens, even if the claims arose outside the United States. "In contrast to alien-alien claims arising abroad, a nation's courts did not implicate other nations' territorial sovereignty under the law of nations when they heard actions by aliens against their own citizens." Bellia & Clark, *Alien Tort Statute* 492. Jurisdiction over such transitory actions was commonplace because it was difficult to obtain personal jurisdiction over a defendant outside his domicile.

Arguments against the extraterritorial application of the ATS start from the mistaken premise that the statute not only confers jurisdiction, but also creates a federal rule of decision to govern cases within that jurisdiction. But merely exercising jurisdiction over a tort case did not require federal courts to apply substantive federal law

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[5] Some proponents of a broad interpretation of the ATS erroneously cite two early cases—*Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795), and *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793)—as supporting ATS jurisdiction over cases between aliens. *Bolchos* is inapposite because the relevant claim was by a French citizen against a U.S. citizen. Bellia & Clark, *Alien Tort Statute* 459. In *Moxon*, the Court declined to exercise admiralty jurisdiction over a British ship owner's claim that his ship was illegally captured by a French vessel in U.S. waters. In dicta, the Court noted that the case also did not fall within ATS jurisdiction because "[i]t cannot be called a suit for a tort only, when the property, as well as the damages for the supposed trespass, are sought for." 17 F. Cas. at 948. It is hard to see how the court's decision *not* to exercise ATS jurisdiction can be taken to support ATS jurisdiction over suits between aliens—an issue the court neither decided nor discussed.

extraterritorially. The ATS "is a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. Pre-existing common law causes of action provided its remedies. As the Court explained in *Sosa*, "[t]he jurisdictional grant 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." *Ibid.* Although the Court assumed that federal courts would apply the common law in ATS cases, it did not identify the precise source of such law.

In the Process Act of 1789, the First Congress instructed federal courts, in the exercise of their jurisdiction, to apply "the forms of writs and executions" then in use by state courts. Process Act of 1789 § 2, 1 Stat. at 93–94; see also Process Act of 1792, § 2, 1 Stat. at 276. This meant that, in ATS cases, federal courts would employ ordinary state common law forms of action for redressing tort injuries—the same forms of action they used in the exercise of their diversity jurisdiction. Section 34 of the Judiciary Act of 1789 further provided "[t]hat the laws of the several states * * * shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, § 34, 1 Stat. at 92. These provisions required a federal court exercising jurisdiction under the ATS to apply the common law of the state in which it sat to redress claims by aliens for torts in violation of the law of nations.

Similarly, exercising jurisdiction over a foreign diversity case that arose abroad did not require a federal court to apply American law extraterritorially. In 1789, the place where the defendant was domiciled was often the only place where the plaintiff could obtain personal jurisdiction. Under well-accepted choice of law principles, federal and state courts adjudicating transitory torts

would have applied local forms of proceeding, but the substantive law of the place where the tort was committed.

The general presumption against extraterritorial application of U.S. law began as a way of respecting the law of nations by preventing intrusions on the territorial sovereignty of foreign states. The same respect for the law of nations not only permitted, but required, the United States to redress injuries inflicted by its citizens against aliens outside the United States. Opening federal courts to aliens injured by Americans abroad ensured that the United States would comply with its obligation under the law of nations to redress such injuries.

An early opinion by Attorney General William Bradford confirms this understanding. In 1794, American citizens joined a French fleet in attacking the British Sierra Leone Company's colony on the coast of Africa. 1 Op. Att'y Gen. 57, 58 (July 6, 1795) (William Bradford). Bradford concluded that because the acts took place outside the United States, the actors could not be criminally "prosecuted or punished for them by the United States." *Ibid.*[6] Hence, ATS jurisdiction was crucial if the United States was to redress such injuries. Bradford explained:

> there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an

[6] At the time, the law of nations prohibited countries from extending their criminal jurisdiction to offenses that occurred within the territory of another nation. See Bellia & Clark, *Alien Tort Statute* 482–83.

> alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

Id. at 59.

When the ATS was enacted, violence by U.S. citizens in nearby borderlands—such as British Canada or Spanish territory adjacent to the Mississippi—was of more immediate concern than acts across the ocean. Bellia & Clark, *Alien Tort Statute* 501-03. Nonetheless, for hostile acts committed by U.S. citizens in any foreign territory, the ATS often provided the only reliable means for the United States to redress the injury and discharge its responsibility under the law of nations.

