No. 19-1530

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ESTATE OF ARTURO GIRON ALVAREZ, *et al.*,

Plaintiffs-Appellees,

v.

THE JOHNS HOPKINS UNIVERSITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland,
Case No. 1:15-cv-00950-TDC (Hon. Theodore D. Chuang)

BRIEF OF *AMICI CURIAE*, THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE CENTER FOR JUSTICE AND ACCOUNTABILITY, IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Katherine Gallagher Date: September 18, 2019

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

****

I certify that on September 18, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT OF INTEREST AND AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29, *amici curiae,* the Center for Constitutional Rights ("CCR") and the Center for Justice and Accountability ("CJA"), respectfully submit this brief in support of the Plaintiffs-Appellees and affirmance of the District Court's denial of Appellants' motion for judgment on the pleadings. All parties have consented to the filing of this brief.[1]

CCR and CJA are human rights organizations with a substantial interest in the proper understanding and application of *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) on the adjudication of claims brought under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

Founded in 1966, CCR has a long history of litigating cases on behalf of those with the least access to legal resources, including victims and survivors of torture, war crimes, and crimes against humanity. CCR brought the landmark case that, for the first time in the modern era, recognized causes of action exist under the ATS to remedy human rights violations, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a decision ultimately endorsed by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). CCR also brought cases that recognized

[1] 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 person other than counsel for *amici curiae* made a monetary contribution intended to fund its preparation or submission.

that the ATS applies to non-state actors, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996), and to corporations, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *dismissed by stipulation pending reh'g en banc*, 403 F.3d 708 (9th Cir 2005), and has served as counsel for *amicus curiae* before the Supreme Court, including on the question of corporate liability for ATS claims, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) and *Jesner v. Arab Bank, PLC*.

CCR is currently litigating *Al Shimari v. CACI Premier Technology, Inc.*, No. 1:08-cv-00827 (E.D. Va. filed June 30, 2008), a case against a Virginia-based corporation on behalf of Iraqi citizens detained at Abu Ghraib prison, who bring claims of war crimes, torture, and cruel, inhuman, and degrading treatment under the ATS. This Court has reviewed *Al Shimari* no less than four times, including in holding that Plaintiffs' ATS claims survive *Kiobel*'s "touch and concern" test so as to displace the presumption against extraterritoriality, *Al Shimari v. CACI Premier Technology Inc.*, 758 F.3d 516 (4th Cir. 2014), and otherwise do not raise a non-justiciable political question. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016); *see also Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc) (dismissing CACI's interlocutory appeal for lack of jurisdiction); *Al Shimari v. CACI Premier Tech., Inc.*, No. 19-1328, 2019 WL 3991463 (4th Cir. Aug. 23, 2019) (same). CCR therefore has a strong interest in ensuring the proper

interpretation of the Supreme Court's decisions in *Sosa*, *Kiobel*, and most notably, *Jesner*, as relates to claims against domestic corporations.

CJA is an international human rights organization dedicated to deterring torture and other human rights abuses worldwide. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks redress for victims. CJA has represented victim plaintiffs in numerous lawsuits filed in federal courts under the ATS and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note. CJA has a strong interest in ensuring that courts apply a consistent and appropriate legal framework when deciding questions regarding the classes of defendants against whom suits may be brought under the ATS. As such, CJA has a strong interest in ensuring the proper interpretation of the Supreme Court's decisions in *Sosa*, *Kiobel*, and *Jesner*.

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) was intentionally constructed to be narrow, and have limited effect. Even though the Court in *Jesner* granted *certiorari* to decide the question of whether *all* corporations were categorically exempt from liability under the ATS, as it had before in the initial (and ultimately abandoned) basis for *certiorari* in *Kiobel v. Royal Dutch Petroleum Co.*, 566 U.S. 961 (2011), the Court centered its concerns on the foreign policy implications of ATS litigation, and accordingly chose to

exempt *foreign* corporations only. Thus, as before in *Kiobel*, the *Jesner* Court—including the plurality and concurring opinions—deliberately chose not to foreclose liability for domestic corporations. By seeking a categorical corporation-exemption rule, Appellants' argument asks this Court to limit ATS liability farther than all nine of the Supreme Court justices in *Jesner* were willing to do.

