No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

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

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

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Framers' territorial understanding of the law of nations would have contemplated extending the jurisdiction of U.S. federal courts under 28 U.S.C. § 1350 to torts in violation of the law of nations occurring within the territory of a foreign sovereign?

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INTEREST OF *AMICUS CURIAE* [1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences, and files *amicus* briefs. The instant case concerns Cato because it raises vital questions about the role of judges in defining the scope of federal jurisdiction and will clarify when and how judges are to interpret international law.

SUMMARY OF ARGUMENT

Cato's prior brief in this case established that this Court should interpret 28 U.S.C. § 1350 (the "Alien Tort Statute" or "ATS") in accordance with the contemporary understanding of the law of nations in 1789 when the statute was enacted. The jurisdictional grant of a statute is a fundamentally political decision and should not be amended by the courts. The law of nations as of 1789 provided a methodology for determining the parties that could be sued for violations of the law of nations (which did not include corporations), and it also provides a methodology for

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

understanding the extraterritorial scope of the statute. Thus, under *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), this Court should not resort to evolving standards of international law to define the extraterritorial scope of the ATS. Petitioners and their *amici* have no answer for *Grupo Mexicano* or the straightforward axioms provided by international law as of 1789.

The Founders' view of jurisdiction necessarily rested on the nexus between territory and sovereignty. There were theoretical and practical reasons for this, not the least of which was the young Republic's concern about other nations applying foreign laws to our own citizens. Further, the law of nations at the time required a territorial nexus between the state asserting jurisdiction and the claim asserted.

Although Petitioners and their *amici* rely heavily on piracy to support an expansive view of extraterritorial jurisdiction, the inherent character of piracy and pirates under the law of nations renders this comparison specious. Piracy occurs on the high seas, in a stateless zone, and involves crimes committed by stateless actors. As a result, all states may punish piracy on the high seas. That the law of nations permitted jurisdiction under those unique circumstances, however, does not mean that a U.S. court may under international law assert jurisdiction over conduct occurring entirely within the territory of a foreign sovereign. This principle is proven by authority from the early years of the Republic involving not only piracy, but impressment and the slave trade.

In particular, authority with respect to the fight against the slave trade demonstrates the deep and growing regard for the moral and legal issues raised by slavery which was shared by the Founders and others in the early Republic—a regard that is consistent with human rights norms as they have continued to develop. Nevertheless, they did not allow these concerns to override the territorial principles that governed the assertion of jurisdiction under the law of nations. To the extent our understanding of those limitations has now changed based on evolving conceptions of human rights law and individual rights, it is for Congress, not the courts, to incorporate those new understandings into the ATS.

Just as in the first round of briefing, the briefs filed by Petitioners, the United States, and supporting *amici* demonstrate the need for this Court to identify a clear, principled methodology with respect to all aspects of ATS claims. The extraterritorial application of the statute has significant foreign policy implications, as the Founders were doubtless aware. Lower courts need clear guidance and a concise approach to the extraterritorial scope of the statute. Cato submits that the law of nations as the Founders understood it in 1789 provides just such methodological guidance.

ARGUMENT

I. UNDER *GRUPO MEXICANO*, THE LAW OF NATIONS IN 1789 DETERMINES THE EXTRATERRITORIAL SCOPE OF THE ATS

As this Court made clear in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the scope of federal jurisdiction contemplated by the Judiciary Act of 1789 does not evolve

absent Congressional action. *Grupo Mexicano* prohibits federal courts from altering their methodology for understanding international law, because adopting such "evolving" standards would allow federal courts to reset their jurisdictional boundaries without an act of Congress.

Recognizing that the reach of federal law is a fundamentally political decision, George Washington observed in another context implicating the law of nations—the sale of foreign prizes in U.S. ports—that it "rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure," including, if "expedient, to extend the legal code and the jurisdiction of the courts of the United States" to the cases in question. Speech of President Washington, delivered on Tuesday, Dec. 8, 1793, to the 1st Session of the 3d Congress, 1 American State Papers: Foreign Relations 21-22 (1833). Then, as now, where doubts exist about extending federal jurisdiction, any jurisdictional expansion can only come from Congress, and, absent legislation to this effect, the extraterritorial scope of the ATS must be understood under the Founders' contemporary understanding of the law of nations as of 1789.

The United States acknowledges what this Court recognized in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004): the ATS is jurisdictional. Brief for the United States as Amicus Curiae Supporting Pet'rs 15; Supplemental Brief of United States as Amicus Curiae in Partial Supp. of Affirmance 2-3. Thus, *Grupo Mexicano* requires the statute to be understood in keeping with the law as it existed in 1789, not as it may have developed since then. *See Grupo Mexicano*, 527 U.S. at 318-21 (looking to the scope of

remedies available in the 1780s to determine whether certain remedies were within the district court's equitable jurisdiction). It is telling that Petitioners, the United States, and Petitioners' *amici* all continue to ignore *Grupo Mexicano*. The United States' brief in particular evinces a struggle to reconcile its own positions with the inevitable consequences of directing courts to use federal common law as a jurisdictional gap-filler. This inherent tension stems from the United States' refusal to accept and apply the methodology of international law as it stood as of the passage of the ATS.

