No. 10-1491

In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, 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 KBR, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTEREST OF *AMICUS CURIAE*[1]

With more than 27,000 employees in 45 countries on five continents, *amicus curiae* KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors. As a matter of policy and conviction, KBR condemns human rights violations and supports efforts to protect the human rights of all people and to hold violators of those rights to account. KBR's Code of Business Conduct requires the Company and its employees to treat all persons with dignity and respect and to comply with all applicable laws, rules, and regulations.

Despite KBR's record of leadership on these issues, it is a defendant in a lawsuit under the Alien Tort Statute ("ATS") concerning other companies' worker-recruitment practices undertaken in the sovereign territories of foreign nations and said to violate the norms of customary international law. *Adhikari v. Dauod & Partners*, No. 09-cv-1237 (S.D. Tex.). Although premised on allegations of KBR's participation or acquiescence in wrongful conduct that, to this day, remain without any support in fact, that lawsuit

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief are filed with the Clerk.

has dragged on for four years, imposing substantial litigation and reputational costs on KBR. For companies that operate in developing countries or provide services to the U.S. government overseas, this is not unusual. The expansive interpretations of the ATS adopted by some lower courts sanction open-ended litigation that does not properly belong in U.S. courts, against defendants far removed from any alleged wrongdoing.

Accordingly, KBR has a strong interest in ensuring that the Court interpret the ATS according to the original public meaning of its text: as a limited grant of jurisdiction over routine torts suffered by foreign persons within the United States that violate the Nation's safe conduct obligations under international and treaty law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The original public meaning of the Alien Tort Statute is not lost to time. Yet by longstanding convention, parties briefing claims arising under the Alien Tort Statute are simply required to quote Judge Friendly's aperçu that the statute is "a kind of legal Lohengrin; . . . no one seems to know whence it came"[2] before skipping ahead to the public policy reasons that the

[2] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

statute ought or ought not to apply in the case at hand. But in so doing, they shortchange the best evidence of the statute's proper reach: its language, its placement in the Judiciary Act of 1789, and the legal and historical circumstances surrounding its enactment. Taken in context, and by its terms, the ATS is no Lohengrin; its source is the established practices of civilized nations known well to the First Congress.

William Blackstone identified but three "offences against the law of nations, animadverted on as such by the municipal laws of England . . . : 1. Violation of safe-conducts; 2. Infringement of rights of embassadors; and, 3. Piracy."[3] These offenses, "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs,"[4] were on the minds of the Congress that enacted the Judiciary Act of 1789, and it legislated on each in turn. That Act established a criminal offense and civil jurisdiction for infringements of the rights of ambassadors and other public ministers. A separate provision vested jurisdiction in the district courts for all civil causes in admiralty and maritime jurisdiction, including injuries suffered through piracy.

That left violations of the safe conduct of foreign persons, the subject of the provision of the 1789 Act known now as the "Alien Tort Statute." Both

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[3] 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (hereinafter Commentaries).

[4] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

customary international law and treaties obligated America to protect the "safe conducts" of foreign persons against infractions within its territory. Failure to do so threatened serious consequences to the Nation's reputation, commerce, and international relations. Yet by 1789, the states' inability or unwillingness to guarantee the safe conduct of aliens against assaults and other private injuries – in particular, British landowners and creditors – was both notorious and consequential, and was a frequent source of diplomatic tension.

The ATS's text is directed at and restricted to these very "alien torts," providing jurisdiction in federal courts for that limited class of private offenses that implicated the United States' obligations regarding aliens under international and treaty law. First, as today, **"alien"** specifically designated a foreign person not residing in the country of his birth and has a narrower meaning than the word, "foreigner," initially employed by the ATS's drafters. The evidence on this point, from dictionaries and contemporaneous usage, is unequivocal and overwhelming. Second, **"tort"** was no cipher but referred to a well-defined class of private offenses already actionable in the states' courts, which the ATS expressly recognized would exercise concurrent jurisdiction over such claims. Third, **"the law of nations or a treaty of the United States"** addressed the two sources of safe conduct rights and obligations that might be infringed by private conduct, rather than (as with other obligations of international law) the acts of

sovereigns. By contrast, the text and structure of the 1789 Act preclude ATS jurisdiction over acts of piracy or offenses against ministers, as such.

Taken as originally understood, the ATS does not support extraterritorial (let alone universal) jurisdiction for any conceivable violation of the shifting norms of customary international law. First, a statute directed at safe conduct violations suffered by "alien[s]" does not overcome the standard presumption against extraterritorial application; to the contrary, that limitation is inherent in the statute itself. Second, the ATS does not license the federal courts to "recognize" and enforce any manner of purported rights under international law, but only routine torts like assault, when in violation of safe conduct obligations. Third, because the common law of torts did not and does not provide for aiding and abetting liability, only primary tortfeasors (or their masters) may be subject to liability in ATS actions.

This brief proceeds in three sections. The first describes America's obligation to provide safe conducts to aliens within its territory, its inability to do so, and the potentially dire consequences of that failure. The second addresses the original public meaning of the ATS, demonstrating that it was carefully tailored to provide redress for violation of America's safe conduct violations and that it does not reach any possible violation of international law. The third section applies this original meaning to the questions before the Court.

