No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

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

PETITIONERS REPLY BRIEF

CAREY R. D'AVINO
BERGER & MONTAGUE. P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000
cdavino@bm.net

PAUL L. HOFFMAN
Counsel of Record
ERWIN CHEMERINSKY
ADRIENNE J. QUARRY
VICTORIA DON
ROBERT BAKER
SCHONBRUN DESIMONE
SEPLOW HARRIS HOFFMAN
& HARRISON LLP
723 Ocean Front Walk
Venice, CA 90291
(310) 396-0731
Hoffpaul@aol.com

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondents claim that federal courts are powerless to hold corporations accountable under the Alien Tort Statute ("ATS") for even the most egregious violations of international law. Neither logic nor authority supports such an absolute rule.

The implications of the decision below are shocking. When I.G. Farben exploited slave labor at Auschwitz and supplied the Zyklon B poison to facilitate mass murder in its death chambers, that corporation violated international law. Respondents' construction of the ATS means that even a modern-day I.G. Farben could not be sued under the ATS. Nor could a "Pirates, Inc." engaged in contemporary piracy, or an entity incorporated to engage in slavery. Neither the *Kiobel* majority nor Respondents have suggested any possible justification for this categorical exclusion, apart from erroneously contending that footnote 20 in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004), requires it.

Sosa does not demand a result so in conflict with the text, history, and purpose of the ATS. To the contrary, *Sosa* held that the ATS grants federal courts both subject matter jurisdiction over, and authority to use their common-law powers to enforce, a narrow range of widely accepted international law violations. *Id.* at 729. The "law of nations" defines the conduct establishing the violation; federal common law provides the cause of action and remedies. *Id.* at 724. *Sosa* also explicitly endorsed

the line of human rights tort cases starting with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Sosa*, 542 U.S. at 725.

Respondents now demand a special corporate exemption from *Sosa*'s holding no matter how egregious the corporate conduct. They do so in the teeth of centuries-old principles of corporate tort liability recognized in the United States and around the world. United States Brief Supporting Petitioners ("U.S. Br.") 7 (explaining that domestically, "[c]orporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our 'legal culture'").

Nor does international law provide a categorical exemption from corporate tort liability for the most serious human rights violations. As the United States points out, corporations are fully capable of violating international law. U.S. Br. 21.

Respondents' real argument is with *Sosa* itself. Their central claim – that international law itself must explicitly provide a right to sue corporations – mirrors the claim that international law must provide a right to sue generally. That claim was rejected in *Sosa* and would have precluded liability in *Filartiga* and virtually all subsequent ATS cases. Respondents' argument that international law must define the remedial scope of an ATS cause of action conflicts with *Sosa*'s holding that the ATS authorizes federal courts to use common-law tort principles to remedy violations of *Sosa*-qualifying norms. Respondents' further request that this Court use

federal common-law principles only to create rules that restrict liability turns *Sosa* on its head.

In the Founders' time, civil remedies against piracy necessarily included principles of derivative liability that held liable the pirate ship and the collective assets of the unlawful enterprise. The same principle was extended to slave traders when U.S. law and the law of nations banned slave trading. The twin aims of tort law – compensation and deterrence – are directly undermined if corporations through their agents operate in a liability-free zone, free to commit or foment genocide, slavery, and other egregious international law violations.

Nor does international law somehow render corporations immune from tort liability. Under international law, domestic enforcement of international norms is a question of domestic law. Corporate liability for the torts of agents is recognized around the world. Thus, international law provides for corporate civil liability and reinforces established federal common-law principles. Petitioners' Opening Brief ("POB") 47.

Respondents' argument for a "norm-by-norm" analysis turns on the same misinterpretation of *Sosa*'s footnote 20 as the *Kiobel* majority's holding. Respondents' Brief ("Resp. Br.") 24. This approach fails for the same reason: under *Sosa* and international law, the ordinary common-law tort principle that a corporation is responsible for the acts of its agents applies to all norms where the agents' conduct violates international law. Application of

either federal common law or international law leads to the same result: corporate tort liability.