Cato's initial brief establishes that international law as it existed in 1789 defines who may be sued under the ATS. But the inquiry need not end there. The Founders also understood the law of nations to provide a methodology for defining the extraterritorial scope of ATS jurisdiction in 1789. That methodology should control the extraterritorial scope of the ATS today.

II. THE FOUNDERS' CONCEPTION OF JURISDICTION UNDER THE LAW OF NATIONS WAS STRICTLY TERRITORIAL

Just as the law of nations as of 1789 limits the range of potential defendants under the ATS, it also defines the bounds of state interest regarding which states may exercise jurisdiction over claims arising under the statute. The Founders' conception of the reach of the law of nations was grounded in a firm commitment to a state's territorial integrity, consistent with their views regarding the nature of sovereignty generally and their keen awareness of the young Republic's vulnerability.

A. The Founders Viewed State Sovereignty as Linked to Territory.

The Founders were pre-positivist legal thinkers who approached the law as a "body of rules and principles" to be discovered rather than invented. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1233 (1985). The Founders would thus have grounded their understanding of the law of nations on recognized treatises and authorities—with special reference to scholars like Vattel[2]—to discern what they considered an "objectively identifiable body of law." Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 832 (1989).

As understood by the Founders, the law of nations revolved around a notion of sovereignty that was inextricably bound up with a state's exclusive control over particular territory. Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. at 1233. Thus, as Vattel stated: "Sovereignty following upon ownership gives a Nation *jurisdiction* over the territory which belongs to it. It is the part of the Nation, or of its sovereign, to enforce justice throughout the territory subject to it, to take cognizance of crimes

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[2] Vattel's work is recognized as especially influential among the members of the founding generation. Sterling E. Edmunds, *The Lawless Law of Nations*, 10 St. Louis L. Rev. 171, 186 n.30 (1924) ("The natural Law of Nations as expounded by Vattel was eagerly accepted by our revolutionary forebears as complementary to the system of natural rights which we were then vindicating in our war against George III."); *see also* Jason Jarvis, *Constitutional Constraints on the International Law-Making Power of the Federal Courts*, 13 J. Transnat'l L. & Pol'y 251, 264 (2003) ("Vattel was so influential that he was still being quoted in 1887 for support of an issue of the law of nations.").

committed therein, and of the differences arising between the citizens." Emmerich de Vattel, *The Law of Nations or the Principles of Nature Applied to the Conduct of Affairs of Nations and of Sovereigns* 139 (Charles G. Fenwick trans., Carnegie Institution 1916) (1758) (hereinafter, "Vattel"); *see also* Joseph Story, *Commentaries on the Conflict of Laws* 883-91 (5th ed. 1857) ("Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory, for otherwise there can be no sovereignty exerted upon the known maxim: *Extra territorium jus dicenti impune non parctur*.").

As the basis of sovereign power derived from the sovereign's rights in and over its territory, the Founders understood that the exercise of jurisdiction required a territorial nexus.

B. The Law of Nations at the Time of the First Judiciary Act Required a Direct Territorial Nexus Between the State Asserting Jurisdiction and the Claim.

As of 1789, the law of nations defined the territorial nexus required to legitimately exercise extraterritorial jurisdiction with respect to the identity, status and location of the defendant. Thus, for example, the United States might exercise extraterritorial jurisdiction under the law of nations where a natural person had committed a tort elsewhere and was present in the United States, or where that person had committed a tort in the United States.

1. Vattel Provides a Territorial Framework for Analyzing Cross-Border Claims

Vattel's emphasis on the respect due to the right of a nation to administer justice within its borders necessarily demands a correspondingly cautious approach to extraterritorial jurisdiction. It was "an attack upon the jurisdiction of the court" of another state to inquire into "the justice of a definitive sentence" handed down by a fair foreign tribunal. Vattel at 139. Indeed, the decision of a "judge of the place where the parties are domiciled, when made within the scope of his authority"—reflecting an appropriate territorial nexus between court, conduct and defendant—was to be "recognized and put into effect even in foreign countries." *Id.*

This principle provides a necessary backdrop to Vattel's discussion of extraterritorial criminal jurisdiction, in which he observes that certain enemies of mankind—"poisoners, assassins, or incendiaries"—were amenable to punishment "wherever they are caught." *Id.* at 92. The right of a nation to punish violators of the law of nations who are physically present on its own territory is consistent with Vattel's emphasis on territorial limits to national jurisdiction, and offers no support for the proposition that the law of nations in 1789 contemplated extraterritorial claims, arising from conduct on another sovereign's territory, against persons absent from the forum state. Indeed, the interpretation Petitioners and their supporters adopt would have these exceptions swallowing Vattel's unambiguous general rule restricting a nation from punishing conduct occurring outside its territory. *Id.*; *see also* 1 Wyndham Beawes, *Lex Mercatoria Rediviva or the Directory Being a Complete Guide to All Men* 226 (1771) (stating that piracy

committed in British territorial waters "by the subjects of any power in amity with the Crown of England, are properly punishable by this Crown only").