II. The Limits Of Article III Diversity Jurisdiction Preclude Applying The ATS To Suits Between Aliens.

During the first oral argument in this case, Justice Alito asked a simple, but essential, question: "[W]hat's the constitutional basis for a lawsuit like this, where an alien is suing an alien?" Tr. at 51:13–15. The answer is just as simple, and it is dispositive: There is no constitutional basis for applying the ATS to suits between aliens. Article III's authorization of foreign diversity jurisdiction does not extend to controversies between aliens, and the ATS is properly understood as a limited grant of diversity jurisdiction to hear certain claims by aliens against Americans. The ATS did not create or incorporate any substantive cause of action as a matter of federal law. Thus, there is no "arising under" jurisdiction over suits brought under the ATS for violations of the law of nations.

A. Suits between aliens are outside the scope of the foreign diversity clause.

Article III's foreign diversity clause authorizes federal court jurisdiction over "Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. While controversies between U.S. citizens and foreign nationals fall squarely within this jurisdictional grant, disputes between or among aliens do not. See generally Bellia & Clark, *Alien Tort Statute* 526–528.

Although this Court has not yet addressed whether the ATS should be construed to include suits between aliens, it early on addressed the parallel issue raised by the general alien diversity provision. Its resolution of this issue is especially probative because both jurisdictional provisions were enacted together in the First Judiciary Act. Section 11 of the Act conferred federal jurisdiction over suits "where the matter in dispute exceeds * * * five hundred dollars, and * * * an alien is a party." Judiciary Act of 1789, § 11, 1 Stat. at 78. Although that language—like the language of the ATS—did not expressly exclude suits between two aliens, federal courts interpreted the provision to exclude such suits.

In *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12 (1800), this Court held that Section 11 must be read narrowly in light of Article III:

> [T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is a *party*;" but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so ex-

> pound the terms of the law, as to meet the case, "where, indeed, an alien is one party," but a citizen is the other.

Id. at 14 (emphasis in original).[7]

These reasons apply equally to the ATS. Although the ATS, like Section 11, does not expressly *exclude* suits between aliens, it rests on the same Article III jurisdictional authorization—controversies "between a State, or the Citizens thereof, and foreign States, Citizens or subjects." U.S. Const. art III, § 2 , cl. 1. Article III provides no other general warrant for jurisdiction over tort claims between aliens—even for violations of the law of nations—unless such claims have been enacted into positive federal law, such as by statute or treaty. The ATS, which is purely "jurisdictional," *Sosa*, 542 U.S. at 712, is not such a statute.

"Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden, B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). Because Article III's foreign diversity clause does not extend the federal judicial power to controversies between aliens, and because the law of nations only required the United States to remedy harms inflicted by its own citizens against aliens, the ATS is most naturally read—like Section 11—to confer jurisdiction only over suits between aliens and U.S. citizens.

B. Suits under the ATS do not arise under the "Laws of the United States."

Because Article III's foreign diversity clause does not extend to suits between aliens, this Court could uphold

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[7] See also *Hodgson* v. *Browerbank*, 9 U.S. (5 Cranch) 303 (1809); *Montalet* v. *Murray*, 8 U.S. (4 Cranch) 46, 47 (1807).

jurisdiction over such suits only by concluding that they constitute cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. This Court held in *Sosa*, however, that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. Rather, the pre-existing "common law would provide a cause of action." *Id.*

At the time the ATS was enacted, rules derived from the law of nations were considered a form of either general law or state common law. But neither form of law supported "arising under" jurisdiction: The First Congress would not have understood an alien claim "for a tort only in violation of the law of nations" to arise under the Constitution, laws, or treaties of the United States.

1. In *Sosa*, the Court stressed that the ATS is a purely jurisdictional statute that creates "no new causes of action." See, *e.g.*, 542 U.S. at 729 ("All Members of the Court agree that [the ATS] is only jurisdictional."). If the relevant cause of action was not "new," then it would not have been a *federal* cause of action because the federal government only came into being with the ratification of the Constitution in 1789.