Respondents and their *amici* make numerous policy arguments against corporate ATS liability. But federal courts have adequate tools, including pleading requirements, *forum non conveniens*, foreign sovereign immunity, and other case-specific considerations, to manage ATS litigation without rewriting the statute to exclude corporations categorically. It is for Congress to decide whether Respondents' claims justify amending the statute.

I. CORPORATE LIABILITY IS NOT AN ISSUE OF SUBJECT MATTER JURISDICTION.

Respondents would convert virtually every ATS issue into a jurisdictional question, ignoring this Court's repeated admonitions about the importance of separating jurisdictional and merits issues. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010); POB 17.

Respondents argue that because the ATS was adopted within a jurisdictional statute, every question under it is jurisdictional. *Sosa* explicitly rejected the argument that the ATS "does no more than vest the federal court with jurisdiction." 542 U.S. at 712. A statute that "creates jurisdiction where none previously existed" – as the ATS does – "speaks not just to the power of a particular court but to the substantive rights of the parties[.]" *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951

(1997). Whether and in what circumstances corporations may be sued, in the absence of any statutory limitation on the identity of ATS defendants,[1] is a merits question concerning the "substantive rights of the parties" and not a jurisdictional question.

If this Court agrees, Petitioners' First Question is dispositive, and the case should be remanded for consideration of the issues actually certified by the district court for interlocutory appeal. The issue of corporate liability was waived by Respondents and was not fairly presented by the district court's interlocutory order because that order addressed substantive violations of the law of nations, not who could be held liable for those violations. *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 205 (1996).

The Second Circuit reached this issue only because it erroneously treated it as an issue of subject matter jurisdiction. Accordingly, this Court should vacate the Second Circuit's corporate liability decision and remand for further proceedings consistent with the limitations on its interlocutory jurisdiction.

---

[1] Respondents claim that the ATS contains a "textual limitation of the universe of defendants," Resp. Br. 13, is directly contrary to this Court's view that the ATS "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 438 (1989).

II. RESPONDENTS' CLAIM THAT CORPORATIONS ARE EXEMPT FROM ALL ATS LIABILITY IGNORES THE TEXT, HISTORY, AND PURPOSE OF THE ATS AND CONFLICTS WITH *SOSA*.

Corporations have been subject to tort liability in the United States and throughout the world for centuries. U.S. Br. 25-26 (citing cases recognizing the "unquestionable" fact that corporations have long been deemed persons for civil purposes, and concluding that corporate liability under the ATS is "consistent with the common law backdrop against which the ATS was enacted and subsequently amended"). Respondents' argument that footnote 20 in *Sosa* requires a special exemption for corporations misreads that footnote and conflicts with the text, history, and purpose of the ATS. The argument also conflicts with *Sosa*'s holding that the ATS authorizes federal courts to recognize federal common-law causes of action to remedy a limited number of violations of the law of nations.

1. The Text, History, and Purpose of the ATS Support Corporate Tort Liability.

There is no basis in the text, history, or purpose of the ATS for the illogical conclusion that corporate employees may be held civilly liable for violations of the law of nations but that the corporation profiting from such violations cannot. Nothing in the language of the statute excludes

corporations from tort liability. *Amerada Hess*, 488 U.S. at 438.

Respondents' argument that the ATS looks to customary international law to determine corporate liability ignores the fact that the ATS is a domestic civil "tort" statute.[2]

First, the word "tort" directs federal courts to apply domestic common-law rules of liability once a violation of the law of nations has been shown. Customary international law supplies only the definition of the wrongful conduct (e.g., torture) to satisfy the jurisdictional threshold; if such a violation exists, common-law tort principles apply. This reading is required because there has never been a customary international law of domestic tort remedies; Respondents' proposed reading conflicts with congressional intent and undermines the ATS's main purposes. *Sosa*, 542 U.S. at 694, 714; POB 24.

Second, the use of the word "tort" instructs that the ATS will fulfill the usual purposes of tort law: to deter future torts and to provide adequate compensation for those harmed. These goals are impossible if corporate profits are exempt from

---

[2] In general, Respondents fail to respond to the historical materials demonstrating that the Founders did not intend to exclude corporations from ATS liability. In particular, Respondents do not address the views of the same historians this Court relied on so heavily in interpreting the ATS in *Sosa*. 542 U.S. at 714; *see* Professors of Legal History *Amicus* Brief Supporting Petitioners ("Historians' Br.").

liability for the acts of the corporation's agents. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011). 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 or unavailable individual actor, and to bar recovery against the company on whose behalf he was acting." U.S. Br. 24.