Sosa did not attempt to enumerate the "relatively modest set of actions" for which the ATS might provide jurisdiction, only ruling out those lacking requisite "specificity" in international law.[5] But that limitation, standing alone, has proven insufficient to confine the ATS to the more modest role it was enacted, and originally understood, to have. Only by embracing the original meaning of the ATS may the Court establish durable protections against its abuse.

ARGUMENT

The ATS is not an inkblot. Enacted in Section 9 of the Judiciary Act of 1789, it originally provided that the federal 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."[6] *Sosa* understood the ATS "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," without defining which or establishing in what circumstances it could apply. 542 U.S. at 720. But its text and placement in the 1789 Act demonstrate that the ATS was a limited grant of

[5] 542 U.S. at 720.

[6] Pub. L. No. 1-20, 1 Stat. 73, 77 (1789). The present codification of the ATS, as slightly amended without substantive effect, is at 28 U.S.C. § 1350. *Sosa*, 542 U.S. at 725.

jurisdiction over private, tortious conduct violating the safe conducts (express or implied) of aliens present in the United States.

I. The National Government's Inability To Satisfy Its Obligations Under International Law and Treaties

A. America's Obligation To Guarantee Safe Conducts

Confusion as to the ATS's intended reach stems primarily from its limitation to torts "in violation of the law of nations or a treaty of the United States." As a general rule, private conduct falls outside the obligations of the law of nations and treaties, *see id.* at 719-20, which traditionally define the rights and obligations of sovereign states alone:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 L. Oppenheim, International Law: A Treatise 19 (H. Lauterpacht 8th ed. 1955); *accord* 4 Commentaries 68 ("For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war. . . .").

But in limited circumstances, private conduct may implicate sovereign obligations. Blackstone identifies three such circumstances of "offences against the law of nations, animadverted on as such by the municipal laws of England": violations of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.*; *see Sosa*, 542 U.S. at 715 (citing Blackstone's *Commentaries*).

Of these three, safe conduct alone establishes an obligation of sovereigns with respect to aliens in gross. As Blackstone explains, the sovereign was required to guarantee the safe conduct of any foreign person whom it admitted to its territory:

> [V]iolation of safe-conducts or passports, expressly granted by the king or his embassadors to the subjects of a foreign power in time of mutual war, or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community.

4 Commentaries 68-69.

Although the guarantee of safe conduct was an obligation of the sovereign, its violation might arise by private acts. "[T]he foreigner is under the protection of the king and the law, and, more especially, . . . there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct." *Id*. at 69; *accord* E. de Vattel, Law of Nations § 104 (J. Chitty, et al., transl. and ed., 1844) (hereinafter Vattel) (When the sovereign admits foreigners, "he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him."). Because private injuries to aliens would be attributable to the sovereign as a safe conduct violation, the sovereign was well-advised to enforce safe conducts through municipal law.

B. America Risked Reprisal for Its Inability To Guarantee Safe Conducts

These concepts were unquestionably "on minds of the men who drafted the ATS with its reference to tort." *Sosa*, 542 U.S. at 715. In 1781 – years prior to the Marbois incident[7] – the Continental Congress had passed a resolution complaining that the states had failed to "sufficiently comprehend offenses against the

[7] "[A] French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia," sparking a diplomatic conflict. *Sosa*, 542 U.S. at 717-18.

law of nations," a situation that could cause diplomatic friction, reprisals, or even war. 21 Journals of the Continental Congress 1136 (1912). Accordingly, it urged the states "to provide expeditious, exemplary and adequate punishment . . . [f]or the violation of safe conducts or passports" and "to authorize suits to be instituted for damages by the party injured." *Id*. at 1136-37.[8] Later incidents, particularly those concerning assaults on British creditors, would only increase the concern of the nation's leaders over the lack of proper redress for torts against aliens in state courts.

Weakness was the most salient aspect of the early Republic's foreign relations. Surrounded by powers (on land and at sea) far greater than itself, the newborn United States was particularly vulnerable to foreign intervention. *See* Pacificus Number III (Alexander Hamilton), *reprinted in* The Pacificus-Helvidius Debates of 1793-1794, 26, 28 (Morton J. Frisch ed., 2006) (explaining American vulnerabilities as justification for 1793 Neutrality Proclamation). The Confederation Congress had proved itself entirely unable to meet the nation's most basic obligations as an independent state. Indeed, when Edmund Randolph "opened the main business" at the Constitutional Convention, this was the very first defect he identified in the Articles:

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[8] Among the authors of this resolution was Virginia's Edmund Randolph, who later served as the first Attorney General at the time of the ATS's enactment. *See* 21 Journals of the Continental Congress 1136, 1137 n.1.

> That the confederation produced no security against foreign invasion; congress not being permitted to prevent a war not to support it by their own authority – Of this he cited many examples; most of which tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul.

James Madison, Notes of Debates in the Federal Convention of 1787 Reported by James Madison 28-29 (Ohio Univ. Press ed. 1984) (entry of May 29, 1787).

