Nos. 19-416 and 19-453

In The Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.,

Respondents.

CARGILL, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY BARBARA ARONSTEIN BLACK, NIKOLAS BOWIE, WILLIAM R. CASTO, MARTIN S. FLAHERTY, DAVID GOLOVE, ELIGA H. GOULD, STANLEY N. KATZ, SAMUEL MOYN, AND ANNE-MARIE SLAUGHTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of Respondents.[1] *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Supreme Court's decisions in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Amici* include individuals who filed an *amicus curiae* brief in *Sosa*,[2] the position of which this Court adopted in Part III of its opinion. *Id.* at 713–14. Several *amici* also filed *amici curiae* briefs in *Kiobel* and *Jesner* concerning the history of the ATS.[3] In line with the history, text, and purpose of the ATS, *amici* respectfully urge this Court to recognize liability under the ATS for wrongs committed by U.S. subjects, including domestic corporations.

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[1] Counsel of record for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The *amici* who joined the *Sosa* brief are William R. Casto and Anne-Marie Slaughter.

[3] The *amici* who joined previous briefs are Barbara Aronstein Black, William R. Casto, Martin S. Flaherty, Stanley N. Katz, Samuel Moyn, and Anne-Marie Slaughter.

SUMMARY OF ARGUMENT

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, codified the basic tenets of the law of nations into the fledging American legal system, thereby allowing the country to join the international community on equal footing. The law of nations obligated a sovereign, at a minimum, to provide a remedy for wrongs by its subjects and wrongs that occurred on its territory, and made clear that the sovereign could not provide safe harbor to violators of the law of nations. As major controversies of the time demonstrated, these principles applied whether the wrongdoer was an accomplice or a principal actor. *See*, *e.g.*, *Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57 (1795); *Henfield's Case*, 11 F.Cas. 1099 (C.C.D. Pa. 1793) (No. 6360). It similarly did not matter whether the wrongdoer was a juridical or natural person, as evidenced by cases brought against ships and precursors to the modern corporation. That the First Congress explicitly included "law of nations" in the text of the ATS signified their affirmative commitment to meet these well-established international obligations to address wrongs by private parties in their territory as well as by their subjects both in and outside of the United States.

The First Congress passed the ATS as one part of its broader effort to federalize the foreign affairs powers and meet its law of nations obligations as it joined the international community. Newly discovered historical sources dating to Washington's first administration affirm that those who interpreted the ATS understood it to be an immediately actionable

remedial tool for foreigners who had experienced law of nations violations. *See* Thomas Jefferson, *Opinion on Offenses against the Law of Nations*, Dec. 3, 1792, *reprinted in* 24 *The Papers of Thomas Jefferson* 693 (John Catanzariti ed., 2018) ("Jefferson Papers") (addressing law of nations violations in two incidents involving Spanish and French territories).

Subsequent interpreters in the 1790s followed suit, whether they were examining violations for breach of neutrality, plunder, or piracy. These same commitments applied equally regardless of whether the wrongdoer was an accomplice or a principal, or a juridical or natural person. Disagreements persisted during this time about criminal prosecutions under federal jurisdiction, but there was no such disagreement regarding the jurisdiction for a civil remedy under the ATS. Indeed, the text and history of the ATS of the Founding era indicate that it was a statute passed to generally address law of nations violations in situations that involved U.S. subjects or territory.

ARGUMENT

I. The Law of Nations—as Incorporated into the Text of the Alien Tort Statute—Required Sovereigns to Redress Wrongs by Their Subjects, Wrongs on Their Territory, and to Ensure Their Land was Not Used to Harbor Fugitives.

The usage of the term "law of nations" in the text of the ATS connoted the understanding that a sovereign

must—at a minimum—provide a remedy for wrongs by its subjects and for wrongs that occurred on its territory, and that it could not provide safe harbor to violators of the law of nations.[4] The law of nations created both general obligations for the United States to uphold the rule of law, as well as specific obligations, including providing redress for violations of established international norms by private parties that could be attributed to the nation. These obligations applied to both principal violators and aiders and abettors, *see* Part II, *infra*, as well as juridical entities, *see* Part III, *infra*.

The Framers understood that failure to provide such redress would itself constitute a violation of the law of nations and could embroil the country in foreign entanglements. To address these concerns, the First Congress passed the ATS as part of a mix of approaches to federalize foreign affairs powers through the Constitution and various statutes. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018) ("The principal objective of the statute . . . was to avoid foreign entanglements by ensuring the availability of a

[4] Section 9 of the First Judiciary Act provided that the district courts "shall also 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." An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) ("Judiciary Act"). With small changes, it is now codified in 28 U.S.C. § 1350, but it has never been suggested that any change has altered the scope of the original provision. This brief is concerned with the historical understanding of the ATS and thus refers primarily to the original text in its analysis.

federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–19 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 123–24 (2013).