Corporate accountability is an essential part of the bargain that shareholders accept in return for the benefits, including limited liability, of incorporation. *See* Brennan Center *Amicus* Brief Supporting Petitioners 16-17. Basic principles of master-servant liability, agency, and loss allocation were clear to the Founders. POB 11, 31; Historians' Br. 11-27. Corporate tort liability was and is an accepted feature of federal common-law jurisprudence and common-law principles generally. POB 21; EarthRights International *Amicus* Brief Supporting Petitioners ("ERI Br.") 27-28. Respondents fail to address these deeply rooted tort principles.

Respondents acknowledge that international law allows recovery against entities, and the taking of the assets of an illegal enterprise, in the context of piracy. *See* Resp. Br. 25 n.13. Their claim that this liability did not extend to a ship owner's other assets is irrelevant: seizure of only the assets employed in the enterprise was the equivalent of limited liability for a corporation's shareholders. Moreover, Respondents do not dispute that corporations have long been proper defendants in international

maritime tort cases. *See* Thomas Schoenbaum *Amicus* Brief Supporting Petitioners 10; POB 11, 31; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 483 (2008). Respondents cannot explain why the Founders would have excluded from ATS tort liability a modern-day corporation complicit in piracy or other *Sosa*-qualifying violations, while accepting libels against ships to compensate victims of piracy. *See Flomo*, 643 F.3d at 1021 (citing cases).

Third, the First Congress's use of the word "tort" undermines Respondents' reliance on the statutes of modern international criminal courts. Whether international tribunals directly impose criminal penalties on corporations is irrelevant to the availability of a domestic civil remedy. U.S. Br. 28-31; *see* Ambassador David Scheffer *Amicus* Brief Supporting Petitioners ("Scheffer Br."). Corporate civil liability, by contrast, is recognized by all nations.

Fourth, transnational claims against corporations may unquestionably be brought as state claims in state courts. Because the ATS was intended to provide a federal forum for the litigation of transnational tort claims implicating international law, forcing alien plaintiffs to litigate such tort claims against corporations in state courts directly contravenes Congress's intent. POB 24; Historians' Br. 10-11.

2. Respondents' Reformulation of the *Sosa* Framework Conflicts with *Sosa*'s Core Holdings.

Respondents offer a strategic oversimplification of *Sosa*, converting this Court's balanced analysis into a series of obstacles that would undermine the ATS's effectiveness in redressing international law violations. *Sosa* rooted its analysis in the language of the ATS and the purposes of the First Congress, holding that: (i) the ATS can be used to address the narrow set of torts that violate modern international norms that are as "specific, universal and obligatory" as the "eighteenth century paradigms"; and (ii) federal common law (and not international law) provides the cause of action for such claims. 542 U.S. at 724-25, 732.

Respondents misinterpret *Sosa* to require that all issues bearing on the "scope of liability" be determined by customary international law. This view is based on a mistaken reading of footnote 20. Resp. Br. 18-19. Footnote 20 clarified that some *Sosa*-qualifying norms require state action and some do not, but it did not distinguish between human and juridical private actors. 542 U.S. at 732 n.20; *see* POB 38-39; U.S. Br. 16-19. Footnote 20 treated "a corporation or individual" as equivalent because both are private actors.

Apart from footnote 20, Respondents' argument that international law controls this question rests entirely on irrelevant references to the jurisdiction of international criminal tribunals, a

domestic choice-of-law rule, and a few citations taken out of context. These citations fail to refute Petitioners' showing that international law looks to domestic law for this purpose. There is no international law rule prohibiting corporate tort liability or modifying the universal acceptance of such liability in all legal systems.

Respondents invent the term "norm of corporate liability" to suggest that corporate liability itself must be seen as an independent customary international law norm. But, after *Sosa*, the proper question is whether the complaint alleges *conduct* that violates a *Sosa*-qualifying norm, after which federal common law provides the remedy. POB 28, 35; U.S. Br. 20; ERI Br. 8-11. Unlike the prohibition of torture, "corporate liability" does not define prohibited conduct. Instead, it is a universally accepted principle for allocating responsibility after wrongful conduct has occurred.