The Constitution was to cure these deficiencies, as John Jay explained in *The Federalist*: "It is of high importance to the peace of America, that she observe the laws of nations towards all these Powers [U.S. treaty and trading partners], and to me it appears evident that this will be more perfectly and punctually done by one national Government." The Federalist No. 3, at 14 (John Jay) (J. Cooke ed., 1961). The ATS – directed as it was at private, rather than public, actions – was enacted as part of the new Federal Government's efforts towards this end.

As noted above, under both the law of nations and treaties, the United States had affirmative and well defined obligations towards other states with regard to their nationals present within its borders. A failure to meet these obligations could, as Randolph feared, constitute a pretext for war. This was especially the case with respect to the rights of British

subjects, guaranteed by Article 4 of the 1783 peace treaty with Great Britain.

Article 4 addressed the contentious issue of pre-Revolutionary War debts owed by Americans to British subjects. It stated that: "It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Definitive Treaty of Peace, U.S.-Gr. Brit., art. 4, Sept. 3, 1783, 8 Stat. 80. In addition, the treaty also required the Confederation Congress to "earnestly recommend" to the States provisions for restoring property (real and personal) confiscated from British subjects, and loyalists who had not actually born arms against the United States, during the war. *Id.* at art. 5. Persons "of any other description," were to "have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavors to obtain the restitution of such of their estates, rights and properties as may have been confiscated." *Id.* Finally, further confiscations and prosecutions based on wartime actions were forbidden: "no person shall, on that account, suffer any future loss or damage, either in his person, liberty, or property." *Id.* at art. 6.

The Confederation Congress was unable to fulfill these obligations which, in turn, gave Britain an excuse for failing to evacuate its remaining military forces from U.S. territory. In a letter to John Adams, then newly appointed American ambassador in London, the British Secretary of State for Foreign Affairs

detailed the grievances of British subjects in this regard, including numerous state statutes enacted to prevent recovery of their debts from American citizens, as well as local violence in some places: "so great and general are the obstructions to the recovery of debts, that, in several districts remote from Charleston [S.C.], the courts have been prevented by tumultuous and riotous proceedings from determining actions for debt." State of the Grievances Complained of by Merchants, and Other British Subjects, Having Estates, Property, and Debts due to Them in the Several States of America, Letter of Lord Carmarthen to John Adams, Feb. 28, 1786, *reprinted in* The Diplomatic Correspondence of the United States of America from the Treaty of Peace to the Adoption of the Present Constitution 7, 13 (1832) [hereinafter "Diplomatic Correspondence"]. Significantly, British subjects, exercising their right of travel under article 5, also claimed to have "experienced great personal insult and abuse during their continuance in the State" of South Carolina.[9]

In reporting on the matter to Congress, American Secretary of State for Foreign Affairs John Jay,

[9] At the time, violence against creditors, alien and American alike, was a constant threat. The 1786 insurrection in western Massachusetts known as "Shays Rebellion," for example, was an effort (by seizing possession of the courts) to prevent the collection of debts, although not limited to those owed to British subjects. *See generally* George Minot, The History of the Insurrections in Massachusetts, in the Year MDCCLXXXVI, and the Rebellion Consequent Thereon 15-16, 38-40, 43, 91 (1788).

conceding (at least in part) the justice of British claims, also noted that Britain might well take exception to his proposals in response because "the individuals who have suffered by our violations are left without compensation for their losses and suffering." Report of Secretary Jay on Mr. Adams' Letter of 4th March, 1786, *reprinted in* Diplomatic Correspondence, *supra*, at 23, 103. However, he concluded,

> Although strict justice requires that they who have wrongfully suffered should, as far as possible, receive retribution and compensation; yet, as it would be very difficult, if practicable, to prevail on the States to adopt such a measure, he thinks it best to be silent about it, especially as the United States have neither the power nor the means of doing it without their concurrence.

Id.

Considered in this light, the ATS was precisely addressed at the anxieties of the day: the enormous risk faced by the young Nation due to its theretofore inability to guarantee the safe conducts and treaty rights of foreign persons within its territories.[10]

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[10] In fact, the fear that private American citizens, at home or abroad, would involve the nation in significant international difficulties persisted for years. In a November 6, 1792, speech to a joint session of Congress, President Washington noted:

> Observations on the value of peace with other nations are unnecessary. It would be wise, however, by timely provisions, to guard against those acts of our own citizens,

(Continued on following page)

II. The Original Public Meaning of the Alien Tort Statute: Providing Redress for Violations of Aliens' Safe Conducts

A. Safe Conducts and the Statutory Text

Not surprisingly, Congress's concern over enforcement of the nation's obligation to guarantee safe conducts is the key to unlocking the statutory text. Private injury to an alien present in the United States was literally an "alien" "tort" "in violation of the law of nations or a treaty of the United States" – specifically, the Nation's obligation to guarantee safe conducts.