New historical sources dating to Washington's first administration that have been uncovered since *Sosa* affirm those who interpreted the ATS in the 1790s all understood the Statute as immediately actionable and part of the effort to meet its international obligations as defined by the law of nations. *See*, *e.g.*, Thomas Jefferson, *Opinion on Offenses against the Law of Nations*, Dec. 3, 1792, *in* Jefferson Papers at 693; *see also Sosa*, 542 U.S. at 724 (holding ATS was intended to have practical effect the moment it became law).

A. The Law of Nations Created a General Obligation for States to Uphold the Rule of Law and Specific Obligations to Provide Redress for Great Crimes Committed by Their Subjects or Within Their Territory.

The law of nations of the 18th century outlined the obligations of nations, detailing where those obligations applied and against whom they must be enforced. It identified three arenas—subjects, territory, and safe harbor—wherein nations were obligated to provide redress for the violations of private individuals

and juridical entities, including both principal violators and their aiders and abettors. Emmerich de Vattel, a preeminent law of nations scholar, heavily influenced early U.S. legal thought on the matter, explaining that "civilized" nations could provide redress through civil "reparation" of injured parties, thus satisfying their obligations. 1 Emmerich de Vattel, *The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* at bk. 2, ch. 6, § 77 (London, J., Newberry et al. 1759) ("Vattel"). Finally, the law of nations clarified that redress was required for all "great crimes" by private parties, encompassing those harms which threatened the rule of law and safety of all nations. *Id.* at bk. 2, ch. 6, § 76.

The law of nations created a general obligation that required every state to respect and uphold the rule of law on the global stage. It demanded states "mutually to respect" each other and for "justice and equity" to govern international relations. *See* Vattel, bk. 2, ch. 6, § 71. If nations failed to uphold the rule of law, the field of international relations would devolve into "nothing but one nation robbing another." *Id*. at bk. 2, ch. 6, § 72. The commitment to uphold the rule of law also granted access to the community of "civilized" nations, cementing a state's reputation as legitimate and worthy of international respect.

Though nations could regulate their own conduct, they could not reasonably control the actions of private parties at all times. Of particular pertinence to this case, the law of nations specifically required sovereigns to redress wrongs by its subjects or wrongs associated

with its territory that could be attributed to the nation. This included, at a minimum, wrongs: (1) committed by their subjects wherever they occurred; (2) committed on their territory; and (3) where a violator took safe harbor within their territory. In practice, these arenas for redress often overlapped and included aiders and abettors as well as the principal actors. *See* Part II, *infra*; *see also Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57; *Henfield's Case*, 11 F.Cas. at 1102. Violations by juridical entities and natural persons both triggered the obligation to provide redress in these arenas as well. *See* Part III, *infra*.

When the subjects of one state violated the law of nations by injuring the subjects of another state, the sovereign with authority over the offending party bore responsibility under the law of nations. Vattel, bk. 2, ch. 6, §§ 71–72. It was accepted that this obligation extended to violations by subjects wherever they occurred. *See*, *e.g.*, Vattel, bk. 2, ch. 6, §§ 75–76, 78 (identifying sovereign's responsibility to provide redress for its subjects violating law of nations by plundering, robbing, or killing on territory of other nations); *see also* 4 William Blackstone, *Commentaries on the Laws of England*, ch. 5, *68 (1769) ("Blackstone") (noting that "where the individuals of any state violate" law of nations it is the "duty of the government under which they live" to provide redress); Thomas Rutherforth, *Institutes of Natural Law*, bk. 2, ch. 9, § 12 (2d Ed. 1832) ("Rutherforth") (same). It would have been in vain for sovereigns to observe the rule of law if their subjects were at liberty to violate the law of nations at their own discretion. "In

short, the safety of the state, and that of human society" required that sovereigns attend to the actions of their subjects wherever they occurred. Vattel, bk. 2, ch. 6, § 72.

The obligation to address harms also extended to violations committed within the sovereign's territory: it was the sovereign's responsibility "to exercise justice in all the places under [its] obedience, to take cognizance of the crimes committed, and the differences that arise in the country." Vattel, bk. 2, ch. 7, § 84; *see also* Rutherforth, bk. 2, ch. 9, § 12 at 509 ("Connivance, or neglect to prevent an injury, cannot make a nation a party to the injury, unless the offender is one of its own *subjects*; or, at least, *was within its territories when the injury was done*.") (emphasis added). The notion that violations of the law of nations that occur on the sovereign's territory could give rise to jurisdiction over defendants was so well-established and uncontroversial that *amici* are aware of no contrary treatment in the historical literature.

The territorial obligation also required the sovereign to refrain from providing safe harbor to violators of the law of nations: "by granting protection to an offender, [the nation] may become a party . . . [to violations] committed abroad, either by its own subjects, or by foreigners, who afterwards take refuge in its territories." Rutherforth, bk. 2, ch. 9, § 12; *see also id.* ("If, therefore, any person is found within its territories, who has committed an offence against a foreign nation, or against [its] members . . . he ought to be delivered up to those against whom the crime is committed, that

they may punish him within their own territories"); Blackstone at *71–72 (describing piracy as against "all mankind" and noting that sovereigns must refuse safe harbor); Vattel, bk. 2, ch. 6, §§ 75–77.