Respondents fare no better under their proposed "norm-by-norm" analysis. *See* Yale Law School Center for Global Legal Challenges *Amicus* Brief Supporting Petitioners ("Yale Br."). Respondents fail to address the analysis presented in the Yale Brief, nor do they address the analysis in *Sarei v. Rio Tinto, PLC*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc), finding corporate liability for genocide and war crimes. As the Yale Brief demonstrates, the same analysis applies to crimes against humanity, torture, and extra-judicial execution, at a minimum. Yale Br. 15, 19, 25; *see also* U.S. Br. 17-18 (discussing torture).

Respondents' suggestion that the statutory language "in violation of the law of nations" specifies "who" can violate the norm is implausible. Resp. Br. 17. Other provisions of the First Judiciary Act show that Congress knew how to restrict federal jurisdiction to specific defendants. Historians' Br. 6. That the ATS includes no such restriction is determinative.

Nor can conflicts principles, Resp. Br. 23-24, justify Respondents' attempted rewriting of the ATS. Citing the Restatement (Second) of Conflict of Laws, Respondents suggest that all substantive issues in an ATS case must be determined by international law.[3] Resp. Br. 23 n.10. But choice of law in ATS cases is a matter of federal law and is controlled by *Sosa*. Specifically, courts must consult the law of nations to determine if the conduct alleged violates a *Sosa*-qualifying norm, and, if so, courts must look to federal common law for the cause of action. *See Flomo*, 643 F.3d at 1020; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41-42 (D.C. Cir. 2011) ("*Exxon*").

Respondents cite nothing that suggests that the ATS mirrors the Restatement's distinction between substantive and procedural rules. Indeed,

---

[3] Even less relevant are Respondents' citations of other nations' conflicts principles. Resp. Br. 24 n.11. Respondents presumably cite these because they contend that conflict laws is a form of international law. Resp. Br. 20, 23. But the treatise they cite itself states that the term "private international law" is "misleading" and that "conflicts law is essentially *national* law." PETER HAY ET AL., CONFLICT OF LAWS § 1.1 (5th ed. 2010) (emphasis in original).

there is no issue of foreign law of the sort that might be governed by the Restatement in interstate cases. Corporate civil liability exists in every forum, so there is no conflict on the issue before the Court.

Respondents misconstrue *Sosa*'s discussion of "practical consequences." Resp. Br. 45-48. That language was directed to determining which conduct-regulating norms of the law of nations should be actionable, not to constraining the tort remedies available to enforce such norms. Respondents attempt to transform "practical consequences" into a grab bag of reasons for this Court to create an absolute immunity that is contrary to bedrock tort principles, notwithstanding that the ATS is a congressional mandate to apply such principles to remedy violations of the law of nations.

Respondents also distort *Sosa*'s cautionary language. *Sosa* recognized that federal courts already have the means necessary to handle an insubstantial case, or a case that would unacceptably compromise the constitutional powers of the executive branch.[4] *Sosa* did not hold that these case-specific concerns erect an insurmountable barrier to ATS litigation generally. 542 U.S. at 733 n.21. An absolute bar to corporate tort liability would far exceed caution or practicality; it would amount to a partial judicial repeal of the ATS.

---

[4] In addition, doctrines of personal jurisdiction, international comity, *forum non conveniens*, and perhaps exhaustion of domestic remedies, minimize potential friction with the legitimate interests of foreign sovereigns.

III. INTERNATIONAL LAW SUPPORTS CORPORATE CIVIL LIABILITY UNDER THE ATS.

Now, as at the time of the Founding, States rely on domestic law to provide the rules of decision necessary to enforce international law. POB 36-37; Historians' Br. 12-14.[5] Thus, international law further supports deference to Congress's choice to enforce international law by means of domestic tort remedies in the ATS.