Jesner likewise affirmed the principles set forth in *Sosa v. Alvarez-Machain*, which authorizes federal courts to recognize claims asserting law of nations violations that are "specific, universal, and obligatory." 542 U.S. 692, 732 (2004). Accordingly, neither *Jesner*'s holding nor its reasoning mandates reevaluation of the propriety of bringing a claim against a domestic corporation under the ATS for the well-established norm prohibiting nonconsensual medical experimentation.

It is correct that *Jesner* reemphasized *Sosa*'s long-standing requirement that courts exercise caution and vigilance before recognizing common law causes of action under the ATS, citing separation-of-powers and foreign-relations concerns. However, adjudication of the universally recognized *Sosa* norm in this case against American entities—as opposed to a foreign one—in a court in which Appellants are domiciled would not cause the diplomatic strife that concerned the Court in *Jesner*; indeed, if anything, it would advance Congress's core purpose in enacting the ATS by ensuring a federal forum to remediate harms conducted by American entities against foreign citizens. *See Jesner*, 138 S. Ct. at 1397.

Moreover, contrary to the suggestion of Appellants and *amicus* Chamber of Commerce, the Court in *Jesner* in no way imported or applied a *Bivens* analysis to the ATS; to do so would be inappropriate given the fundamental difference between *implied* constitutional torts at issue in *Bivens* litigation, *see Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and judicially recognized causes of action authorized by a federal *statute*—the Alien Tort Statute—which have been endorsed by the Court in *Sosa*. Even if the former may, in some cases, require an explicit grant from Congress before being applied to domestic corporations, there is no such separation-of-powers concern for congressionally endorsed ATS claims.

As *Jesner* recognized, properly construed, the ATS is designed to ensure harmony in the community of nations. The Executive Branch has condemned the acts against the citizens of Guatemala at issue in this case. The ATS provides jurisdiction for a cause of action against U.S. corporations that seek to profit from what former U.S. Secretaries of State and Health and Human Services referred to as "abhorrent research practices [that] do[] not represent the values of the United States, or [its] commitment to human dignity and great respect for the people of Guatemala." *Estate of Alvarez v. Johns Hopkins Univ.*, 205 F. Supp. 3d 681, 683 (D. Md. 2016). The District Court decision should be affirmed.

ARGUMENT

A. *JESNER* DID NOT DISRUPT THE LEGAL FRAMEWORK AFFIRMING JUDICIAL RECOGNITION OF CLAIMS PURSUANT TO THE ATS.

In 1980, in the landmark decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit revived the ATS, a then little-used statute from 1789, holding that, in accordance with the obligation to "observe and construe the accepted norms of international law," *id.* at 877, Congress empowered district courts to vindicate certain law of nations violations against non-U.S. citizens, in tort. To determine whether the norm at issue fell within the ambit of the law of nations and would thus be cognizable under the ATS, *Filártiga* explained, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881. In *Filártiga*, the court found that torture "violates established norms of the international law of human rights, and hence the law of nations," comparing torture to 1789 norms of piracy and slavery. *Id.* at 880, 890.[2]

In *Sosa*, 542 U.S. at 729-33, the Supreme Court endorsed both *Filártiga*'s holding and reasoning. Endorsing the line of cases since *Filártiga* that recognized

[2] The court's finding was consistent with the views of the Executive Branch, which stated that "there is little danger that judicial enforcement [of ATS claims] will impair our foreign policy efforts." Brief of the United States as Amicus Curiae, *Filártiga*, No. 79-6090, 1980 WL 340146 at *22 (2d Cir. June 6, 1980).

certain "international norm[s] intended to protect individuals," *Sosa*, 542 U.S. at 730-31, the Court held that the ATS authorizes federal courts to use their common law powers to recognize a cause of action for a "narrow class" of international law violations that have no less "definite content" and "acceptance among civilized nations" than the claims familiar to Congress at the time the statute was enacted. *Sosa*, 542 U.S. at 724-25, 729, 732. The Court affirmed that to fall under the jurisdiction of the ATS, the norm at issue must be "specific, universal, and obligatory." *Id.* at 732 (citation omitted).

The Court also identified several areas for "judicial caution" before recognizing claims that might actuate ATS jurisdiction. The Court instructed that "great caution" should be exercised when identifying "new norms" of international law to lessen the "risks of adverse foreign policy consequences." *Id.* at 727-28. Mindful of this judicial caution, the District Court affirmed that the norm at issue—prohibition of nonconsensual medical experimentation—satisfied the *Sosa* "specific, universal, and obligatory" standard. *Estate of Alvarez*, 205 F. Supp. 3d at 689, *citing Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d. Cir. 2009), *cert. denied*, 561 U.S. 1041 (2010).