In order to avoid violations by private parties escalating to full international conflict or irrevocably damaging the state's reputation, nations could satisfy their obligations by providing foreign citizens means to seek redress for their injuries. To simply denounce or disavow the violation was insufficient. By failing to provide a penalty, the sovereign rendered itself "in some measure an accomplice in the injury, and [became] responsible for it." Vattel, bk. 2, ch. 6, § 77. However, if the sovereign of a private party who committed a law of nations violation "delivers up, either the goods of the guilty, or makes a recompense, in cases that will admit of reparation, or the person, to render him subject to the penalty of his crime, the offended has nothing farther to demand from him." *Id*. The law of nations left open which of these three methods—civil, criminal, or extradition—the state should take in response to a particular violation; it only made clear that some form of redress was required to meet international obligations.

The law of nations specifically obligated sovereigns to address "great crimes" committed in violation of the law of nations. Vattel, bk. 2, ch. 6, § 76 (describing "great crimes, or such as are equally contrary to the laws, and safety of all nations"). While piracy, violations of safe conduct, and attacks on ambassadors were paradigmatic violations of the time, these were

not all-encompassing of law of nations violations. *See* Vattel, bk. 2, ch. 6, § 71 (noting that whoever "offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever" is subject to penalty under law of nations); *id*. at bk. 2, ch. 6, § 76 ("Assassins, incendiaries and robbers, are seized everywhere. . . ."); *see also United States v. Robins*, 27 F.Cas. 825 (D.S.C. 1799) (No. 16,175) (discussing crimes of murder and forgery); *Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57 (discussing breach of neutrality); *Territorial Rights—Florida*, 1 U.S. Op. Att'y Gen. 68 (1797) (discussing breach of territorial rights); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 465 (2011) ("In 1789, the ATS reasonably would have been understood to encompass all tort claims for intentional injuries that a U.S. citizen inflicted upon the person or property of an alien."). Tolerating any such behavior was viewed as an attack on the civilized world.[5] *See* Part I.B., *infra*. The law of nations also encompassed the concept of aiding and abetting. *See* Vattel, bk. 2, ch. 6, § 77 and bk. 3, ch. 16, § 241 (referring to both accomplice liability and accessory liability in his discussions of state responsibility); *see also Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57; *Henfield's Case*, 11 F.Cas. 1099.

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[5] The First Congress understood the reprehensibility of piracy and other "great crimes," and during the 1800s, the slave trade joined the accepted list of law of nations violations. *See*, *e.g.*, Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2012).

B. The First Congress Took Seriously Their Obligations Under the Law of Nations and Passed the ATS in Order to Meet Those Obligations by Providing Civil Redress for Violations Associated with U.S. Subjects or Territory.

The First Congress was well aware that their fragile new nation faced serious international threats on numerous fronts. *See*, *e.g.*, The Federalist No. 80 (Alexander Hamilton) (J. & A. McLean ed., 1788) ("The union will undoubtedly be answerable to foreign powers for the conduct of its members."). The First Congress understood that failing to provide redress for private law of nations violations was in and of itself a violation. Vattel, bk. 2, ch. 6, § 77. Violations included those "great crimes" that threatened America's reputation as a "civilized" nation. *Id.* at bk. 2, ch. 6, § 76; *see also id.* at bk. 2, ch. 6, § 72 (noting prohibition of "all injury", "all offense", "all abuse"). Being a "civilized" nation was no mere title—America aspired to diplomatic recognition from the European powers in order to be seen as a treaty-worthy nation on the global stage. *See* Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (2012).[6] The commitment to provide redress was

[6] In order to achieve legitimacy among its European peers, the United States followed the British tradition, which adhered to these established law of nations rules. *See Mostyn v. Fabrigas*, 98 E.R. 1021 (1774) (discussing British law following its citizens); *Dutton v. Howell*, 1 E.R. 17 (1693) (same); *Thomas Skinner v. The East India Company*, 6 State Trials 710 (1666) (demonstrating that Britain felt obligated to provide remedies for its corporate

necessary for the United States to join the global community in order to forge strong alliances, facilitate commerce, and avoid conflicts it was unprepared to handle.[7] *See*, *e.g.*, Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 478, 483–84 (1989); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution*, *the Law of Nations*, *and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 939–40 (2010); Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* 75 (Bridget Flannery-McCoy & Alena Chekanov eds., 2019).

The First Congress knew these risks all too well—they had been repeatedly frustrated by the Articles of Confederation's limited powers to address law of nations violations. Previous remedial efforts in state courts had also been inadequate. The 1784 "Marbois Incident"[8] in Pennsylvania and a similar case

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citizens *in England* for actions that took place outside of England); *Rafael v. Verelst*, 96 E.R. 579 (1775) (same).