The contours of these limits on transnational jurisdiction under the law of nations also appear in Vattel's discussion of cross-border actions involving wills. Vattel at 139-40. Vattel observed that a civil claim regarding a will's "bequests and devises" could be brought only "where the property is situated, since the property can be disposed of only in accordance with [the] laws of [that] country." *Id.* at 140. The validity of the will itself, meanwhile, "can only be passed upon by the judge where the testator had his domicile," but that decision, "if in proper form, should be recognized everywhere." *Id.* Vattel—and the Founders—thus understood the law of nations to define the appropriate forum in civil cases with reference to the claim's territorial nexus with the jurisdiction. Indeed, it was this principle that supported the jurisdiction of Pennsylvania's state courts over the perpetrator behind the Marbois incident which supposedly motivated the ATS. *See Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (Pa. 1784); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-18 (2004) (addressing the Marbois incident).

2. This Territorial Analysis Also Informed the Transitory Tort Doctrine

Early American jurisprudence mirrors Vattel's methodology, cautiously approaching cross-border cases and requiring a concrete territorial nexus to trigger jurisdiction. This Court's decisions in *Charming Betsy* and *Rose v. Himely* provide particularly powerful evidence of the contemporary sensitivity to

the potential for offense to foreign sovereigns inherent in the extraterritorial application of U.S. law.

Enacted during the undeclared, maritime "Quasi-War" between the United States and France, the Non-Intercourse Act of 1800 provided for the seizure of vessels engaged in commercial intercourse with France under specific circumstances which ensured that the condemned vessel's owners or operators had a sufficient territorial connection to the United States. Chief Justice Marshall's careful construction of this statute followed from the implicit recognition that the law of nations provides an outer-boundary to the application of U.S. law to non-U.S. nationals outside the territorial jurisdiction of the United States, such that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The balance of Justice Marshall's analysis reflects a focused search for territorial ties justifying jurisdiction; the Chief Justice found none, as the vessel at issue was "with her cargo . . . the *bona fide* property of a *Danish* burgher . . . carrying on trade and commerce with a *French* island." *Id.* at 120-21.

Justice Marshall's opinion in *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808), reprises this territorial analysis on two levels. The case arose from a French privateer's seizure of an American vessel, the *Sarah*, which had allegedly traded with rebels on St. Domingo in violation of French law. The French ship carried the *Sarah* into a Spanish port as a prize and sold her,

along with her cargo, to purchasers including the master of another U.S.-flagged ship, which carried the *Sarah*'s coffee into the port of Charleston. Thus, as a threshold matter, it is noteworthy that the case presented a strong territorial nexus with the United States: U.S.-owned property, located within the territorial jurisdiction of the United States when proceedings began, which was seized from a U.S.-flagged vessel.

Justice Marshall's decision to order the cargo restored to its original owners, meanwhile, rested largely on the record of the case as it related to the physical location of the parties. *Id.* at 276-79. Observing that the "legislation of every country is territorial," the Court concluded that the French prize court which had purported to condemn the *Sarah* under French law lacked jurisdiction because the *Sarah* had never entered French territory; absent such a territorial nexus, no proceedings under French law against the vessel "could be . . . cognizable by the court of St. Domingo, until some other act was performed" which would place the foreign parties "within the legitimate power of the sovereign, for the infraction of whose laws" the vessel was seized. *Id.* at 278-79.

The essential caution evinced by the Court in both of these cases, demanding a territorial nexus as a prerequisite to jurisdiction, defines the Framers' methodology. Significantly, it also explains the mechanics of the transitory tort doctrine.

When the ATS was enacted, American judges were beginning to adopt the contemporary British distinction between "transitory" and "local" actions.[3] *See*

[3] For an example of a contemporary British application of the practice, see *Doulson v. Matthews* (1792) 100 Eng. Rep. 1143

Livingston v. Jefferson, 15 F. Cas. 660 (C.C.D. Va. 1811) (Marshall, J.) (holding that "the jurisdiction of the court depends on the character of the parties" under federal law in rejecting jurisdiction of circuit court over trespasser who had left the district and might never return); *Cave v. Trabue*, 5 Ky. 444 (1811) ("Actions are either local or transitory in their nature. Where the action is local, the jurisdiction attaches to that Court in whose circuit the cause of action arises; but where it is transitory, the jurisdiction belongs to the Court of the circuit in which the defendant may be, the cause of action in such case following him wherever he may go."); *Hill v. Pride*, 8 Va. 107 (Va. Gen. Ct. 1787) (noting that plaintiffs in transitory actions must allege that the defendant is located within the court's jurisdiction). The very existence of this doctrine reflects a *territorial* mindset: classifying an action as transitory or local ensures that a territorial interest exists as a basis for jurisdiction, requiring that either the property at issue or the person against whom the claim is asserted be present in the forum jurisdiction. *See, e.g.*, *Hill*, 8 Va. at 107.