To ensure a forum for redress of such injuries, the ATS gave the federal courts jurisdiction over torts against aliens that violated their safe conduct rights under treaty and international law, without providing them rights in addition to those that American citizens were able to vindicate in state courts. This is the only kind of "tort," or private wrong, against the

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> which might tend to disturb it, and to put ourselves in a condition to give that satisfaction to foreign nations, which we may sometimes have occasion to require from them particularly recommend to your consideration the means of preventing those aggressions by our citizens on the territory of other nations, and other infractions of the law of nations, which, furnishing just subject of complaint, might endanger our peace with them.

Speech of the President of the United States to Both Houses of Congress, Nov. 6, 1792, *reprinted in* 1 State Papers and Publick Documents of The United States 33, 36 (3d ed. 1819).

subject of a foreign sovereign that would implicate the Nation's obligation to that foreign sovereign.

1. "Alien"

In analyzing the ATS, most courts and commentators have focused on the nature and extent of the "torts" the statute permitted the newly established federal judiciary to adjudicate. But the law's benefits are first and foremost limited to "aliens." This is because, as suggested above, it was the rights of aliens – non-U.S. nationals resident or at least present within the United States – the new federal government needed to protect. For that reason, the broader term employed in the Constitution, "foreign . . . citizens or subjects," would not do. Art. III, § 2, cl. 1.

The all-important distinction between "aliens" and "foreigners" has been fully investigated by M. Anderson Berry in an article titled "Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute," 27 Berkeley J. Int'l L. 316 (2009). Through a detailed examination of contemporaneous usage and the 1789 Judiciary Act's drafting history, Berry shows that the ATS was originally understood to apply only to individuals present within the territory of the United States, who were described at that time as "aliens." *Id*. at 337-67.

The legal works of the era, when they had occasion to distinguish between "aliens" and "foreigners," did so with consistency and precision. "[F]or Blackstone the term 'alien' was a subset of the term

'foreigner.'" Berry, *supra*, at 338-44 (surveying Blackstone's *Commentaries*). Blackstone divided the people of England "into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the king; and aliens, such as are born out of it." 1 Commentaries 354. The same chapter defines an "alien" as a "stranger born, for so long time as he continues within the king's dominion and protection," and observed that "the children of aliens, born here in England are, generally speaking, natural-born subjects, and entitled to all the privileges of such." *Id*. at 358, 361-62. By contrast, Blackstone includes among "strangers" or "foreigners" those owing no allegiance to the king, including foreign persons abroad, *e.g., id*. at 358, as well as those so beholden, *e.g.*, 4 Commentaries 68-69 (regarding safe conducts). Thus, while an "alien" owed "[l]ocal allegiance" to the sovereign when in its territory, "it ceases the instant such *stranger* transfers himself from this kingdom to another." 1 Commentaries 358 (emphasis added).

Similarly, *Cunningham's Law Dictionary* (1764) defines an "alien," with respect to rights in England, as "one born in a strange country, and never here enfranchised." 1 Cunningham's Law Dictionary (1764) (definition of "alien"). Cunningham's explanation of the basis for distinguishing between the rights of aliens and citizens is also illuminating:

> An alien is one born in a strange country and different society, to which he is presumed to

> have a natural and necessary allegiance; and therefore the policy of [England's] constitution has established several laws relating to such a one; the reasons whereof are, that every man is presumed to bear faith and love to that prince and country where first he received protection during his infancy; and that one prince might not settle spies in another's country; but chiefly that the rents and revenues of the country might not be drawn to the subjects of another.

Id. Thus, the necessity for a term, "alien," to define this class of persons whose legal rights differed from those of subjects or citizens. "Foreigner," by contrast, is again employed to refer to foreign citizens abroad. *Id*. (definition of "foreigner"). And Charles Viner's famous *Abridgement of Law* (1741-56) defines an "alien," with respect to rights under English law, as "one born in a strange country, under the obedience of a strange prince or country." 2 Viner's Abridgement 262. Viner uses the term "foreigner" twice, each time to refer to foreign citizens abroad. *Id*. at 414, 415. Consistent examples of these usages in contemporaneous legal works abound. Berry, *supra*, at 338-64 (discussing, *inter alia*, *Jacob's New Law Dictionary*, *Bacon's Abridgement*, and *Blount's Nomo-Lexicon*).

General works also observed this distinction. For example, Dr. Samuel Johnson's *Dictionary of the English Language* (1755), after defining "alien" as "foreigner," offered an additional definition "in law" perfectly consistent with Blackstone's view:

> An alien is one born in a strange country, and never enfranchised. . . . If one born out of the king's allegiance, come and dwell in England, his children (if he beget any here) are not aliens, but denizens.

Dictionary of the English Language (definition of "alien"); *accord* Blount's Glossographia (D. Brown ed., 1707) (defining "alien" as "A Forreigner, a Stranger born, and not here enfranchised"). Thus, an alien was a foreign-born individual present within the realm but who had not been "enfranchised," or granted the full civil and political rights attendant on naturalization. *See* 1 Commentaries 362. To Dr. Johnson, as to the legal commentators, an "alien" was a species of "foreigner," one present in a country not his own.