[7] At its most extreme, law of nations violations could lead to international conflict. *See*, *e.g,.* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 470 (2011). However, the law of nations made no distinction between violations per se and those violations that were likely to result in war. To uphold the rule of law, all violations were considered gravely serious, whether or not they triggered war, and therefore all violations obligated a response from the sovereign. *See*, *e.g.*, Vattel, bk. 2, ch. 6, §§ 72, 77.

[8] A Pennsylvania court convicted Frenchman Chevalier De Longchamps of a law of nations violation for "unlawfully and

involving the Dutch ambassador in New York[9] both raised sufficient concerns for the First Congress to seek a federal solution to preempt and rectify such incidents in the future. As a preliminary step, the Constitution federalized control over foreign affairs, including through the courts. *See*, *e.g.*, Flaherty, *supra*, at ch. 3. The Framers intended the federal government to handle matters involving aliens and the law of nations to ensure proper oversight of potentially volatile matters of international relations. *See*, *e.g.*, The Federalist No. 42, at 264 (James Madison) (C. Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

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violently threatening and menacing bodily harm" to French diplomat Francis Barbe de Marbois in the French Minister Plenipotentiary's residence. *Respublica v. De Longchamps*, 1 U.S. 111, 115–16 (Pa. O. & T. Oct. 1784). Chief Justice M'Kean said that the residence was a "Foreign Domicil [sic]" and not part of U.S. sovereign territory, but nevertheless adjudicated the claims arising from this foreign territory. *Id*. at 114. However, the national government remained effectively powerless in the face of a potential international crisis as, under the Articles of Confederation, the remedies for such actions could only occur on a state-by-state basis. The Continental Congress could only pass a resolution "highly approv[ing]" the state case. William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 492 (1986) (internal citation omitted).

[9] New York authorities arrested a servant in the Dutch ambassador's household. The Dutch government sought relief from the U.S. Foreign Affairs Secretary, who could only recommend that Congress pass a resolution urging New York to institute judicial proceedings. *See* Casto, *supra*, at 494 n.152.

As part of a wide-ranging set of efforts to centralize foreign affairs powers, the First Congress passed the ATS to provide a civil remedy ("a tort only") for aliens who had suffered law of nations violations.[10] By explicitly including the words "law of nations" in the text of the ATS, the First Congress signified its affirmative commitment to meet all of its international obligations. That the First Congress included "treaties of the United States" as a source of liability in the ATS reinforces the Statute's focus on the international obligations of the United States, whether those obligations were found in treaties or the well-established custom of the law of nations.[11] With no limiting language regarding the "law of nations," the ATS provided for the "general coverage" of such violations, which, as discussed above, included "great crimes" that occurred on U.S. territory or at the hands of U.S. subjects. *See*

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[10] The Framers viewed the ATS as a tool to allocate jurisdiction among state courts of general jurisdiction and federal courts of limited jurisdiction. Their choice to include "concurrent jurisdiction" between the state and federal courts affirms an understanding of the severity of these harms and that they sought to provide multiple avenues for legal redress. *See*, *e.g.*, *Jesner* at 1417 (Gorsuch, J., concurring) (finding that ATS filled statutory gap by allowing aliens to sue in federal court for law of nations violations, regardless of the amount in controversy).

[11] While the drafters of the ATS would not have understood the "touch and concern" or "focus" inquiries as established in *Kiobel*, 569 U.S. at 124–25, and *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 249 (2010), respectively, the history indicates that the ATS was understood to meet, at a minimum, the sovereign's obligation to address torts by U.S. subjects or torts associated with U.S. territory, whether directly or through not providing safe harbor.

Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, 1749 (2020).[12] After its passage, the federal government almost immediately faced the need to consider the application of the ATS.

C. As Demonstrated by the Newly Discovered Jefferson and Randolph Opinions, American Jurists Viewed the ATS as an Immediately Actionable Civil Remedy to Meet U.S. Obligations on Law of Nations Violations.

In newly uncovered historical materials, Secretary of State Thomas Jefferson and Attorney General Edmund Randolph explicitly affirmed that the ATS provided an immediately actionable civil remedy for incidents of robbery, a law of nations violation, committed by U.S. citizens extraterritorially during George Washington's first administration. *See* Jefferson, *Opinion on Offenses against the Law of Nations*, *in* Jefferson

[12] The "fact that a statute has been applied in situations not expressly anticipated by Congress . . . simply demonstrates the breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (internal citations omitted). The ATS was intentionally broad to cover all manner of law of nations violations, and "unexpected applications of broad language reflect only Congress's presumed point to produce *general coverage*—not to leave room for courts to recognize ad hoc exceptions." *Id*. (internal citations omitted) (emphasis added). For comparison, the intended general coverage and breadth of the legislative command of the ATS can be contrasted with the specific statutory provision regarding suits involving ambassadors and the law of nations. *See* Judiciary Act, ch. 20 § 13.