In *Kiobel*, the Supreme Court revisited the scope and application of the ATS. The initial question upon which the Court granted *certiorari* was whether corporations could be held liable under the ATS. *Kiobel*, 566 U.S. 961 (2011).

Following oral argument, the Court ordered briefing on a different question: whether and when courts can recognize ATS claims involving extraterritorial conduct. *Kiobel*, 569 U.S. at 112-13.

The new question, and the decision that followed, reflected no apprehension about domestic corporations' liability under the ATS. Instead, the Court expressed concern that a case—brought by foreign plaintiffs against foreign defendants, for conduct that occurred exclusively in foreign countries, and which involved a foreign government's own action—could lead to "diplomatic strife," *id.* at 116-17, 124.[3] Accordingly, it recognized a general presumption against extraterritoriality, but instructed it was not a categorical bar to ATS claims, including claims involving tortious conduct occurring abroad. *Id*. at 124-25 (instructing that the presumption can be displaced if claims sufficiently "touch and concern" the United States).[4] *Compare Al Shimari*, 758 F.3d at 529-30 (finding conduct relevant to plaintiffs' ATS claims sufficiently "touch and concern" the U.S. and recognizing

[3] The Court's analysis was animated by the principles underlying the presumption against extraterritoriality, which serves to guard against potential "unintended clashes between our laws and those of other nations which could result in international discord," and from the Judiciary "erroneously adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 115, 116 (citations omitted).

[4] Indeed, the Court implicitly approved of corporate liability for claims involving more than the "mere corporate presence" in the United States of a foreign corporation, which had been at issue in *Kiobel*. 569 U.S. at 125.

hearing claims would avoid resultant "international discord" from not remediating conduct associated with U.S. actors) *with Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017) (finding claims' connections to United States did not sufficiently "touch and concern" the United States).[5]

Kiobel also did not question *Sosa*'s holding that the ATS authorizes federal court jurisdiction over certain international law violations, and affirmed "that the First Congress did not intend the provision to be 'stillborn.'" *Id.* at 115 (quoting *Sosa*, 542 U.S. at 714).

In *Jesner*, the plurality opinion observed that courts evaluating whether to recognize a common-law cause of action under the ATS should ask first, whether the alleged violation is of "a norm that is specific, universal, and obligatory," (the *Sosa* norm) and second, whether courts should exercise "judicial discretion" in authorizing a claim, considering the important role of the coordinate branches "in managing foreign affairs." *Jesner*, 138 S. Ct. at 1399 (quoting *Sosa*, 542 U.S. at 732, 727); *see also id*. at 1409 (Alito, J., concurring) (identifying *Sosa*'s "two-step process").

[5] The Fourth Circuit recently re-affirmed that *Kiobel's* touch and concern test is the relevant test for evaluating extraterritoriality in the ATS context. *See Roe v. Howard*, 917 F.3d 229, 240 n.6 (4th Cir. 2019).

B. *JESNER*'S REASONING AND HOLDING IS LIMITED TO THE DISTINCT CAUTIONS PERTAINING TO ATS CLAIMS AGAINST FOREIGN CORPORATIONS.

While *Jesner* held that foreign corporations cannot be sued in U.S. courts for law of nations violations, the Court clearly avoided two additional steps the Appellants incorrectly attempt to read into the decision. First, despite certifying for review the question whether corporations are categorically exempt from ATS liability (for the second time) and despite Respondent's urging, the Court elected not to so hold. *Jesner*, 138 S. Ct. at 1407 (plurality opinion); *id*. at 1409 (Alito, J., concurring); *id.* at 1419 (Gorsuch, J., concurring). Second, the Court did not overrule *Sosa* or reinterpret *Kiobel*—indeed, the plurality and Justice Alito endorsed *Sosa* and applied its second step in exercising judicial caution to not extend ATS claims to foreign corporations, while Justice Gorsuch would have gone one step further to exclude all foreign defendants.