We agree that the First Congress expected federal courts to apply the common law to redress torts committed by Americans against aliens, but that expectation did not transform the common law into federal law. To the contrary, the Process Act and Section 34 of the Judiciary Act instructed federal courts to apply the forms of proceeding used by state courts and the laws of the several states as rules of decision.

Moreover, a "purely jurisdictional" statute—that is, one that seeks to do "nothing more than grant jurisdiction over a particular category of cases"—does not confer

jurisdiction on the federal courts pursuant to the "arising under clause." *Verlinden*, 461 U.S. at 496 (quoting *The Propeller Genessee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 451 (1852)). "This reasoning is obviously correct: a 'purely jurisdictional statute' granting jurisdiction over a particular class of cases does not make that particular class of cases arise under federal law any more than the diversity jurisdiction statute makes a $100,000 breach of contract suit between a Massachusetts corporation and a Maine citizen 'arise under' federal law." *Sarei*, 671 F.3d at 820 (Ikuta, J., dissenting) (citation omitted).

The ATS's purely jurisdictional nature forecloses the argument that tort suits between aliens "arise under" the jurisdictional statute itself.

2. This Court should also reject any argument that ATS claims "arise under" federal law because "the law of nations" is part of the "Laws of the United States."[8] When the ATS was enacted, the First Congress did not understand the law of nations to constitute federal common law:

> Federal common law is a modern construct. Prior to the twentieth century, courts did not recognize federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands. To

[8] This erroneous approach was adopted by the Second Circuit in *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980), in which two citizens of Paraguay sued another Paraguayan national for torturing their son in Paraguay. As discussed below, this approach is anachronistic and lacks a convincing basis in the historical record. Moreover, none of the cases relied on in *Filartiga* involved questions of "arising under" jurisdiction. Bellia & Clark, *Common Law of Nations* 63–75, 84–90.

> be sure, federal courts applied certain rules derived from the law of nations in the exercise of their Article III jurisdiction—particularly their admiralty and foreign diversity jurisdiction. They did not apply such rules, however, because they constituted a form of supreme federal law.

Bellia & Clark, *Alien Tort Statute* 547–48 (citations and internal quotation marks omitted); see also Bellia & Clark, *Common Law of Nations* 37–41; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 597–616 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

This approach has been followed by the Supreme Court. As Judge Ikuta explained in her dissent in *Sarei*:

> [A] series of subsequent Supreme Court decisions establish[ ] that cases presenting questions of international law do not arise under the laws of the United States for purposes of Article III. See *Caperton* v. *Bowyer*, 81 U.S. (14 Wall.) 216, 228 (1871) ("It is said that [the plea] involves a question of international law. If it does, this can give this court no jurisdiction. The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States."); *New York Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1875) (holding that the court lacked jurisdiction to hear a case involving "the general laws of war, as recognized by the law of nations applicable to this case," because "it [was] nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United

> States were necessarily involved in the decision."); *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545 (1828) ("A case in admiralty does not, in fact, arise under the Constitution or laws of the United States.").

671 F.3d at 823 (Ikuta, J., dissenting); see also *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886) (Supreme Court had "no right to review" the decision of an Illinois court regarding "a question of common law, or the law of nations"); Bellia & Clark, *Common Law of Nations* 39–41.

In short, "[e]ven if the law of nations was considered a form of *general* common law, it was not understood to be supreme federal law inherently capable of either preempting state law or supporting 'arising under' jurisdiction in federal court." Bellia & Clark, *Alien Tort Statute* 528 (emphasis in original; citations omitted). Consequently, such law cannot support federal question jurisdiction for alien-versus-alien lawsuits under the ATS.

* * *

As *Sosa* confirmed, the ATS "is in terms only jurisdictional." 452 U.S. at 712. It did not create a federal cause of action or adopt the law of nations as a matter of federal law. Such steps were unnecessary in 1789 because diversity jurisdiction was enough to give aliens a federal forum in which to pursue tort claims against American citizens, and to fully satisfy the United States' obligations under the law of nations to redress the misconduct of its citizens toward aliens. Reading the ATS as an exercise of foreign diversity jurisdiction also accords with the reasons for

"great caution" identified by this Court in rejecting an expansive interpretation of the statute.[9]

III. This Case Is The Proper Vehicle For Deciding Whether The ATS Covers Suits Between Aliens.

1. When *Sosa* reached this Court, it involved ATS claims only among Mexican nationals. However, *Sosa* did not address—much less answer—whether the ATS grants jurisdiction over suits between aliens, or whether such jurisdiction comports with Article III. That question remains open and is ripe for decision by the Court in this case.