Attorney General Bradford's 1795 opinion, on which Petitioners rely so heavily, is consistent with the contemporary caution in exercising extraterritorial jurisdiction absent a territorial nexus or an express authorization to do so in a treaty. Thus, while referencing a potential ATS claim, Bradford focuses on the existence of a U.S. treaty as integral to the exercise of jurisdiction. 1 Op. Att'y Gen. 57, 58 (1795); *see also* U.S. Br. at 8 n.1 (conceding that the

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(holding that trespass against property in Canada was not actionable in England, as the "law has settled the distinction, and that an action *quare clausum fregit* is local.").

conduct referenced by Bradford may have involved violation of a treaty, and thus might not have implicated the ATS's "law of nations" provision at all). Significantly, Bradford was careful to draw a threshold distinction between jurisdiction over transactions that occurred outside U.S. territory ("[s]o far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts") and the criminal prosecution of the offenders as to these foreign transactions ("*nor* can the actors be legally prosecuted or punished for them by the United States"). *Id.* at 58. In rejecting jurisdiction in both instances, Bradford's reasoning is entirely consistent with a territorial view of the limits of U.S. jurisdiction under the law of nations in effect when the ATS was enacted. The holding in *Filartiga* accords with the law of nations as of 1789, because the perpetrator was both in the United States and a natural person, and the claim arose under a treaty signed by the United States. *See Filártiga v. Peña-Irala,* 630 F. 2d 876 (2d Cir. 1980). But no such territorial interest would exist under circumstances, like those underlying the instant case, where the perpetrator is not present, is not a natural person, and the predicate act did not occur in the United States.

It is thus unsurprising that U.S. courts rarely asserted extraterritorial jurisdiction, and would not do so absent a direct extraterritorial interest. *See Molony v. Dows*, 8 Abb. Pr. 316, 329-30 (N.Y. Sup. Ct. 1859) (English courts would hear cases between foreigners for wrongs done on English soil, but "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."). Indeed, British courts continued to wrestle with these jurisdictional questions a generation after the ATS was enacted.[4]

This consistent disinclination to exercise extra-territorial jurisdiction also implicates the question of corporate liability in cross-border actions. The paucity of transnational transitory tort actions in British and American courts reflects the application of the legal fiction underlying the transitory tort doctrine only to natural persons in addressing the locus of the actual perpetrator, not to corporations or other entities. *See* 3 William Blackstone, *Commentaries on the Laws of England* 384 (1758) ("All over the world, actions transitory follow the person of the defendant . . .").[5]

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[4] The High Court of Admiralty's decision in *The Johann Friederich* exemplifies this persistent reluctance to hear actions between foreign parties arising elsewhere. (1839) 1 Wm. Rob. 35. That case arose from a Danish ship colliding with the Bremen-flagged *Johann Friederich* on the high seas. The Danish vessel sunk, and the *Johann Friederich* put into a British port. Though high-seas collisions were actionable under the law of nations as *communis juris*, the international character of the claim alone did not justify jurisdiction. Rather, the court identified two additional grounds: (1) the vessel's presence within British waters at the time of her arrest; and (2) the collision's location "close upon the English coast." *Id.* at 40. British-owned cargo aboard the Danish ship was also "of considerable importance" as the court was reluctant to "send the British owners to a foreign country" to seek redress.

[5] Thus, there is no basis for extraterritorial use of the ATS in either the so-called "F-squared" or "F-cubed circumstance." *See Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010) (addressing "foreign-cubed" lawsuits).

3. *Under the Law of Nations in 1789, and Consistent With the Founders' Understanding, the ATS Needed No Express Territorial Limitation in its Text*

Petitioners emphasize the lack of an explicit territorial restriction in the clause of the First Judiciary Act that became the ATS. The Petitioners' argument reads the absence as significant because the two preceding sections of the Judiciary Act contain territorial restrictions. Pet'rs' Supplemental Opening Br. at 23. Petitioners, however, ignore the fact that the law of nations itself supplies a territorial limit on ATS actions, rendering the absence of additional language irrelevant.