This means all nine justices in *Jesner* voted to leave in place ATS liability for *Sosa*-based claims against domestic corporate defendants, at least where the "relevant conduct" satisfies *Kiobel*'s presumption-against-extraterritoriality "touch and concern" test. *Id.* at 1395, 1398. The Court left ample room for ATS claims such as those brought by Plaintiffs that meet the *Sosa* norm and involve domestic corporations.

1. *Jesner* Did Not Reject Judicial Recognition of Corporate Liability under the ATS.

In *Jesner*, the Court granted *certiorari* on this question: "Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability." Petition for Writ of Certiorari, *Jesner* (No. 16-499), 2016 WL 6069100, at * i (U.S. Oct. 5, 2016), *cert. granted*, 137 S. Ct. 1432 (2017). This same question had been granted in *Kiobel*, but deferred after the Court ordered re-argument to address the separate question of the extraterritorial application of the ATS. *Kiobel*, 569 U.S. at 114. The Petitioners and Respondent in *Jesner* briefed this question on these—categorical—terms.[6]

Yet, it is critical to underscore that, for the second time in five years, the Court chose *not* to foreclose application of the ATS to all corporate defendants. Instead, revealing its central focus on foreign policy implications, first raised in *Sosa* and reiterated in *Kiobel*, the *Jesner* Court pivoted to a narrower question: "whether common-law liability under the ATS extends to a *foreign* corporate defendant." *Jesner*, 138 S. Ct. at 1398 (emphasis added). The *Jesner* plurality

[6] *Compare* Brief of Petitioners, *Jesner* (No. 16-499), 2017 WL 2687507 at *17, *26-27 (U.S. June 20, 2017) (arguing that "corporate liability flows from the text, history, and purpose of the ATS," and "*Sosa v. Alvarez-Machain* does not preclude corporate liability") *with* Brief of Respondent, 2017 WL 3668990 at *18 (U.S. Aug. 21, 2017) (arguing "The Law of Nations Imposes No Specific, Universal, and Obligatory Duty on Corporations, Either Generally or in this Context").

briefly considered the question arguably left open in footnote 20 of *Sosa*—whether scope of liability for a given *Sosa* norm can extend to corporations—and noted the existence of the competing views on that question. *Id*. at 1399-1402. The plurality chose not to resolve that broader question, opting instead to focus on whether *Sosa*'s second step cautions against recognizing ATS liability against foreign corporations.

In declining to review the categorical question of corporate liability, the Court left intact the status quo at the time of the District Court's first consideration of the question. *See Estate of Alvarez v. Johns Hopkins Univ.*, 275 F. Supp. 3d 670, 687-89 (D. Md. 2017). Each Court of Appeals that has adjudicated cases against corporations, except for the Second Circuit, has recognized that corporations are subject to liability under the ATS.[7] In each of these cases, the Courts of Appeals have determined that nothing in the text or the history of the ATS warranted establishing a bar for all claims against corporations. *See Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017–1021 (7th Cir. 2011); *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1020–1022 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 40–55 (D.C. Cir. 2011),

[7] The circuit split emanating from the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013) rendered it an outlier on the issue of corporate liability and led to the Supreme Court's grant of *certiorari* in *Jesner*.

vacated on other grounds, 527 F. App'x 7 (D.C. Cir. 2013); *see also Al Shimari.*, 758 F.3d at 528-31.

The decisions of these Courts of Appeals accord with the views of the Executive Branch across different administrations as expressed in amicus briefs in both the *Kiobel* and *Jesner* cases, on the specific issue of corporate liability. Br. of Amicus Curiae United States, *Kiobel v. Royal Dutch Petroleum Co.*, (No. 10-1491) 2011 WL 6425363 at *22 (U.S. Dec. 21, 2011) (quoting *Sosa*, 542 U.S. at 728-29) (concluding that "'vigilant doorkeep[ing]'" and "exercis[ing] 'great caution'…does not justify a *categorical exclusion* of corporations from civil liability under the ATS") (emphasis added); Supplemental Br. of Amicus Curiae United States, *Jesner v. Arab Bank, PLC* (No. 16-499), 2017 WL 2792284 at *9 (U.S. June 27, 2017) (concluding that "[a] corporation can […] be a proper defendant in a civil action based on an *otherwise-valid claim* under the ATS") (emphasis added). As the Executive Branch stated in *Kiobel*, there is "no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting." *Kiobel* U.S. Br. *24.

2. *Jesner*'s Reasoning is Bounded by the Distinct Foreign Policy Implications Arising from Suits Against Foreign Corporations.