Even if this international rule of deference to domestic legal systems were disregarded, corporate liability for the torts of agents is also a general principle of law among the major legal systems of the world, from which international law may be derived.[6]

---

[5] Respondents misrepresent Professor Henkin's Cuba example. Resp. Br. 21. Henkin emphasized that Congress could provide civil remedies, defined by domestic law, for international law violations. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245-46 (2d ed. 1996). *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 n.2 (D.C. Cir. 1984) (Edwards, J., concurring) (observing that the law of nations allows each state to decide "the extent and method of enforcing internationally recognized norms"). Since the question of whether there is a right to sue is one of domestic law, *id.* at 777-78, so too is the subsidiary question of whether there is a right to sue a corporation. POB 36-37; ERI Br. 17-21; *see Sosa*, 542 U.S. at 724, 731 (citing Judge Edwards' opinion with approval).

[6] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1)(c) (1987); *see* International Human Rights Organizations and International Law Experts *Amicus*

Both domestic and international courts rely on general principles to resolve the questions that inevitably arise in any litigation. *See First Nat'l City Bank v. Banco Para El Comercio de Cuba,* 462 U.S. 611, 621-23 (1983) ("*FNCB*"). This approach would have been quite familiar to the Founding generation. Historians' Br. 13 & n.12.

Thus, it is highly significant that every civilized legal system embraces the principle that corporate personality brings with it the possibility of corporate tort liability. Respondents fail to identify any legal system in which corporate civil liability does not apply.[7] This general principle of law provides an additional international law basis for corporate tort liability under the ATS that reinforces the established federal common-law tort principles applicable in ATS cases.

Brief Supporting Petitioners 10; International Law Scholars *Amicus* Brief Supporting Petitioners ("Int'l Scholars Br.") 22-24.

[7] Respondents' attempt to distinguish *FNCB* and *Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5), fails. These cases' "understanding of corporate personhood" in international law "is directly contrary to" *Kiobel*. *See Exxon*, 654 F.3d at 54; *see also* ERI Br. 28-29. Veil-piercing alone demonstrates "an international law norm of treating corporations as subjects of international law," *see* Resp. Br. 42 n.33; otherwise there would be no veil to pierce.

IV. THIS COURT SHOULD REJECT RESPONDENTS' ARGUMENTS AGAINST ESTABLISHED PRINCIPLES OF CORPORATE TORT LIABILITY.

Notwithstanding the centuries-old, universal acceptance of corporate tort liability in all legal systems, Respondents make a variety of arguments to support a corporate exemption. None are valid or persuasive reasons for curtailing the jurisdiction Congress has established.

1. *Bivens* Jurisprudence Is Inapposite.

Respondents argue that this Court's limitation of *Bivens* claims to natural persons should lead to the same rule in ATS cases. Resp. Br. 43-44. *Bivens* involves causes of action implied under the Constitution against federal officials. The ATS is a statutory mandate to use federal common law to enforce the law of nations against state and private actors. The congressional mandate is dispositive, and the usual federal common-law principles of corporate tort liability apply.

In *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), and *Minneci v. Pollard*, 132 S. Ct. 617 (2012), this Court declined to extend an implied cause of action under the Constitution to corporate actors without Congress's approval. Here, by contrast, Congress has explicitly authorized the courts to use federal common-law tort causes of action without limiting the universe of defendants. This Court has engaged in post-*Erie* federal common law decision-

making in a range of situations authorized by Congress without abandoning the usual principles of corporate tort responsibility. *See, e.g., Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) (congressional authorization in Labor Management Relations Act to fashion federal common law). The ATS is a similar congressional mandate to the federal courts.

In declining to extend *Bivens*, this Court emphasized that *Bivens* claims were designed primarily to deter unconstitutional actions by federal officials and not necessarily to provide compensation from all responsible parties. *Malesko,* 534 U.S. at 71, 74; *see also FDIC v. Meyer*, 510 U.S. 471, 485 (1994). But the ATS is a tort statute, the main purposes of which include both deterring future violations *and* providing compensation to the victims. Corporate liability furthers both goals. *See Flomo*, 643 F.3d at 1018-19 (emphasizing the importance of holding corporations accountable for deterrence purposes).

Indeed, *Malesko* and *Minneci* support holding corporations liable under the ATS. In both cases, this Court found that existing state law remedies vested the plaintiffs with remedial tools capable of providing adequate compensation and deterrence. *Malesko*, 534 U.S. at 72-74; *Minneci*, 132 S. Ct. at 623-26. Here, by contrast, Congress instructed the federal courts to provide such remedies so that these claims would not have to be heard in state court.