In addition, the structure of the First Judiciary Act rebuts Petitioners' suggestion that the statute implicitly contemplates extraterritorial jurisdiction. Petitioners ignore several other clauses of Section 9 that similarly lack an express territorial restriction. The clause immediately following the ATS, for example, gives the district courts "cognizance . . . of all suits at common law where the United States sue, and the matter in dispute amounts . . . to . . . one hundred dollars." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Applying Petitioners' logic, the Court would arrive at the nonsensical result that the Founders intended to authorize the United States to bring, in federal court, extraterritorial claims at common law. This clause also refers back to the ATS in describing the district courts' jurisdiction as "concurrent as last mentioned." The ATS granted jurisdiction to the district courts "concurrent with the courts of the several States, or the circuit courts." The connection between the clauses shows that Congress considered the grant of jurisdiction under these

clauses to be the same, and provides no evidence that Congress intended to assert extraterritorial jurisdiction through silence.

The logical reading, and the one consistent with international law as of the First Judiciary Act,[6] is that the United States has an interest in the law of nations only insofar as it applies in U.S. territory. Indeed, that the ATS might not reach acts committed by parties that might have some U.S. presence also comports with modern notions of jurisdiction. *Compare* Restatement (Third) of the Foreign Relations Law of the United States § 402 (Jurisdiction to Prescribe) (noting factors which are strongly territorial) *with* § 421 (Jurisdiction to Adjudicate) (noting factors focusing on the relationship of the person to the state, such as presence, domicile, corporate organization under the law of the state). Not all jurisdiction to adjudicate gives rise to jurisdiction to prescribe. *See* Restatement (Third) § 421 comment *a* ("The fact that an exercise of jurisdiction to adjudicate in given circumstances is reasonable does not mean that the forum state has jurisdiction to

[6] Petitioners' reliance on *Talbot v. Jansen*, 3. U.S. (3 Dall.) 133, 159–60 (1795) (opinion of Iredell, J.) also is misplaced. Petitoners cite this case for the proposition that violations of the Law of Nations were considered "enquirable, and may be proceeded against, in any nation," such that the use of that phrase automatically implies extraterritorial jurisdiction. Pet'rs' Supplemental Opening Br. at 23-24. The only example Justice Iredell cites to support this assertion comes from a discussion of piracy in Beawes's *Lex Mercatoria Redeviva*. As noted in Section II-C-3, *infra*, Beawes's summary of eighteenth century piracy law only supports the exercise of jurisdiction over acts on the high seas, and not acts in the territory of another sovereign. Thus, use of the phrase "law of nations" does not transform this principle into a grant of universal jurisdiction.

prescribe in respect to the subject matter of the action."); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (differentiating legislative jurisdiction from judicial jurisdiction).

C. Territorial Limits on Jurisdiction Were Important to the Survival of the Young Republic.

There is significant evidence that the Founders would not have exercised extraterritorial jurisdiction over this case given their focus on territorial nexus. It is noteworthy that these concerns were not simply abstract legal questions for the Founders. Rather, the concerns that guided their approach to extra-territorial jurisdiction carried real and potentially disastrous consequences for the young United States.

As a young nation, the United States was better served by an interpretation of the law of nations that respected the sovereign prerogatives of all nations, regardless of their size or strength. *Cf. The Antelope*, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights."); Albert de Lapradelle, "Introduction" to Vattel at xlvii (emphasizing Vattel's robust support for the doctrine of "the equality of Nations," according to which "a small Nation is as much a Nation as a large one, just as a dwarf is as much a man as a giant . . . all Nations have the same rights and the same obligations, as much and no more being allowed to one Nation as to another."). Indeed, as Attorney General Randolph observed in 1793, circumspection became the young Republic, "because the United States, in the commencement of their career, ought not to be precipitate in declaring their approbation of

any usages, (the precise facts concerning which we may not thoroughly understand) until those usages shall have grown into principles, and are incorporated into the law of nations[.]" Opinion of the Attorney General of the United States (Edmund Randolph) to the Secretary of State Concerning the seizure of the ship Grange, May 14, 1793, 1 American State Papers: Foreign Relations 149 (1833).

The Founders had good reason to be wary of extending U.S. jurisdiction without a traditional territorial nexus to the United States or its citizens. As a small, weak power we stood to lose a great deal by having other nations do unto us what Petitioners now suggest we do unto other nations—extending our jurisdiction and views on the law of nations into the territory of other sovereigns. Authority relating to impressment, the slave trade and piracy confirms that the Founders' view of the law of nations did not support extraterritorial jurisdiction in cases such as this one.

