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

BRIEF OF PLAINTIFFS-APPELLEES ESTATE OF ARTURO GIRON ALVAREZ, ET AL.

BEKMAN, MARDER &
ADKINS, L.L.C.
Paul D. Bekman
E. Dale Adkins, III
Laurence A. Marder
Emily C. Malarkey
Gregory G. Hopper
Aryeh M. Rabinowitz
300 West Pratt Street, Suite 450
Baltimore, Maryland 21201
410-539-6633
Attorneys for Plaintiffs

September 11, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1530 Caption: Estate of Arturo Giron Alvarez, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Estate of Arturo Giron Alvarez, et al.
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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/ Paul D. Bekman Date: 08/07/19

Counsel for: Estate of Arturo Giron Alvarez, et al.

CERTIFICATE OF SERVICE

****

I certify that on 08/07/19 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:

/s/ Paul D. Bekman (signature) 08/07/19 (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE FOR REVIEW

Whether the District Court erred when it determined that *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), did not bar suits against domestic corporations under the Alien Tort Statute and did not provide any basis to revisit the District Court's prior rulings in the case.

INTRODUCTION

As much as Defendants-Appellants ("Hopkins") attempt to frame the question presented broadly, as one about the power of the District Court to recognize a new common law cause of action under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, that is not the subject of this interlocutory appeal. Rather, the subject of this interlocutory appeal is far more limited. It concerns whether *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), which only barred ATS suits against *foreign* corporations, actually barred ATS suits against *domestic* corporations as well.

Not only did the explicit holding of *Jesner* apply just to foreign corporations, but the reasoning of the majority, concurring, and dissenting opinions favored the continuation of domestic corporate liability under the ATS. The *Jesner* majority had the opportunity to author an opinion that categorically precluded all corporate liability under the ATS, but chose not to do so. Instead, the *Jesner* majority did not even discuss, let alone reach any conclusion about, domestic corporate liability

under the ATS or the first prong of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). No amount of massaging dicta from the *Jesner* majority—whether couched as interpreting the general reluctance of courts to create causes of action, discussing separation of powers in the foreign policy realm, or divining what certain justices might hold about corporate liability under the first prong of *Sosa*—changes this conclusion. Simply put, *Jesner* did not bar suits against domestic corporations under the ATS, nor did it provide any basis to revisit the District Court's prior rulings.

When faced with the hard truths of *Jesner*, Hopkins next urges the Court to look beyond not just *Jesner*, but also beyond the District Court's prior ruling to side with the overwhelming majority of U.S. Circuit Courts and U.S. District Courts in the Fourth Circuit on the question of ATS corporate liability. This Court should refuse Hopkins's invitation to address the *Sosa* prongs raised here for the first time. Should this Court choose to examine *Sosa*, however, it will find that the majority reasoning is correct—the proper reading of *Sosa*, and the text, history, and purpose of the ATS, status of international law, and pragmatic concerns support ATS domestic corporate liability. Hopkins has also not pointed to any specific separation of powers or foreign policy concerns, *Jesner*-level or otherwise, that would apply here.

This Court should, therefore, affirm the District Court's ruling below.

STATEMENT OF THE CASE

This case is about non-consensual medical experiments performed on human subjects in Guatemala by physicians, researchers, and other employees of Johns Hopkins, The Rockefeller Foundation, and Bristol-Myers Squibb. JA89. High-level decision-makers and policymakers from these institutions "designed, developed, approved, directed, and oversaw" experiments from 1945 to 1956 in which Guatemalans were exposed to and infected with syphilis, gonorrhea, and other diseases. *Id.* Documents related to the experiments were buried or destroyed and these institutions kept the experiments, and their role in the experiments, a secret for decades. *Id.* at 91-92. When the experiments finally came to light, President Obama assigned the responsibility of investigating the experiments to a Presidential Commission for the Study of Bioethical Issues ("the Commission"). *Id.* at 92. The Commission determined that the "experiments involved gross violations of ethics" and "that the researchers and those who oversaw them committed egregious moral wrongs."[1] *Id.*

[1] Importantly, the Commission concluded:

> It is clear that many of the actions undertaken within the Guatemala experiments were morally wrong. … In the final analysis, institutions are comprised of individuals who, however flawed, are expected to exercise sound judgment in the pursuit of their institutional mission. This is all the more true and important when those individuals hold privileged and powerful roles as professionals and

Judge Garbis, in the District Court's Decision re: Third Amended Complaint, allowed Plaintiffs-Appellees' claims under the ATS to proceed. *Estate of Alvarez v. Johns Hopkins Univ.*, 275 F. Supp. 3d 670, 711 (D. Md. 2017); JA347. The ATS provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. The ATS is a jurisdictional statute that "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." *Estate of Alvarez*, 275 F. Supp. 3d at 683 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013) ("*Kiobel II*"); JA281. Judge Garbis also found that the District Court had "jurisdiction under the ATS for a cause of action for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent." *Estate of Alvarez*, 275 F. Supp. 3d at 683; JA281-82; *see also* JA64 (citing *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009)).

> public officials. One lesson of the Guatemala experiments, never take ethics for granted, let alone confuse ethical principles with burdensome obstacles to be overcome or evaded, is a sobering one for our own and all subsequent generations.

U.S. PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, ETHICALLY IMPOSSIBLE: STD RESEARCH IN GUATEMALA FROM 1946 TO 1948 108 (2011).

Although the District Court concluded that the prohibition against non-consensual medical experimentation was a customary international norm, Hopkins challenged the idea that the ATS provided for corporate liability. On that point, Judge Garbis determined that the District Court would follow the majority consensus among U.S. Circuit Courts, and U.S. District Courts in the Fourth Circuit, that corporations could be held liable under the ATS. *Estate of Alvarez*, 275 F. Supp. 3d at 687 n.21; JA291. Judge Garbis added that "[i]f necessary, the Court will readdress this issue after the Supreme Court reaches a decision [in *Jesner*]." *Id.*

The Supreme Court granted *certiorari* in *Jesner* to resolve whether corporations, as a class of defendant—both foreign and domestic—could be held liable under the ATS. The Court was not able to reach a consensus on this question in broad categorical terms, and issued a narrower plurality opinion that addressed foreign corporations only. *Jesner*, 138 S. Ct. at 1407 (majority. op.). The singular focus of the *Jesner* majority opinion on serious foreign policy implications, diplomatic strife, affronts to the sovereignty of other governments, national security, and attendant separation of powers issues that were inextricably intertwined with ATS suits against foreign corporations made it clear that *Jesner* did not address domestic corporate liability. The Supreme Court had the

opportunity to, but did not, categorically preclude corporate liability under the ATS, thereby maintaining the viability of ATS suits against domestic corporations.

Shortly after the Supreme Court issued the *Jesner* opinion, Hopkins filed a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) asking the District Court to reverse its prior holding—that it would apply the majority view that corporations could be held liable under the ATS—and foreclose liability even for domestic corporate defendants. Hopkins supported its position by: (1) cherry-picking broad quotes about creating new causes of action from the sections of the *Jesner* opinion that had majority support; (2) relying on sections of the opinion supported by a plurality of only three justices; and (3) guessing the ideology of two concurring justices from opinions that pertained to serious foreign policy implications and that did not relate to the question of categorical corporate liability under the ATS.

In a 19-page memorandum opinion, the District Court authored a point-by-point rejection of every one of Hopkins's arguments, and denied the motion for judgment on the pleadings. JA415-22. Significantly, Judge Chuang[2] "[did] not agree with Defendants that the reasoning of *Jesner* mandates that there can be no domestic corporate liability under the ATS or effectively overrules the decisions of the circuit courts holding that U.S. corporations may be held liable under the

[2] This case was assigned to U.S. District Judge Theodore Chuang after the retirement of U.S. District Judge Marvin Garbis.

ATS." JA415. With its opinion, the District Court joined the Ninth Circuit in *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018), *reh'g denied*, 929 F.3d 623 (9th Cir. 2019), and the United States District Court for the Eastern District of Virginia in *Al Shimari v. CACI Premier Tech, Inc.*, 320 F. Supp. 3d 781 (E.D. Va. 2018), to become the third court that squarely addressed the issue of domestic corporate liability post-*Jesner*—with those courts all holding that *Jesner* did not preclude domestic corporate liability under the ATS.