Papers at 693; *Edmund Randolph's Opinion on Offenses against the Law of Nations*, Dec. 5, 1792, *in* Jefferson Papers at 702. Additionally, these materials establish that the ATS was interpreted to have practical effect the moment it became law and was not viewed as requiring further enabling legislation. *See*, *e.g.*, *Sosa*, 542 U.S. at 724.

Two separate incidents of "robbery" by U.S. citizens who unlawfully captured enslaved persons in foreign territory raised the urgent need for effective federal redress for law of nations violations. In the first incident, three U.S. citizens—Thomas Harrison and his accomplices—residing in Georgia entered San Agustin de la Florida, a Spanish territory, and stole five enslaved persons belonging to John Blackwood, a Spanish subject who resided there. *See Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson*, June 26, 1792, *in* Jefferson Papers at 129–31. They then returned to Georgia, claiming that they owned the five persons. *Id.*

In the second incident, Hickman, an American ship captain, landed on the Island of St. Domingo, a French territory. *See Letter from Thomas Jefferson to Jean Baptiste Ternant*, Nov. 9, 1792, *in* Jefferson Papers at 603. Falsely promising employment, he captured several persons enslaved by residents of the island and sold them in the United States. *Id*.

In resolving these incidents, which had the potential to damage the U.S. relationship with these nations, all the sovereigns involved worked within the

well-established expectation that the United States had to address the actions of its subjects wherever they occurred. As Secretary of State, Jefferson received complaints from France and Spain. The letter from Spain "informed [Jefferson] of the robbery" and demanded "reasonable compensation for the damages caused, and the punishment the laws prescribe for offenders." *Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson*, *in* Jefferson Papers at 130.[13] Further, the letter emphasized that the matter was one of great import to the foreign relations between the two countries: "We have no doubt that all this will be done, since it is the means not only of preventing in the future similar attempts, but likewise of consolidating the *harmony and good relations*, to the preservation of which our two nations are so much disposed."[14] *Id*. (emphasis added).

In response to the diplomatic protests, Jefferson recognized that the United States was responsible for holding its own subjects accountable. He gave his assurances to the Spanish minister that "every thing shall be done on the part of this government which right shall require, and the laws authorise" to address the "robbery supposed to have been committed" by U.S.

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[13] The French letter to Jefferson has not been found, but Jefferson states in his letter that he is responding to it directly. *See Letter from Thomas Jefferson to Jean Baptiste Ternant*, *in* Jefferson Papers at 603.

[14] The Spanish complaint did not threaten war or raise concerns about the peace, reinforcing that "foreign entanglements" were not limited to situations implicating a just cause for war.

subjects. *Letter from Thomas Jefferson to Josef Ignacio de Viar and Josef de Jaudenes*, July 3, 1792, *in* Jefferson Papers at 156. Similarly, writing to the French minister, Jefferson vowed to "lend to the agent of the parties injured, every aid which the laws permit." *Letter from Thomas Jefferson to Jean Baptiste Ternant*, *in* Jefferson Papers at 603.

In opinions assessing options for redress for these incidents,[15] both Jefferson and Randolph confidently asserted that the ATS provided jurisdiction over torts against aliens. In his December 3, 1792 memorandum, titled *Opinion on Offenses against the Law of Nations,*[16] Jefferson identified the ATS as an option for civil remedy, directly quoting the Statute: "The act of 1789, c. 20 § 9, says the district Courts 'shall have cognizance concurrent with the Courts of the several States, or the Circuit Courts, of all causes, where an *alien sues for a tort only*, in violation of the law of nations.'" *See* Jefferson, *Opinion on Offenses against the Law of Nations*, *in* Jefferson Papers at 694 (emphasis in original). Responding to Jefferson's memorandum, Attorney General Edmund Randolph affirmed that

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[15] Jefferson considered various options that might be available, noting that this was not a case of piracy nor one involving ambassadors which were provided for in the Constitution and a specific statute respectively. He also considered more generally whether criminal prosecution or civil remedy was permissible. *See* Jefferson, *Opinion on Offenses against the Law of Nations*, *in* Jefferson Papers at 695.

[16] In organizing his papers, Jefferson subsequently titled the opinion "Opn. as to defect of law on crimes commd in forn. countries." *Id*. at 695.

federal courts had civil jurisdiction. *See Edmund Randolph's Opinion on Offenses against the Law of Nations*, *in* Jefferson Papers at 702. Notably, Jefferson's conclusion that the incidents did not involve piracy or wrongs against ambassadors but instead robbery as a law of nations violation affirms that the Statute applied to violations beyond Blackstone's exemplary list. *See* Blackstone at *68 (listing safe conduct, attacks on ambassadors, and piracy); *compare* Vattel, bk. 2, ch. 6, § 76.