1. The Founders' Practical Concerns With Extraterritorial Jurisdiction Were Manifested in Their Opposition to British Impressment

The history of British impressment of U.S. citizens to serve involuntarily in the Royal Navy dramatically demonstrates the Founders' interest when the ATS was enacted in a territorial approach to jurisdiction under the law of nations. Between 1789 and the War of 1812, the United States was unable to defend its interests at sea, including the merchant shipping carrying its flag. *See* Ian W. Toll, *Six Frigates: The Epic History of the Founding of the U.S. Navy* 270 (2008) (noting that forcible conscription of American seamen into the Royal Navy prompted "angry

protests" by the U.S. government through the summer of 1804). Asserting rights grounded on a theory of "perpetual allegiance," under which no British subject could renounce his obligations to the British crown, the Royal Navy routinely boarded U.S. merchant vessels—and, in the case of the infamous *Chesapeake-Leopard* Affair, a U.S. warship—to seize alleged British subjects and forcibly enlist them in the Royal Navy. *Id.* at 270-72. The Founders adamantly insisted that this practice violated the law of nations. As James Madison stated:

> Although Great Britain has not yet adopted, in the same latitude with most other nations, the immunities of a neutral flag, she will not deny the general freedom of the high seas, and of neutral vessels navigating them, with such exceptions only as are annexed to it, by the law of nations. She must produce, then, such an exception in the law of nations in favor of the right she contends for. But in what written and received authority will she find it? In what usage except her own will it be found? She will find in both, that a neutral vessel does not protect certain objects denominated in contraband of war, including enemies serving in the war, nor articles going into a blockaded port, nor as she has maintained, and as we have not contested, enemies' property of any kind. But no where [*sic*] will she find an exception to this freedom of the seas, and of neutral flags, which justifies the taking away of any person not an enemy in military service, found on board a neutral vessel.

Extract of a letter from the Secretary of State to James Monroe, Esq., dated January 5, 1804, 2 American State Papers: Foreign Relations 730 (1832). Observing that no treaty authorized British personnel to board U.S. merchant ships, Madison emphasized that it could

> *not be pretended, that the sovereignty of any nation extends in any case whatever beyond its own dominions, and its own vessels on the high seas*. Such a doctrine would give claims to all nations, and more than any thing [*sic*] would countenance the imputation of aspiring to an universal empire of the seas. It would be the less admirable too, as it would be applicable to times of peace, as well as to times of war, and to property as well as to persons. If the law of allegiance, which is a municipal law, be in force at all on the high seas, on board foreign vessels, it must be so at all times there, as it is within its acknowledged sphere. [. . .]. [A]nd thus every commercial regulation in time of peace too, as well as of war, would be made obligatory on foreigners and their vessels, nor only whilst within the dominion of the sovereign making the regulation, but in every sea, and at every distance, where an armed vessels might meet with them.

Id. (emphasis added). James Madison later echoed this position, noting that "all laws of [Great Britain] would be executory on board neutral vessels on the High Seas which would make the foreign vessel a part of British Territory." Letter from James Madison in the hand of John P. Todd on British Impressment, 1812, *available at*: http://goo.gl/TbTw6. When the

United States ultimately fought the War of 1812, it fought in large part to vindicate these U.S. territorial interests. *See, e.g.*, William S. Dudley and Michael J. Crawford (eds.), *The Naval War of 1812: A Documentary History* 61 (1985) (noting that impressment "became a principal cause for the United States' declaration of war against Great Britain in June 1812.").

2. Maritime Counter-Slavery Operations Show the Young Republic's Aversion to Assertions of Extraterritorial Jurisdiction

Although many of the Founders opposed the slave trade, the United States repeatedly refused to join the British counter-slavery treaty system, in large part due to the Executive's reluctance to grant other nations reciprocal rights to board, search and seize U.S.-flagged vessels. *See* Suppression of the Slave Trade-Conference of Foreign Governments on the Subject, H.R. 346, 16th Cong. (1820). In the years following the War of 1812, the British began constructing a massive system of bilateral treaties, which formed the legal basis for their rights to search, seize and condemn foreign slave ships. Absent those treaties, the territorial jurisdiction of the foreign sovereign responsible for an alleged slaver—as opposed to British law premised on the evils of the slave trade—controlled. *See Le Louis* (1817) 165 Eng. Rep. 1464 (Adm. Ct.).

Significantly, the British encountered delicate jurisdictional questions in combatting the slave trade on this basis. The plaintiffs in *Le Louis*, for example, challenged the Royal Navy's seizure of a French ship prior to the existence of an Anglo-French treaty permitting reciprocal search and seizure rights. The court overturned a lower admiralty tribunal's con-

demnation of the vessel—which had no territorial ties to the forum that might trigger jurisdiction[7]—despite the court's obvious disgust with the slave trade. *Id.* at 1477. Though it considered analogizing to the universal jurisdiction permitted in piracy cases, as Petitioners urge in this case, the court identified the unique distinction that enables jurisdiction over pirates: the "want of a national character legally obtained." *Id.* at 1476. Though engaged in an odious trade, the French slaver was nevertheless "the property not of sea rovers, but of French acknowledged domiciled subjects." *Id.* It was up to France to call the slavers to account for violations of French anti-slavery laws; the British, meanwhile, bowed to the territorial limits the law of nations imposed on their own exercise of jurisdiction over foreign nationals engaged in conduct overseas. *Id.* at 1480 ("But a nation is not justified in assuming rights that do not belong to her merely because she means to apply them to a laudable purpose").[8]