Contemporary American statesmen and courts were similarly precise in their use of "alien" to refer to "foreigners" resident in the United States. These terms are used consistently throughout *The Federalist*. In particular, "'[f]oreigner' is used broadly to indicate foreign-born individuals located here or extraterritorially, where "alien" is only used to indicate foreign-born individuals residing in the United States." Berry, *supra*, at 368 (discussing *The Federalist* Nos. 5, 15, 30, 42, 43, 69, and 80). Thus, *The Federalist* Nos. 42 and 43 speak, respectively, of aliens' "residence" for naturalization purposes and "the accession of alien residents," while *The Federalist* Nos. 5 and 80 speak, respectively, of commerce with "foreigners" "regulate[d] by distinct treaties" and the great "proportion of [maritime] cases in which

foreigners are parties." In no instance does *The Federalist* employ "alien" to describe persons outside the territory at issue. And to the limited extent they had calling to do so, contemporaneous court opinions followed this same practice. *See* Berry, *supra*, at 370-71 (discussing cases); *see, e.g., Apthorp v. Backus*, 1 Kirby 407 (Conn. 1788) (Law, J., and Ellsworth, J.) (holding that the plaintiff, at the time of suit a British subject resident in Jamaica, had not been an "alien" when resident in Connecticut prior to the Revolution but "as much a citizen of the now state of Connecticut, as any person at present within it").

Finally, there is good reason to conclude that Congress's substitution of "alien" for "foreigner" in a late draft of the 1789 Act was motivated, in part, by Anti-Federalist fears that foreign persons would enjoy greater rights, through access to federal courts, than U.S. citizens. During the state ratification debates, still fresh in memory at the 1789 Act's passage, the Anti-Federalists had sharply criticized the availability of diversity jurisdiction to citizens of foreign states, complaining that it threatened to "place foreigners in a better situation than our own citizens." 10 The Documentary History of the Ratification of the Constitution 1447 (J. Kaminski & G. Saladino, et al., eds., 1993).

The initial drafts of the 1789 Act, by Sen. Oliver Ellsworth (later Chief Justice of the United States),

used the word "foreigner" consistently throughout.[11] Berry, *supra,* at 329. But during Congress's consideration of the bill, each usage of "foreigner" ultimately was revised to "alien," despite Ellsworth's defense of his draft "with the care of a parent, even with wrath and anger." William Maclay, The Journal of William Maclay, United States Senator From Pennsylvania, 1789-1791 91-92 (E. Maclay ed.) (1890). This substitution was deliberate – an attempt to calm political discord, negate any inference that the ATS provided unprecedented extraterritorial jurisdiction, and limit federal court jurisdiction over foreign matters. And the resulting language, though narrowed, still reached the most damaging violations of the Nation's safe conduct obligations, those suffered by aliens who might be denied a remedy in the state courts.

2. "In Tort Only"

Second, the ATS provides jurisdiction over "tort[s]," the meaning of which has scarcely changed over the centuries. Torts, per Blackstone, were all actions "whereby a man claims a satisfaction in damages for some injury done to his person or property," including "all actions for trespasses, nuisances, assaults,

[11] Significantly, Ellsworth used the spelling "forreigner" in his initial drafts, although this was later corrected to "foreigner" as the bill passed through the Senate. It is more than coincidence that this idosyncratic spelling, "forreigner," is in Blount's "Glossographia," which also draws a basic distinction between foreigners and "aliens" Berry, *supra*, at 363-64.

defamatory words, and the like." 3 Commentaries 117. A statute intended to provide redress for violation of safe conducts would naturally be limited to actions on injurious conduct, while excluding actions on contracts and real property, which no source suggests were subject to the safe conduct obligation.

3. "In Violation of the Law of Nations or a Treaty of the United States"

Third, ATS jurisdiction is confined to torts "in violation of the law of nations or a treaty of the United States." Safe conducts, and related obligations such as passports issued to enemy aliens in wartime, may arise by treaty or by operation of the law of nations, when a foreign person is admitted to a nation's territory. *See, e.g.*, 4 Commentaries 68-69. The ATS would provide no relief, however, to a person not subject to such an obligation – e.g., an enemy alien lacking an express safe conduct document.

At the time of the 1789 Act, the United States had entered into treaties with six countries – France, Great Britain, the Netherlands, Sweden, Prussia, and Morocco – giving rise to safe conduct obligations. Thomas Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830, 875 (2006) (listing treaty instruments). The 1782 Treaty of Amity and Commerce between The Netherlands and the United States is representative. It guaranteed Dutch citizens liberty of conscience and the right not to be molested in regard to worship, the right to dispose of

personal property in the United States "by testament, donation, or otherwise," and the right not to have their property seized or detained for the "public or private use of any one, by arrests, violence, or any color thereof; much less shall it be permitted to the subjects of either party, to take or extort by force, any thing from the subjects of the other party," except by proper judicial process. Treaty of Amity and Commerce, U.S.-Neth., arts. 4, 6, 8, Oct. 8, 1782, 8 Stat. 32. In case of war between the two powers, Dutch citizens in the United States (and Americans in The Netherlands), were to have nine months to leave with their effects. *Id.* at art. 18.