Jefferson and Randolph's certainty about the ATS contrasted with Jefferson's initial doubt about the availability of criminal jurisdiction over law of nations violations. Jefferson initially found no criminal remedy available. Jefferson, *Opinion on Offenses against the Law of Nations*, *in* Jefferson Papers at 693–95. He believed this to be a shortcoming serious enough to not only suggest Congress pass criminal legislation to enable prosecution "against offenders under the law of nations," but also to draft a statute with this purpose. *Id.* at 694. *See Clause for Bill on Offenses against the Law of Nations*, Dec. 3, 1792, *in* Jefferson Papers at 693. Although Jefferson ultimately amended his opinion to agree with Randolph's conclusion, the lack of any such indicia of doubt, disagreement, or call for legislation regarding civil jurisdiction demonstrates Jefferson and Randolph's certainty that the ATS provided a jurisdictional basis for redress on which they could rely to satisfy the United States' obligations under the law of nations. *See* Jefferson, *Opinion on Offenses against the Law of Nations*, *in* Jefferson Papers at 693;

Edmund Randolph's Opinion on Offenses against the Law of Nations, *in* Jefferson Papers at 702. Subsequent interpreters in the 1790s agreed.

II. Throughout the 1790s, American Courts and Jurists Understood the ATS to Provide Redress for Law of Nations Violations, Including Aiding and Abetting, Associated with U.S. Subjects or Territory.

American courts and jurists in the 1790s who considered the ATS understood it to provide civil jurisdiction for violations of the law of nations, particularly those concerned with U.S. subjects or territory. While the private parties changed from one incident to the next, all interpreters applied the same analysis as Jefferson and Randolph had regarding the ATS. The historical incidents make clear that violations also involved aiders and abettors. Foreign powers who interacted with the United States operated with the same understanding about the need for the United States to provide redress, including against aiders and abettors.

Outside the ATS context, American jurists and courts understood the more general law of nations obligations to provide civil or criminal redress, or extradite for "great crimes," including aiding and abetting, by U.S. subjects or connected to U.S. territory. *See*, *e.g.*, *United States v. Robins*, 27 F. Cas. 825, 861 (D.S.C. 1799) (summary of speech by John Marshall) ("The principle is, that the *jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every*

part of the world.") (emphasis added); *id*. at 833 (deciding to extradite Robbins to meet obligation to deny safe harbor); *Henfield's Case*, 11 F.Cas. 1099 (criminal aiding and abetting prosecution of U.S. citizen for law of nations violation); Neutrality Proclamation No. 3 (1793), *reprinted in* 11 Stat. 753 (1859) (stating that private citizens' aiding and abetting of hostilities that breached neutrality constituted law of nations violation).[17]

In the ATS context, Randolph and Jefferson were the first to consider the application of the Statute. They viewed it to apply to U.S. citizens who had stolen ("robbed") enslaved persons from abroad and brought them back to the United States, prompting the need for the United States to hold its subjects responsible and not provide a safe harbor in order to maintain good relations. *See* Part I, *supra*. The next executive to consider the ATS, Attorney General William Bradford in Washington's second term, concluded the same.

In the incident considered by Bradford, he, like Jefferson and Randolph, agreed that the ATS provided a civil remedy for law of nations violations committed by U.S. subjects abroad, though he had questions about criminal responsibility. In September 1794, U.S. citizens David Newell and Peter William Mariner "aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British

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[17] *See also Territorial Rights—Florida*, 1 U.S. Op. Att'y Gen. 68. This incident involving Spanish Florida was similar to the one that Jefferson and Randolph addressed some five years earlier. *Id.*

subjects on that coast," thereby breaking U.S. neutrality[18] and violating the law of nations. 1 Op. Att'y Gen. at 58; *see* Appendix B (Transcription from Original Memorial of Zachary Macaulay and John Tilley (Nov. 28, 1794)); *see also Substance of the Report of the Court of Directors of the Sierra Leone Company*, *Delivered to the General Court of Proprietors, on Thursday the 26th February, 1795,* 18 (James Phillips 1795) (complaint emanating from British slave-trade company amounting to 40,000*l* [a great sum for the time]). With a clear expectation that the United States would remedy the wrongs of its own citizens, British Minister Plenipotentiary George Hammond wrote to Attorney General Randolph stressing "the necessity of adopting the most vigorous measures with a view to restrain in future such illegal and piratical aggressions." *See* Appendix C (Letter from George Hammond 4 (June 25, 1795)).

In his memorandum evaluating the legal demands of this incident, Bradford wrote:

> [T]here 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 alien sues for a tort only, in violation of the laws of nations. . . .

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[18] In the 1790s, the U.S. government proclaimed its neutrality in the war between France and Great Britain. *See* Casto, *supra*, at 501.

1 U.S. Op. Att'y Gen. at 59 (emphasis in original). By quoting the ATS directly, Bradford clearly indicated that the Statute applied to "great crimes," such as plunder and pillaging, the aiding and abetting of which by U.S. citizens abroad was a violation of neutrality and the law of nations.