The United States meanwhile took no part in the British counter-slavery treaty system. Thus, the U.S. applied *domestic* law to bar U.S. vessels and U.S. citizens from participating in the trade—never extending the prohibitions to foreign subjects or inviting foreign powers to regulate the conduct of U.S. citizens on U.S. territory (*i.e.*, U.S.-flagged ships). *See*

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[7] The court rejected, for example, the suggestion that the presence of British colors aboard the French slaver might support jurisdiction to condemn the vessel. *Id.* at 1473.

[8] The High Court of Admiralty's statement here is strikingly similar to this Court's observation in *Morrison* that "[i]t is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." 130 S. Ct. at 2886.

United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (ordering that, notwithstanding the slave trade's odiousness under the law of nations, French slaver captured off African coast should be surrendered to French consular agent "to be dealt with according to his own sense of duty and right.").

Thus, while the Founders and others in the early Republic had a deep and growing regard for the moral and legal issues raised by slavery—a regard that is consistent with today's human rights norms as they have continued to develop—they did not allow these concerns to lead them to ignore the territorial principles that governed the assertion of jurisdiction under the law of nations. To the extent our understanding of those limitations has now changed, based on changing conceptions of human rights law and individual rights, it is for Congress, not the courts, to incorporate those new understandings into the ATS. *See, e.g.*, Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1991); 18 U.S.C. § 1091 (genocide); 18 U.S.C. §§ 2340-2340A (torture).

3. Petitioners' Analogy to Piracy is Misplaced Given the Founders' Narrow Territorial Understanding of that Crime

Petitioners and their supporting amici analogize to piracy. Pet'rs' Supplemental Opening Brief at 8-10, 13-14; *see also* Supplemental Brief of Yale Law School Center for Global Legal Challenges in Supp. of Pet'rs 10-11; Supplemental Brief of Professors of Legal History William R. Casto, *et al.*, in Supp. of Pet'rs 3 (asserting ATS jurisdiction encompasses authority to enforce "violations, such as piracy, to their fullest extent, which did not include a territorial limitation."). The comparison is unhelpful, as punishing pirates was permissible on grounds that have no application

here: the territorial principle in play did not give rise to any potential friction with other sovereigns. Piracy subject to universal jurisdiction *only* occurred in a *stateless* zone, the high seas, and by definition involved *stateless* actors—pirates turn their back on their home country and cruise on their own authority under no national flag. *United States v. Furlong*, 18 U.S. 184, 198-99 (1820) (noting that "a vessel, by assuming a piratical character," no longer constituted a "foreign vessel" under federal anti-piracy legislation);[9] *United States v. Klintock*, 18 U.S. 144, 152 (1820) (observing that persons "on board of a vessel not at the time belonging to the subjects of any foreign power" and "acknowledging obedience to no government whatever" to be "proper objects for the penal code of all nations" as pirates); *see also* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L. J. 183 (2004); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the*

[9] *Furlong*, in which the Court reviewed indictments under the Punishment of Crimes Act of 1790, includes a noteworthy passage in which Justice Johnson wrestled with the anti-piracy statute's treatment of murder as piracy:

> If by calling murder piracy, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases in which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it . . . .

Id.

Limits of the Alien Tort Statute, 80 Notre Dame L. Rev. 111 (2004).

Given piracy's unique circumstances, its inclusion as a violation against the law of nations actionable under the ATS does not compel the conclusion that the Founders intended the ATS to extend to any violations of the law of nations that occur in the territory of a foreign sovereign. Indeed, to the contrary—it is *because* piracy occurs on the high seas that punishing it does not implicate the territorial interests of another state. *See* Beawes, *Lex Mercatoria* 226-27 (describing sovereign's exclusive right to punish "piracy" committed in sovereign's own territorial waters).

Additionally, because piracy does not occur within the territory of a foreign sovereign, there is no mechanism or state that could punish piracy in the absence of each state asserting jurisdiction against violations. In contrast, the conduct at issue in *Kiobel* occurred entirely within a sovereign state and was allegedly carried out by citizens of that sovereign and aided by citizens of various other sovereigns.