First, the *Sosa* Court had no need to consider the question of party alignment given its conclusion that the plaintiff there had failed to allege a tort "in violation of the law of nations" under the ATS. 542 U.S. at 727.

In addition, the jurisdictional issue was not cleanly presented in *Sosa* because the district court had independent constitutional and statutory bases for subject matter jurisdiction. The court had jurisdiction over plaintiff's original claims against the United States under the Federal Tort Claims Act and over the claims against the DEA agents under the foreign diversity statute. Because the claims against the Mexican defendant shared a

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[9] Restricting the ATS to torts committed by U.S. citizens would minimize "the potential implications for the foreign relations of the United States." *Sosa*, 542 U.S. at 727. And limiting its coverage to ordinary intentional torts of force—of the kind that have been recognized and routinely litigated for centuries—would avoid embroiling the courts in creating a new federal common law of "international" offenses. See *id.* at 728 (courts "have no congressional mandate to define new and debatable violations of the law of nations").

common nucleus of operative fact with the claims against the U.S. defendants, the federal courts had supplemental jurisdiction even after the claims against the U.S. defendants were dismissed. See 28 U.S.C. § 1367(a); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966).

In short, the *Sosa* Court did not decide—and had no need to decide—whether the ATS permits a suit between aliens in order to hold that the claims in that case were outside the scope of the statute. This means that the Court is free to address—and resolve—it here. See *Hagans* v. *Lavine,* 415 U.S. 528, 535 n.5 ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

2. The *Sosa* Court itself questioned whether certain alien-alien claims arising abroad ever could be brought in federal court under the ATS. Specifically, it questioned whether ATS jurisdiction ever could extend to suits that "claim a limit on the power of foreign governments over their own citizens" and that seek "to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727–28. Because such suits could have "adverse foreign policy consequences," the Court stressed that ATS jurisdiction "should be undertaken, *if at all*, with great caution." *Id.* at 728 (emphasis added).

3. Unlike *Sosa*, this case squarely presents the statutory and constitutional questions of whether the ATS covers a lawsuit solely between aliens. The plaintiffs and defendants are all aliens; no American citizen or corporation has ever been a party.

Moreover, if the Court decides that the ATS does not apply to suits between aliens, it is unlikely that it will ev-

er need to resolve the question of corporate liability under the statute. Pursuant to the diversity statute, 28 U.S.C. § 1332, federal courts already have jurisdiction over suits by aliens against American corporations where the amount in controversy is greater than $75,000. Thus, aliens would have to rely on the ATS only in the unlikely event that they were suing a U.S. corporation for less than $75,000. Claims over that amount would proceed identically regardless of whether the claims were brought under the ATS or under foreign diversity jurisdiction.

However, if the Court declines to address the subject matter jurisdiction issue here, the question will remain open and will almost certainly require resolution by this Court. For example, in *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), an en banc panel of the Ninth Circuit sharply divided on this question. Judge Ikuta—in a dissent joined by Judges Kleinfeld, Callahan, and Bea—argued that federal courts lack subject matter jurisdiction over claims between aliens. *Id.* at 818–34 (Ikuta, J., dissenting). Similarly, in *Mwani* v. *United States*, a Magistrate Judge recently stayed proceedings in an ATS case to await, among other things, whether *Kiobel* addresses the question of whether the ATS extends to claims against aliens. No. 99-125 (JMF), 2012 WL 78237 (D.D.C. Jan 10, 2012). Indeed, if the Court were to decide here that corporations may be liable under the ATS, the jurisdictional question would remain open on remand to the Second Circuit. See, *e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.") (citation omitted). Considerations of certainty and judicial economy counsel in favor of resolving the subject matter jurisdiction issue now rather than later.

CONCLUSION

For the foregoing reasons, the Court should hold that the ATS does not extend to cases between aliens and affirm the decision of the Second Circuit on that basis.

Respectfully submitted.

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