U.S. courts shared the view of the executive branch that the ATS could provide a jurisdictional basis to hold U.S. citizens responsible for committing or aiding and abetting law of nations violations. *See*, *e.g.*, *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C. 1795); *M'Grath v. Candalero*, 16 F.Cas. 128 (D.S.C. 1794); *Talbot v. Janson*, 3 U.S. 133 (1795). In *Bolchos v. Darrel*, the court found that it had jurisdiction under the ATS. 3 F.Cas. at 810. Darrel, a U.S. citizen acting as an agent of the British mortgagee of a Spanish ship, seized and sold enslaved persons from that Spanish ship once it had landed in the United States. *Id.* Bolchos, a French privateer who had seized that ship, sued Darrel, claiming that the enslaved persons were his property and entitled to protection under the 1778 Treaty of Alliance. *Id*. The court held that even if admiralty jurisdiction would not apply since the wrong was committed on land, "[the ATS] gives this court concurrent jurisdiction" over the claims. *Id*. The court thus clearly found the ATS to allow jurisdiction over law of nations violations committed by U.S. citizens and involving U.S. territory.

The ATS arose in two other actions, which, though primarily focused on other statutes, affirmed the same analytical approach to the application of the ATS.

In *M'Grath v. Candalero*, a U.S. citizen asked the court for an attachment *in rem* on a French privateer's ship, which had allegedly seized his ship and cargo and carried it into a French port. *See* 16 F.Cas. at 128. In granting jurisdiction based on the exclusive admiralty grant, the court reasoned by analogy to the ATS: "If an alien sue here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained. Shall it be otherwise, where the alien is the offender, and one of our citizens the party complaining?" *Id.* Through this analogy, the court showed its understanding that under the ATS, the United States would provide a remedy to aliens for law of nations violations committed by its own citizens, and thereby fulfill the expectation placed on sovereigns at the time.

In a law of nations aiding and abetting case that reached the Supreme Court, *Talbot v. Jansen*, a lower court decision identified the ATS as a source of concurrent jurisdiction. *See Jansen v. The Vrow Christina Magdalena*, 13 F.Cas. 356, 358 (D.S.C. 1794). *Talbot* was a law of nations prize case in which the outcome hinged on the nationality of the individuals and the ships. *Talbot v. Janson*, 3 U.S. 133. The Supreme Court found the capture of the ship a violation of the law of nations because the American vessel had illegally captured a Dutch ship when the United States was at peace with the nation. *Id.* at 168–89. This once again affirmed that U.S. courts were concerned with regulating the unlawful behavior of its subjects—in this case, an American vessel. The case implicates aiding and

abetting because more than one ship was involved and one captain assisted the other. *See id.* at 156. Though centrally adjudicated as a prize case, there is no indication that if it had been adjudicated under the ATS, it would have resulted in a different outcome given that prize cases were law of nations cases and the ATS provided general coverage over such claims.

Altogether, all those known to have expounded on the ATS viewed it the same way. It provided general coverage over the law of nations. This included both principals and aiders and abettors. The discussion always involved a U.S. subject or territory, or both. Finally, the incidents touched on a number of prohibitions, from robbery to breaches of neutrality, to piracy, and plunder. As a statute with broad legislative intent, it could be applied to a variety of situations, as evidenced by the discussions. A faithful interpretation of the ATS would not abandon this approach.

III. The Framers Viewed the Law of Nations to Apply to Juridical Entities, Including Under the ATS.

The preceding analysis of the need to provide redress for law of nations violations does not differ when applied to juridical entities. In the 18th century, the Framers would have expected juridical entities—the historical analogs to modern corporations—to be treated as defendants under the law of nations. They were intimately familiar with prize cases, which applied the law of nations routinely to ships as defendants. *See*,

e.g., *M'Grath*, 16 F.Cas. at 128; *see also Jansen v. The Vrow Christina Magdalena*, 13 F.Cas. at 358 (noting ATS allowed jurisdiction over ship in prize case); *see generally* Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 Buff. L. Rev. 477 (2015). Entities such as the East India Company were also inextricably linked to both international commerce and could be implicated in the law of nations, whether that be related to the law mercantile or piracy. *See* Casto, *supra*, at 505. Nothing in the text of the ATS suggests the Framers would have wanted to provide an exemption for juridical entities.[19] Indeed, to read such an exemption into the ATS would have undermined the Statute's purpose and text as understood at the time.

Juridical entities that anticipated modern corporations—and in relevant respects were their functional equivalents—had previously been held liable under common law, including for law of nations violations. Early English entities, including the British East India Company, were held liable for the torts of

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[19] Though juridical entities of the 18th and early 19th centuries were precursors to the modern corporation and were different in some regards, such juridical entities were not immune from suit for law of nations violations. No early interpreter read a juridical entity exemption into the Statute, and neither should this Court. *See*, *e.g.*, *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (not distinguishing among defendants and noting that ATS plaintiffs could include a "company"). In *Darrel*, 3 F.Cas. 810, Darrel, acting as an agent for a British mortgagee, was found to be subject to ATS jurisdiction. It beggars belief that the court would have decided differently if the mortgagee had chosen a corporation as his agent.