This Court's long-standing recognition of corporate liability under 42 U.S.C. § 1983 is more relevant than *Bivens,* given the explicit congressional authorization and compensatory purpose that statute shares with the ATS. *See* Law Professors of Civil Liberties *Amicus* Brief Supporting Petitioners 9-12. Like the ATS, § 1983 "create[d] a species of tort liability" that relied on the federal courts to develop a body of law to fulfill the statutory purposes. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Those purposes are undermined by the corporate exemption Respondents seek.

2. The Torture Victim Protection Act Was Intended to Supplement and Secure the ATS.

Sosa explained that "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute," and that the Torture Victim Protection Act ("TVPA") "supplement[s]" (not supplants) the ATS. *Sosa*, 542 U.S. at 725, 731; *see generally* Senator Arlen Specter et al., *Amicus* Brief Supporting Petitioners. The TVPA responded specifically to Judge Bork's opinion in *Tel-Oren*, by providing the express cause of action he found lacking, and it supplemented the ATS by extending a remedy to U.S. citizens. *See* H.R. Rep. No. 102-367, at 4 (1991); S. Rep. No. 102-249, at 5 (1991).

Conceding that displacement is inapplicable, Respondents instead assert that the TVPA is a "data point" for interpreting the ATS. Resp. Br. 29. But they fail to point to any evidence that Congress

believed that any limitations on TVPA defendants were required by international law. The ATS and TVPA are different statutes with different text, historical context, and purposes. If the TVPA is a "data point," it demonstrates Congress's commitment to supplement the ATS, not supplant it in any way.

Although the TVPA is broader than the ATS in that it provides a cause of action to U.S. citizens, it contains several limitations that the ATS does not (e.g., TVPA is limited to torture and extra-judicial execution under color of foreign authority only). *Sosa*, 542 U.S. at 728; U.S. Br. 27 n.16. Moreover, dispositive for this case, the ATS has no textual limitation on whom can be sued. *Amerada Hess*, 488 U.S. at 438.

Respondents assert that it is anomalous for U.S. citizens to have fewer rights under the TVPA than aliens have under the ATS. Resp. Br. 30. This is certainly an argument for interpreting the TVPA to provide the same corporate tort liability as is available under the ATS, but no interpretation of the TVPA can be a reason to restrict the ATS. Congress recognized that aliens would continue to have broader rights under the ATS when it enacted the TVPA. *Sosa*, 542 U.S. at 728; U.S. Br. 27 n.16; *see also* H.R. Rep. No. 102-367, at 3 (1991), S. Rep. No. 102-249, at 5 (1991). Such differences provide no basis for restricting the ATS.

3. Neither the Statutory Restrictions on International Criminal Tribunals nor Any Other Source of International Law Immunizes Corporations from Civil Liability.

There is no doubt that corporations can commit acts, through their agents, that violate international law, and that States may provide for civil liability for such violations, as Congress did in the ATS. International law does not immunize corporations from liability for violations of *Sosa*-qualifying norms. U.S. Br. 27-31. The absence of corporate criminal liability in the statutes of modern international criminal tribunals merely reflects the practical decisions and diplomatic compromises made in establishing these international bodies, not that corporate immunity is obligatory under international law.[8]

Similarly, "nothing in the history of the Nuremberg proceedings suggests that juridical persons could never be held accountable (through criminal prosecution or otherwise) for violating international law." U.S. Br. 30. *See* Nuremberg Scholars *Amicus* Brief Supporting Petitioners 3-4. The Control Council based its actions on

---

[8] *See* Scheffer Br. 2-3 (decision to exclude ICC jurisdiction over corporations was unrelated to customary international law or corporate civil liability). To fulfill their obligations under the ICC, several States have codified criminal corporate liability for genocide, war crimes, and crimes against humanity. POB 49 n.43.

international law and explicitly applied its directives to juridical entities, including I.G. Farben. *Id.* at 6, 13, 21-22.