Similar provisions appear in other treaties then in effect. The Treaty of Amity between Sweden and the United States also guarantees individuals liberty of conscience, the right to give or bequeath their "goods and effects," and to a nine-month grace period to leave with their goods in case of war, as does that between the United States and Prussia. *See* Treaty of Amity and Commerce, U.S.-Swed., arts. 5, 6, 22, Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.-Prussia, arts. 10, 11, 23, Sept. 10, 1785, 8 Stat. 84. Indeed, the Swedish treaty specifically requires that "if any thing is taken from them, or if any injury is done to them by one of the parties, their people, and subjects, during the term above prescribed, full and entire satisfaction shall be made to them on that account." U.S.-Sweden Treaty, *supra*, art. 22.

Thus, the United States was obligated, under pain of retribution by nations mightier than itself and

essential to its commerce, to protect the rights of their citizens, when present on its shores. Yet, as described above, federalism (in particular, reliance on the states' courts) proved an obstacle to avoiding offense, caused by violations of safe conducts, through private-law remedies. The ATS was a straightforward solution, providing access to federal courts for a limited class of claims by aliens that could otherwise cause the United States great injury to its reputation, its commerce, and even its sovereignty.

B. The 1789 Act Confirms the ATS Was Limited to Safe Conduct Violations

The notion that the ATS confers omnibus jurisdiction for any violation of the law of nations also is belied by the 1789 Act itself. The Act specifically addresses, in turn, each of the three offenses against the law of nations that Blackstone, and later the Continental Congress, identified as incumbent upon a sovereign to redress – infringements of the rights of ambassadors, piracy, and violations of safe conducts. Assuming that all three types of offenses fall under the ATS gives short shrift to the Act's text and other, more specific provisions.[12]

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[12] *Sosa* did not say that piracy and offenses to ambassadors were necessarily within the ATS's ambit, a question not before the Court, only that those offenses, along with safe conduct violations, were "[u]ppermost in the legislative mind." 542 U.S. at 720.

Sosa assumed that the ATS was motivated by the Marbois affair and other incidents of offenses to ambassadors. 542 U.S. at 716-17. And the First Congress, like the Framers of Article III, was certainly mindful of such incidents – although, as discussed above, their concerns were far broader. But as to ambassadors' rights, they enacted Section 13 of the Act, which addresses the problem directly by conferring on the Supreme Court nonexclusive original jurisdiction "of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul shall be a party." 1 Stat. at 80-81. This sweeping provision – not limited to torts or violations of the law of nations – provided broad protection for ambassadors' rights and, by vesting jurisdiction in the Supreme Court, was consistent with their dignity of office as the representatives of foreign sovereigns. *Cf.* U.S. Const. art. III, § 2, cl. 2; *Ames v. Kansas*, 111 U.S. 449, 464 (1884) (explaining that original jurisdiction "was due to the rank and dignity of those for whom the provision was made").

By contrast, there is no indication that the ATS was concerned with offenses against ambassadors. To the contrary, the 1789 Act carefully distinguishes between private aliens and ambassadors, consistent with contemporaneous practice. For example, although Section 13 grants the Supreme Court *exclusive* jurisdiction over "proceedings against ambassadors, or other public ministers" and Section 9 vests the district courts with *exclusive* jurisdiction over "suits against consuls or vice-consuls," Section 12 recognizes

concurrent jurisdiction with state courts over suits "against an alien" where the amount in dispute exceeds $500. These closely related provisions can be reconciled only by recognizing the distinction between a private "alien" and an ambassador, consul, or other "public minister." Indeed, this distinction reflects that in Article III of the Constitution between "Ambassadors, other public Ministers and Consuls" and "foreign . . . Citizens or Subjects." Such a distinction was consistent with the practices of nations at the time and the prevailing principles of international law. *See* Lee, *supra*, at 854-55 (quoting Vattel and Pufendorf).

And, at the time, such a distinction may have been thought compelled by Article III's vesting of original jurisdiction over "all cases affecting ambassadors" in the Supreme Court. As then understood, that provision would have cast serious doubt on the validity of a statute purporting to place the very same jurisdiction in district courts *and* recognizing concurrent jurisdiction in state courts. *See United States v. Ravara,* 2 U.S. 297, 298-99 (C.C. Pa. 1793) (Iridell, J., dissenting); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original, . . . the distribution of jurisdiction, made in the constitution, is form without substance.").[13] But the ATS

[13] Only decades later did the Court adopt a narrower construction of Article III, § 2, cl. 2, holding that its original jurisdiction need not be exclusive. *Ames v. Kansas*, 111 U.S. 449 (1884).

need not be so interpreted, if the then-prevailing distinction between aliens and foreign ministers (including ambassadors) is recognized, thereby avoiding serious constitutional doubt. *See, e.g., United States ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 504 (1909).

Piracy was also addressed directly in the 1789 Act, by a separate clause providing the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade with the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas." 1 Stat. at 77. That this provision reached all or nearly all acts of piracy and maritime seizure, including by prize, is not seriously in dispute. *See, e.g.*, *DeLovio v. Boit*, 7 F.Cas. 418, 441 (C.C. Mass. 1815) (Story, J.) (holding that, under § 9, cl. 3, the 1789 Act, the district courts have jurisdiction over "all maritime contracts, and all torts, injuries and offences, upon the high sea, and in ports as far as the tide ebbs and flows"). Notwithstanding the ATS, aliens already had redress to federal courts for piracy and other injuries on the high seas.