Jesner's holding is narrow and precise: "foreign corporations may not be defendants in suits brought under the ATS." 138 S. Ct. at 1407. *Jesner*'s reasoning is tethered to that narrow holding: the judiciary should generally defer to Congress before imposing substantive norms and domestic-law liabilities on foreign corporate forms because of the risk of creating diplomatic strife. *Id*. at 1406-07. Given the risk of foreign-relations tensions attendant to suits against foreign corporations, *Jesner* held that class of defendant is exempt from ATS liability. *See* 138 S. Ct. at 1407 (majority opinion); *see also* 138 S. Ct. at 1410 (Alito, J., concurring) (excluding foreign corporations); 138 S. Ct. at 1419 (Gorsuch, J., concurring) (urging no ATS liability for any foreign entity, corporate, individual or governmental).

The majority in *Jesner* urged such judicial caution because of the distinct foreign policy implications attending to suits against foreign corporations in federal courts in the United States. 138 S. Ct. at 1403. Because the ATS is designed to promote "harmony in international relations," *id*. at 1407, and "avoid[] diplomatic strife," *id*. at 1410 (Alito, J., concurring), the Court identified numerous reasons why ATS claims against foreign corporations would "create unique problems" and defeat that purpose. *Id*. at 1407. Specifically, that litigation created

"significant diplomatic tensions" with the government of Jordan, which considered the suit a "grave affront" to its sovereignty, and the U.S. government regularly relies upon defendant Arab Bank for counterterrorism partnerships. *Id*. at 1406-07 (citations and quotations omitted). Noting that foreign sovereigns have objected to ATS suits against their own corporations, the Court concluded that, "these are the very foreign-relations tensions the First Congress sought to avoid." *Id*. at 1407; *see also id*. 1410-11 (Alito, J., concurring) (identifying foreign government objections to suits in U.S. courts). The Court also cautioned that authorizing ATS suits against foreign corporations might encourage foreign nations to "hale our [corporations] into their courts for alleged violations of the law of nations." *Id*. at 1405 (citing *Kiobel*, 569 U.S. at 124).

Even Justice Alito, who has expressed broader skepticism of ATS litigation, *see id*. at 1409 (questioning whether *Sosa* was "correctly decided"), would have gone no farther than excluding foreign corporations from ATS liability. *See id*. at 1409 ("this Court should not create causes of action under the ATS against foreign corporate defendants."); *id*. at 1410 (same). Indeed, although Justice Gorsuch would go further to foreclose liability against *all foreign* defendants, even he—taking into account the existing Supreme Court precedent in *Sosa* and *Kiobel*—would leave intact *Sosa* claims against U.S. defendants that "touch and concern" the United States under *Kiobel*. 138 S. Ct. at 1419 (arguing ATS liability should

not extend "to punish *foreign* parties for conduct that could not be attributed to the United States" and thereby risk reprisal against the U.S.) (Gorsuch, J., concurring) (emphasis in original). Thus, Appellants (and *amicus* Chamber of Commerce) would have this court go farther than all nine Justices in *Jesner*, who voted to leave in place ATS liability for *Sosa*-based claims against domestic corporate defendants, at least where the claims satisfy *Kiobel*'s "touch and concern" test. *Id.* at 1398.

In sum, given *Jesner*'s holding and its refusal to displace the ATS framework carefully outlined in *Sosa* and *Kiobel*, the *most* that can be said about *Jesner*'s applicability in future cases is that it limits ATS claims to certain *classes* of defendants. Following *Jesner*, the ATS landscape is as follows: (i) under *Sosa*, courts must ensure that a claim raises a norm that is sufficiently "specific, universal, and obligatory"; (ii) under *Kiobel*, a court must ask if the claim sufficiently "touch[es] and concern[s]" the United States so as to displace the presumption against extraterritoriality; and (iii) under *Jesner*, courts cannot extend their jurisdiction over a *Sosa*-based claim that "touch[es] and concern[s]" the United States to foreign corporate defendants. Plaintiffs' claims properly pass through this judicially imposed doorkeeping.

3. *Jesner* Does Not Incorporate the *Bivens* Analysis Into the ATS.