their corporate agents. In 1666, for example, Thomas Skinner sued the East India Company in London for "robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done him" by Company agents beyond the realm.[20] *Thomas Skinner v. The East India Company*, 6 State Trials 710, 711 (1666). Skinner's claims partly stemmed from the Company stealing his ship, "a robbery committed *super altum mare*." *Id.* at 719.[21]

The House of Lords feared that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice." *Id.* at 745. Faced with "a poor man oppressed by a rich company," *id.*, the Lords decreed that the "Company should pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000*l.*" *Id.* at 724. The Company argued only that it could not be held liable for the unauthorized acts of its agents; it did not challenge the Court's jurisdiction or Skinner's ability to sue them for tortious acts generally.[22] *Id.* at 713; *Eachus v. Trs. of the*

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[20] Of all 18th century business entities, the East India Company "resembled more closely the modern corporation, with limited liability, transferable shares, and trading capital owned in the name of the company." Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 12 (1918).

[21] Taking a ship on the high seas—*super altum mare*—was piracy and therefore a violation of the law of nations. James Kent, 1 *Commentaries on American Law* 171 (1826).

[22] The Company conceded its liability for agents' acts undertaken by its order or with its knowledge: "[T]he Company are not liable for the debt or action of their factors, *unless done by their order*; and if the Company should be liable to every one's

Ill. & Mich. Canal, 17 Ill. 534, 536 (1856) (holding *Skinner* established "courts could give relief" for actions of corporate agents "notwithstanding these [actions] were done beyond the seas"). *See also Rafael v. Verelst*, 96 E.R. 579 (Armenian merchants brought tortious claims against British agent of East India Company); *Brief of Amici Curiae Professors of Legal History* in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499) at 14–16, Appendices B–D (Company indemnified agent, noting agent would pay lesser damages but never questioning Company's ability to be sued); *see also id.* at 12–16, 20–22 (demonstrating corporate liability hinged on agency principles).

The Framers were also very familiar with another example of a limited-liability business entity: the ship. Ships were regularly involved in international trade and commerce and consistently part of the legal landscape of the law of nations. Because the vessel's owners—who were natural persons—rarely sailed on their ships, those owners were almost never present when their ship became involved in a legal dispute. As with a limited liability corporation, ownership and control

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clamours, and pretences for wrongs done, or pretended to be done by their factors (when if any such thing were done the same was not by their *order or knowledge*, nor applicable to their use and account) the same will necessarily impoverish and ruin the Company: And the Company gave no order for the seizure of Thomas Skinner's ship." *Skinner* at 713 (emphasis added). *Skinner* was later vacated on unrelated grounds. Much as the House of Lords found that the Company was required to pay reparations whether or not they authorized the harms against Skinner, this Court should avoid a "failure of justice" and allow the case to proceed against Petitioners.

were separated—owners invested money in their ships while selecting separate management (the captain) to run the day-to-day operations. Once a ship sailed from its homeport, the captain operated the enterprise beyond the owner's control. The Framers understood this conceit as the legal fiction it was and had a functional understanding of a ship operating as an enterprise. *See id.* at 16.

The classic solution to obtain personal jurisdiction over absent owners was to sue the ship instead, including for violations of the law of nations. The legal fiction of permitting suits against ships applied in the piracy context during the Framers' era and later to the slave trade in the 1800s. *See* Martinez, *supra*, at 121. To accomplish these goals, ships were sued frequently for the crew's misconduct and liability attached to the ship itself, regardless of the owner's claim of innocence. *See The Little Charles*, 26 F.Cas. 979, 982 (C.C.D. Va. 1818) (Case No. 15,612) (case against ship for crew's actions "does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner"); *The Malek Adhel*, 43 U.S. 210, 233 (1844) (claim against ship for crew's actions considered "without any regard whatsoever to the personal misconduct or responsibility of the owner thereof").[23]

[23] At the time of the passage of the ATS, the "common law" encompassed both international law (the law of nations) and domestic law. Historically, the common law provided background principles to give effect when the law of nations was silent on a particular matter, such as how to allocate losses to juridical entities for injuries committed by their agents in violation of law of nations. *See* Andre Nollkaemper, *Internationally Wrongful Acts*

Courts thus allowed civil actions against ships and other juridical entities to ensure an adequate remedy for law of nations violations committed by a ship's captain and crew.

The core rationale for subjecting ships and precursors to the modern corporation, like the East India Company, to suit follows from the fundamental purposes of tort law: To ensure an effective remedy and deter wrongful acts committed as part of an enterprise. To exclude these entities from law of nations liability would have thwarted both the intent and text of the ATS, which was passed to provide remedies in order to meet the country's international obligations. This Court should thus follow the purpose and text of the ATS in allowing causes of action against juridical entities in situations where it would be "the only adequate means of suppressing the offense or wrong." *Id*. at 233–34.

in Domestic Courts, 101 Am. J. Int'l L. 760, 795 (2007). *See Brief of Amici Curiae Professors of Legal History*, *supra*, at 8–9.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to uphold the text, history, and purpose of the ATS by affirming the judgment below.

Respectfully submitted,

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