Again, by contrast, there is no indication that the ATS was directed at piracy or prize. To the contrary, the 1789 Act itself forbids it: with exclusive jurisdiction over cases in admiralty and maritime jurisdiction vested in the federal district courts, such jurisdiction could not be exercised, as required by the

ATS, "concurrent with the courts of the several States." 1 Stat. at 77. In addition, piracy and prize stand outside the class of "tort[s]" amenable to ATS jurisdiction. Thus, in *Moxon v. the Fanny*, 17 F.Cas. 942, 947-48 (D. Pa. 1793), the district court found itself without jurisdiction over a claim for the return of a British ship captured by a French privateer within the territorial waters of the United States. "It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id*. at 948.[14]

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[14] As for Attorney General William Bradford's 1795 opinion stating that ATS jurisdiction might be available for the raid of a British colony (in Sierra Leone) by a French fleet aided by Americans, it must be understood in context as a diplomatic gesture. The United States was neutral between belligerents France and Britain, and Bradford wrote in response to questions posed by the governor of the colony, forwarded on by the British Foreign Office. He disclaimed any authority on behalf of the United States to bring suit against the perpetrators for their conduct on land, for that conduct was "not within the cognizance of our courts," and any obligation to bring suit for their conduct on the high seas. 1 Op. Att'y Gen. 57, 58 (1795). While denying any intention to take any further action in the case at all, he offered that the victims could bring suit themselves in district court, under the ATS – an opinion offered without analysis, befitting what Bradford knew to be an empty gesture given the practical impossibility of bringing and maintaining such a suit. *Id*. (A less-offhand response might have noted, for example, that the Jay Treaty, which the British alleged had been violated, was not yet in force at the time of his writing.) And indeed, no such suit ever was brought, and the reporters do not describe any case relying on ATS jurisdiction for torts suffered on the high seas.

In any case, given the district court's broad admiralty jurisdiction, an additional provision directed at such injuries would have been "largely redundant." William Dodge, The Historical Origins of the Alien Tort Statute, 19 Hastings Int'l & Comp. L. Rev. 221, 251 (1996). It is also doubtful that, given the availability of admiralty jurisdiction and the prejudices of the day, any alien would have chosen to proceed under the ATS and face a jury trial, rather than proceed in admiralty before a judge. *See id*. (observing that aliens in fact did, as possible, "prefer[ ] to bring their suits as libelants in admiralty").

III. Applying the Alien Tort Statute's Original Meaning

A. The Alien Tort Statute Does Not Apply to Extraterritorial Conduct

A statute providing federal-court jurisdiction over safe conduct violations suffered by foreigners within the United States is limited, by its own terms and purpose, to territorial conduct.

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869, 2877 (2010) (internal quotation marks omitted). "[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect," the Court "must presume it is primarily

concerned with domestic conditions." *Id*. Accordingly, "[w]hen a statute gives no *clear indication* of an extraterritorial application, it has none." *Id*. at 2878.

This presumption against extraterritorial application is longstanding, premised on principles of law that predate the ATS and the Constitution. As explained by the well regarded and highly influential publicist Emmerich de Vattel, a sovereign "is to exercise justice in all the places under his obedience. . . . Other nations ought to respect this right." Vattel § 84; *see also id*. (explaining that a foreign sovereign should not even "interfere in the causes of his subjects in foreign countries," except in the most extreme case of "palpable and evidence injustice"); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("'Crimes are in their nature local, and the jurisdiction of crimes is local.'") (quoting Blackstone's report of *Rafael v. Verelst*, 2 W. Bl. 1055, 1058 (1776)); *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808) ("[T]he legislation of every country is territorial"). Drawing heavily on Vattel and British legal custom, the First Congress was well versed in the traditional territorial limitation of municipal law when it enacted the ATS.

And, consistent with that tradition, Congress made express in the text of the ATS its limitation to domestic conduct. In particular, its use of the term "alien," which designates a foreign person present in the United States, precludes application of the ATS to conduct occurring outside of the United States. This is because a foreign person suffering a private wrong outside of the United States would not be for these

purposes an "alien." Only by this interpretation may the Court accord proper meaning to Congress's choice to vary its choice of language from the broader term ("foreign . . . citizens or subjects") employed in the Constitution.

The purposes of the ATS, inherent in its text, demand the same result. The Nation's obligation to guarantee the safe conducts of those foreign citizens whom it had admitted to its territory was absolute and unquestionable, and its failure to so provide threatened severe international consequences. By contrast, the Nation owed no such obligation, as a matter of international law, with respect to foreign persons in foreign places, and there is no plausible reason that it would have wished to throw open its courthouses to actions on injuries suffered by such persons. Instead, Congress chose limiting language perfectly congruent with its international obligations, no more.