Contrary to Respondents' selective quotation of Professor John Ruggie's early writings, Resp. Br. 2, 9, 39-40, the U.N.'s Guiding Principles, which he wrote, confirm that corporations can commit human rights violations and that States must provide a remedy for corporate breaches. *See Guiding Principles on Business and Human Rights,* Human Rights Council, U.N. Doc. A/HRC/17/31 (March 21, 2011); *see also* Int'l Scholars Br. 29-30. Indeed, Professor Ruggie's publications conclude that States should use domestic law to assert corporate tort liability for international law violations, not that international law prohibits them from doing so.

Respondents also misread the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT"), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, as limited to natural persons. As the United States notes, the CAT's definition of torture, which reflects customary international law, focuses on "any act" of torture, and does not distinguish between acts performed by natural persons and corporations. *See* U.S. Br. 20; CAT art. 1. *See also Sarei*, 2011 WL 5041927, at *24-25 (finding corporations can be held liable because norm did not focus on the identity of the perpetrator).

The provisions of the CAT Respondents selectively cite involve not the definition of torture

but rather particular obligations imposed on States Parties to prosecute or extradite torturers. Other articles impose broader obligations to prevent and redress acts of torture, including providing civil redress to victims, CAT art. 14(1), and explicitly allowing States to provide remedies beyond what the treaty requires, art. 14(2).

4. Respondents' Policy Arguments Are Misplaced and, in Any Event, Should Be Addressed to Congress.

Respondents and their *amici* claim that corporate liability under the ATS will cause a host of problems for this country's foreign relations and foreign investment. Yet ATS claims against corporate defendants have been brought for at least two decades, and Respondents proffer no evidence to support this parade of alleged horribles. Nonetheless, it is Congress's job to determine whether such problems exist and, if so, how to respond.[9]

Moreover, the United States is in a better position than Respondents or their *amici* to assess whether ATS corporate liability will adversely affect this country's foreign relations or commerce, and it

---

[9] Corporate complaints about the negative impact of tort liability have an ancient lineage. The East India Company argued that the tort liability recognized by the House of Lords in *Skinner* would ruin the Company. *Case of Thomas Skinner, Merchant v. The East India Company,* (1666) 6 State Trials 710 (H.L.). *Flomo,* 643 F.3d at 1021 (dismissing such arguments).

has raised no such concerns.[10] Claims of such interference should be resolved on a case-specific basis under well-established doctrines. *Sosa*, 542 U.S. at 733 n.21.

The argument that ATS claims against corporations lack merit and have been improperly filed to extract settlements is completely unsupported. This Court has already addressed Respondents' policy concerns regarding non-meritorious suits and excessive litigation by giving district courts many tools to dismiss such claims, including at the pleadings stage. *See*, *e.g.*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

There is no reason to revisit those issues here, nor do they support the categorical exclusion of corporate liability. Contrary to the unsupported claims by Respondents and their *amici*, federal courts have been faithful to this Court's cautionary

---

[10] None of Respondents' and their *amici*'s unsupported claims about the economic impact of ATS cases respond to Nobel Prize-winning economist Joseph Stiglitz. Professor Joseph Stiglitz *Amicus* Brief Supporting Petitioners 23. As Professor Stiglitz notes, the most extensive examination of the impact of human rights legislation on foreign direct investment found that respect for human rights is actually strongly *correlated* with improved economic returns on projects. *Id.* at 14. ATS entity liability is only "bad for *bad* businesses." *Id.* at 7 (emphasis in original). *See also Flomo*, 643 F.3d at 1021. It may facilitate a "more level playing field" for businesses, including U.S. corporations, that refrain from violating the law of nations. Stiglitz Br. 12.

admonitions in *Sosa*, and plaintiffs face daunting obstacles in bringing these cases. This Court should not rewrite the ATS and overrule *Sosa* based on policy arguments that are ill-founded and are properly addressed to Congress, not the courts.

V. THIS COURT SHOULD NOT REACH RESPONDENTS' ALTERNATIVE GROUNDS FOR AFFIRMANCE.

Respondents ask this Court to consider two issues that the panel below did not decide: aiding and abetting liability and "extraterritoriality." Resp. Br. 48-56. This Court should decline Respondents' invitations. *See* U.S. Br. 6.