Contrary to Appellants' and *amicus* Chamber of Commerce's suggestion, *Jesner* did not engraft a *Bivens* framework into ATS jurisprudence. While some of

the principles involving implied causes of action have come to animate both areas of law, there is no evidence in *Jesner* that the Supreme Court believes that the *Bivens* and the ATS frameworks are coterminous. To begin, none of the opinions in *Jesner* ever use the term "special factors" or "new context"—the touchstones in *Bivens* jurisprudence, *see Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

Moreover, the *Bivens* framework could not be incorporated into the ATS because of fundamental differences in the nature of the claims. *Bivens* claims involve causes of action *implied* directly from the Constitution, absent any congressional authorization; it is that absence of *any* congressional authorization to the judiciary to impose monetary damages on individual federal government employees that has brought heightened skepticism to *Bivens*. *See Ziglar*, 137 S. Ct. at 1848. In contrast, the ATS is a *statute* by which Congress has affirmatively conferred onto federal courts the power to "recognize private causes of action" involving a limited class of serious violations of the law of nations. *Sosa*, 542 U.S. at 724; *see also* 28 U.S.C. § 1350 ("the district courts shall have original jurisdiction of any civil action by an alien *for a tort only* […]") (emphasis added). And that recognition is consistent with federal courts' historic competence to adjudicate claims involving international law. *See The Paquete Habana*, 175 U.S 677, 700 (1900) ("International law is part of our law, and must be ascertained and

administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination").

Congress has viewed nearly forty years of judicial recognition of federal common law claims under the ATS with approbation. It chose to enact the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350, note, to supplement the ATS by providing certain human rights protections to U.S. citizens that the courts had been enforcing under the ATS—but that otherwise was not available given the ATS restriction of common law remedies to "aliens." *See* H.R. Rep. No. 102-367, pt. 1, at 3 (1991) ("Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing"); *Sosa*, 542 U.S. at 731 (characterizing TVPA as "supplementing," not replacing, "the judicial determination" in *Filártiga*).

Indeed, it would actually violate separation of powers for a court to engraft judge-made law regarding implied constitutional torts onto a congressionally enacted statute; courts are not free to ignore or dispose of grants of jurisdiction. *See id.* at 725 (nothing "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute").

C. FOREIGN POLICY CONSIDERATIONS SUPPORT, RATHER THAN DISPLACE, PLAINTIFFS' ATS CLAIMS.

The predominant concern of the *Jesner* Court was the potentially negative foreign policy implications arising out of judicial recognition of ATS claims. The Court articulated the objective of the ATS as: "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (citations omitted).

This case does not risk "international discord." The substantive norm prohibiting nonconsensual medical experimentation is universally recognized—and condemned by Guatemala. There is no risk of strife with a foreign nation where the plaintiffs voluntarily avail themselves of U.S. courts and the "defendants are United State citizens." *See Al Shimari*, 758 F.3d at 529-30. Like *Al Shimari*, this litigation will not require "unwarranted judicial interference in the conduct of foreign policy," because "the political branches already have indicated that the United States will not tolerate" the human experimentation that took place against unknowing and nonconsenting Guatemalans. *See id.* at 530 (quoting *Kiobel*, 133 S. Ct. at 1664).

There are additional reasons why adjudicating Plaintiffs' claims would not invite international discord. Unlike in *Jesner* and other cases against foreign

corporations that could create diplomatic strife with foreign sovereigns, 138 S. Ct. at 1407, there has been and would be no reason for the Guatemalan government to object to Guatemalan nationals accessing justice in U.S. courts against U.S. defendants; on the contrary, providing redress to Guatemalan victims in U.S. courts serves to ameliorate diplomatic friction caused by "the Guatemalan Study." Notably, the U.S. government, which is implicated in the underlying conduct, has not indicated any foreign policy concerns regarding this case proceeding against the U.S. corporate defendants, but rather, has condemned the underlying conduct. *Estate of Alvarez*, 205 F. Supp. 3d at 683. *Compare Jesner*¸ 138 S. Ct. at 1406-07 (noting U.S. government's concern that ATS liability would implicate anti-terrorism cooperation with Jordan) and *Doe v. Exxon Mobil Corp*., No. 01-cv-1357-RCL, 2019 WL 2343014 at *1 (D.D.C. June 3, 2019) (dismissing ATS claims that "have caused significant diplomatic strife").

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's denial of Appellants' motion.

Dated: September 18, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-1530 **Caption:** Estate of Arturo Giron Alvarez v. The Johns Hopkins Un

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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