Legislating more broadly, by contrast, would have had the opposite effect of that intended by Congress. "In 1789, adjudication of such disputes not only was not required by the law of nations, but in fact would have stood in tension with the principles of territorial sovereignty." Anthony Bellia & Bradford Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 484 (2011). Rather than ease international tensions, acting to regulate conduct within other nations' territories would have violated those nations' sovereignty, sowing only discord. *See* Vattel § 84.

There is certainly no indication in the ATS that Congress intended to overcome the presumption against extraterritorial application. Its references to the "laws of nations" and "treaties of the United States" are not deprived of meaning, limited to domestic conduct, but cover the field of safe conduct violations. Those references no more signal a willingness to interfere in the affairs of other sovereigns than other statutes' references to "foreign commerce" or intercourse with a "foreign country." *See Morrison*, 130 S.Ct. at 2881; *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991). And the claim that Congress intended the ATS to apply to piracy, necessarily an extraterritorial act, is belied by the statute itself. *See, supra*, Section II.B.[15]

Congress's choice of words, and the purposes suggested by those words, preclude application of the ATS to conduct occurring outside of the United States.

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[15] In addition, the First Congress surely was aware that Article III jurisdiction was questionable for aliens' suits against other foreign persons under general common law, a type of claim especially likely to arise outside of U.S. territory. *See* U.S. Const. art. III, § 2, cl. 1.

B. The Alien Tort Statute Is Not an Open-Ended Grant of Authority for Federal Courts To Recognize (or Contrive) New Causes of Action

Properly understood, the ATS does not authorize federal courts to recognize some amorphous set of "customary international law torts," but only routine torts, of the sort recognized under state law and actionable in state courts. Only this interpretation, which builds on the Court's decision in *Sosa*, provides an existing and coherent body of substantive law to be applied under what was unambiguously phrased as a jurisdictional statute, and avoids according aliens greater substantive rights than those generally available to American citizens – a result Congress is unlikely to have intended.

Even assuming that the ATS authorizes the *federal* courts to recognize causes of action, *see Sosa*, 542 U.S. at 726; *but see id*. at 740-42 (Scalia, J., concurring), the statutory text strictly circumscribes their discretion in doing so. "Tort" is not an empty vessel, but a body of law defined through the opinions of the nation's common law courts over centuries, before and since passage of the 1789 Act. Then, as now, tort reached assault and battery, trespass to property, and other private wrongs. While the category of torts actionable in the courts may have expanded, it is not apparent that the category of torts violating safe conduct obligations – i.e., those that concern the basic physical security of a person and his possessions – is at all different.

Whether federal courts hearing ATS cases apply a federal common law or those of the states, per *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), matters less than that they observe the statute's textual limitations and reject claims apart from ordinary torts in violation of safe conduct obligations. To do otherwise is to load the term "tort" with a meaning it bears in no other context.

C. The Alien Tort Statute Provides No Basis for Aiding and Abetting Liability

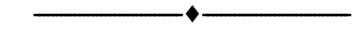
The ATS, because it is premised on the ordinary common law of tort, does not recognize aiding and abetting liability. "[T]here is no general presumption that the plaintiff may also sue aiders and abettors." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994). "Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability." *Id*. at 182. And in this instance, there is no such statutory authority, and so there may be no such liability. *Cf*. *id*. at 183 (rejecting the argument "that aiding and abetting should attach to all federal civil statutes, even laws that do not contain an explicit aiding and abetting provision").

The law on this point is unchanged over centuries. Blackstone's detailed exposition of the criminal law of England devotes a chapter to "principals and accessories," 4 Commentaries 34-40, while his discussion of private law mentions but one instance of vicarious liability: "it is not material whether the

damage be done by the defendant himself, or his servants by his direction." 3 Commentaries 153. This formulation is not, however, anywhere near so broad as to reach assistance and encouragement, the usual substance of aiding and abetting. Other historical sources, despite discussing private wrongs, have little or nothing to say on secondary liability, indicating its absence.

Reluctance to impose civil liability on non-primary actors carried over to the United States, where secondary tort liability was all but unknown until the mid-nineteenth century. Richard Mason, Civil Liability for Aiding and Abetting, 61 Bus. L. 1135, 1138 (2006). Even then it remained rare through to the present, more or less limited to securities law and "isolated acts of adolescents in rural society." *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983); *see also Central Bank of Denver*, 511 U.S. at 181-82 (explaining that the availability of civil aiding and abetting liability remains uncertain in many states).

The claims that may be recognized under the ATS are ordinary torts, no more, no less. Because tort law, and federal common law in particular, did not and do not recognize aiding and abetting liability, it is unavailable for torts asserted under the ATS.



CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reject the Petitioners' attempt to read the Alien Tort Statute as establishing a bottomless font of jurisdiction for federal courts to recognize any manner of customary international law tort occurring anywhere in the world. That is a meaning the statute's words cannot bear. Instead, the Court should interpret the Alien Tort Statute according to its original meaning and hold that it does not apply to extraterritorial conduct, is limited to routine torts in violation of the Nation's safe conduct obligations, and provides no basis for aiding and abetting liability.

Respectfully submitted,

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