1. The Standards for Aiding and Abetting Liability Are Not Properly Before This Court.

There is no reason to address the issue of aiding and abetting liability in this case. The Circuits agree that aiding and abetting liability is available in some circumstances under the ATS. The Second Circuit agrees with Respondents that international law supplies a "purpose" *mens rea* standard based on its reading of international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), *cert. denied,* 131 S. Ct. 122 (2010). Petitioners must meet that standard on remand.

Additionally, Judge Leval's concurring opinion found Petitioners' operative complaint, filed in 2004, Joint App. 41, insufficient under applicable law. Pet.

App. 182-194. Petitioners concede that they will need to amend their complaint on remand to conform to the subsequently decided *Iqbal* and *Talisman* cases. The courts below should first consider whether Petitioners' amended allegations satisfy these new requirements.

2. This Court Should Not Consider Respondents' "Extraterritoriality" Argument.

Respondents' new "extraterritoriality" argument was not raised previously by Respondents or briefed by the parties in this case. It is not properly before this Court.[11]

There is no conflict in the Circuits on this issue because *no* court has accepted the argument advanced by Respondents or their *amici*. Moreover, in the face of similar arguments, this Court approved the *Filartiga* line of cases in *Sosa*. 542 U.S. at 725. All of those cases arose from human rights violations occurring in foreign countries.

Respondents' reliance on the presumption against extraterritoriality is misplaced, for the presumption does not apply to jurisdictional

---

[11] Respondents' assertion that the extraterritoriality of the ATS is a question of subject matter jurisdiction, Resp. Br. 53, is contrary to this Court's decision in *Morrison*, 130 S. Ct. at 2877 (holding that the extraterritorial reach of the Exchange Act is a merits question).

statutes.[12] *See Morrison*, 130 S. Ct. at 2877-81 (applying the presumption against extraterritoriality to the substantive provisions of the Exchange Act but not to its jurisdictional provisions). "To say that a court is applying the ATS extraterritorially when it hears an action such as appellants have brought makes no more sense than saying that a court is applying 28 U.S.C. § 1331, the federal question statute, extraterritorially when it hears a TVPA claim brought by a U.S. citizen based on torture in a foreign country." *Exxon*, 654 F.3d at 23.

Even if the presumption applied to the ATS, its text and context make clear its extraterritorial application. As this Court noted in *Sosa*, one of the paradigm cases the First Congress had in mind was piracy. *Sosa*, 542 U.S. at 715. And in 1795, Attorney General Bradford opined that Americans who participated in an attack on the British settlement in Sierra Leone could be sued under the ATS. *See Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57, 58 (1795); *Sosa,* 542 U.S. at 721.

Respondents suggest that assertion of jurisdiction over foreign corporations involved in torture, extra-judicial execution, and crimes against

---

[12] Because the usual canon of statutory construction concerning extraterritoriality is plainly inapplicable to a statute that applies to piracy on the high seas, Respondents seek to invent a new canon of construction limiting the reach of the ATS when the acts at issue occur within the territory of another State. There is no basis for applying a new canon to the first statute Congress passed.

humanity outside the United States may somehow violate international law. Resp. Br. 55-56. Respondents cannot cite any international law authorities for this contention because international law plainly allows jurisdiction. In any event, arguments that the extraterritorial application of the ATS is limited by international law should be resolved after full briefing and argument, and not on the untested assertions of Respondents and their *amici* initially in this Court.

Since the establishment of our courts, the United States has afforded its residents a forum to adjudicate transitory tort claims. POB 24 n.15; ERI Br. 35-37. Petitioners are U.S. residents, having been granted asylum by our government as a result of the human rights violations at the heart of this case. The ATS, in keeping with the Founders' design, provides them with access to the federal courts to seek redress for the violations of their human rights from a tortfeasor they have found in the United States.

CONCLUSION

This Court should reverse the judgment below.

Dated: February 21, 2012

Respectfully submitted,

Carey R. D'Avino
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Paul L. Hoffman
Counsel of Record
Erwin Chemerinsky
Adrienne J. Quarry
Victoria Don
Robert P. Baker
Schonbrun DeSimone
Seplow Harris Hoffman
& Harrison LLP
723 Ocean Front Walk
Venice, California 90291
(310) 396-0731

Counsel for Petitioners