III. THE METHODOLOGY PROVIDED BY THE LAW OF NATIONS AS OF 1789 ESTABLISHES A PRINCIPLED AND PREDICTABLE APPROACH TO ATS JURISDICTION AND AVOIDS SERIOUS SEPARATION OF POWERS PROBLEMS

The Constitution assigns Congress the authority to vest jurisdiction in the federal courts. *See* U.S. Const. art. III, sec. 2. It is for this reason that this Court has consistently avoided expanding the scope of jurisdiction by judicial action. *See, e.g.*, *Morrison*, 130 S. Ct. 2886-88; *Great-West Life & Annuity Ins. Co. v.*

Knudson, 534 U.S. 204, 217 (2002); *Grupo Mexicano*, 527 U.S. at 318. In 1789, when the First Judiciary Act was enacted, Congress spoke in accordance with the Founders' understanding of the law of nations. Given the balance of power established by the Constitution, it is not for the federal courts to engage in ad hoc determinations based on shifting notions of federal common law because this would allow the courts to use federal common law to extend federal jurisdiction beyond its original Congressional mandate.

A. The Positions of Petitioners and Their *Amici* Again Confirm the Absence of Consensus as to the Scope and Reach of Current International Law.

Similar to the conundrum evidenced during the first round of briefing, the competing submissions of petitioners and their *amici* only established that there is no universal rule of international law as to corporate liability. The varied approaches advanced now demonstrate the need for the Court to address the question of extraterritoriality clearly and conclusively so lower courts are not left to speculate as to the reach of the statute.

The briefs filed by foreign governments demonstrate the foreign policy implications of allowing broad extraterritorial jurisdiction. These briefs confirm that projecting U.S. law into foreign countries via the ATS "would create serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155, 165 (2004). *See, e.g.*, Brief of the Gov'ts of the U.K. and the Netherlands in Supp. of Neither Party; Brief of the Gov'ts of the U.K. and the Netherlands in Supp. of

Resp'ts; Brief of the Fed. Rep. of Germany in Supp. of Resp'ts, 15.

The brief filed by the European Union, however, advocates universal civil jurisdiction for ATS claims premised on evolving standards of international law. *See* Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Supp. of Neither Party, 17-18. But this wholly ignores this Court's holding in *Grupo Mexicano*, and also entirely disregards the Founders' focus on territoriality.

Argentina's brief correctly notes that Vattel "maintains that as a general rule States should limit themselves to punishing crimes committed within their own territory." Brief for the Gov't of the Argentine Republic in Supp. of Pet'rs, 7. To escape this principle, Argentina then relies on Vattel's list of universal crimes, including poisoners, assassins, arsonists and pirates, an Argentine statute from 1853—which has apparently never been applied—and the ATS's allegedly positive impact on human rights in Latin America. *Id.* at 8-11. None of these is a basis for disregarding the territorial principles enunciated by Vattel and recognized by states as of 1789. In pressing its argument, Argentina disregards the territorial principle inherent in *Filartiga*, where the defendant, a natural person, lived in Brooklyn when plaintiffs brought suit. That is as opposed to this case where there is no nexus between Respondents and the United States.

Former UN Special Representative John Ruggie relies primarily on an "emerging" norm of corporate liability. Brief of Former UN Special Representative for Business and Human Rights, Professor John Ruggie, *et al*., in Supp. of Neither Party, 7-11. Significantly, the reports he cites recognize that even

modern-day international law requires something crucial missing in this case—some territorial nexus between the forum nation and the defendant to warrant the exercise of extraterritorial jurisdiction. *Id.* at 12, 15.

Other briefs from United Nations officials present theories that only will exacerbate the confusion in U.S. courts regarding the jurisdictional extent of the ATS. These *amici* assemble the concept of universal jurisdiction from divergent theoretical bases. *Compare* Supplemental Brief of Amicus Curiae Navi Pillay, the U.N. Comm'r for Human Rights, in Supp. of Pet'rs, 19 (combining the notion that "crimes against humanity" are of interest to everyone, which grants every state an equal interest, and a "pragmatic" *forum necessitatis* argument, which implies that universal jurisdiction is a fallback when no local forum is available), *with* Brief of Prof. Juan E. Méndez U.N. Special Rapporteur on Torture in Supp. of Pet'rs, 11 (setting out non-exhaustive list of rationales that adds "the need to end impunity for those crimes" to the mix of reasons). Since the law of nations extends farther than the areas of international law cited by Pillay and Méndez, these approaches would require courts to determine whether each specific cause of action gives rise to extraterritorial jurisdiction. As such, these briefs demonstrate that universal jurisdiction is not itself universally understood among states, and is too unstable a methodological foundation upon which to base our understanding of the jurisdictional reach of the ATS.

As opposed to the clarity of the law of nations in 1789, current international law will yield disparate and unpredictable results which are contrary to the limited legislative mandate contained in the ATS,

and will exacerbate foreign relations problems as U.S. courts make pronouncements of international law with respect to disputes located within the jurisdiction of other states, and in which the United States has no territorial interest whatsoever.

CONCLUSION

For the foregoing reasons, the Cato Institute respectfully requests that this Court affirm the judgment below and limit any extraterritorial application of the ATS to cases where the United States has a territorial interest consistent with principles of international law as of 1789.

Respectfully submitted,

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