Hopkins then petitioned the District Court to certify interlocutory appeal on the issue of whether *Jesner* barred suits against domestic corporations under the ATS thereby providing any basis to revisit the District Court's prior rulings. The District Court certified this issue for interlocutory appeal and this Court granted permission to appeal.

SUMMARY OF THE ARGUMENT

In *Jesner*, the Supreme Court held that the ATS precluded corporate liability for foreign corporations because of serious foreign policy implications and attendant separation of powers concerns. 138 S. Ct. at 1407 (majority op.). An examination of the components of the *Jesner* opinion compels the conclusion that the Supreme Court did not reach, and did not resolve—either explicitly or implicitly—whether the ATS categorically foreclosed corporate liability. The Court had the opportunity to hold that ATS categorically precluded corporate

liability, but did not do so. What can be gleaned from the *Jesner* holdings, opinions, and dicta, is that a majority of the justices did not preclude domestic corporate liability under the ATS.

Recognizing this, Hopkins tweaks its argument on appeal and contends that the "teachings" of *Jesner* cautioned that a new federal common law cause of action should not be recognized when Congress might question the necessity of a damages remedy or when there might be significant foreign policy consequences. Hopkins's argument, however, is fundamentally flawed.

Jesner made it clear that when *Sosa* created its two-part test, it necessarily took into account, and adjusted for, the general reluctance of federal courts to create new causes of action. According to *Jesner*, this general reluctance was built **into** the *Sosa* test. Hopkins, therefore, asks this Court to impermissibly "double-dip" in the caution against creating causes rights of action—Hopkins requests this Court to account for the general reluctance as part of the *Sosa* inquiry, and then, after the cause of action passed the *Sosa* inquiry, to account for this caution again under *Jesner*. This is not a proper reading of *Jesner*. Furthermore, if the *Jesner* majority was so concerned about creating new causes of action in the context of ATS domestic corporate liability, then the majority should have answered the *certiorari* question in the affirmative and categorically precluded corporate liability. Furthermore, any concerns raised by Hopkins about "difficult

policy choices" that would stem from allowing domestic corporate liability or about the customary international norms is a misdirection and is wholly speculative.

All ATS cases necessarily require some level of foreign connection. That is the foundation of the ATS. *Jesner* warned that ATS cases with serious foreign policy implications, diplomatic strife, affronts to the sovereignty of other governments, or national security issues should be scrutinized. But this is not that case. Hopkins simply speculates, and has put forth absolutely no evidence, that any of those concerns are present here. Thus, this Court should adopt the post-*Jesner* reasoning of the Ninth Circuit and U.S. District Court for the Eastern District of Virginia, which was followed by Judge Chuang below, and hold that *Jesner* did not bar domestic corporate liability under the ATS.

Hopkins then attempts to exploit the limited question that the District Court originally invited in *Estate of Alvarez*, and therefore the question before this Court on interlocutory appeal—whether *Jesner* in any way barred domestic corporate liability under the ATS—to re-litigate the broader question of whether this Court should follow the vast majority of the U.S. Circuit Courts (holding that the ATS, under the *Sosa* prongs, allows for corporate liability) or the Second Circuit (holding that the *Sosa* prongs do not permit any corporate liability under the ATS).

This Court should not permit Hopkins's improper expansion of the interlocutory appeal.

Even if this Court chooses to examine the two prongs of *Sosa*, however, it will find that this case satisfies the *Sosa* test.

Judge Garbis previously ruled, and the issue is not before this Court on interlocutory appeal, that the non-consensual human experimentation alleged in the Complaint met the requirement under the first *Sosa* prong as a specific, universal, and obligatory international norm. Contrary to Hopkins's position, *Sosa*'s first prong only required that the norm, or standard of conduct, must be recognized under customary international law. The method of enforcement of the norm, or avenue of legal liability, such as domestic corporate liability, did not need such recognition. Under accepted international law those issues are determined by the legal systems of each individual nation. There is no question that the U.S. legal system provides for domestic corporate liability. Furthermore, the text, purpose, and history of the ATS demonstrate that domestic corporate liability is proper under the ATS. No provision of international law undercuts the conclusion that standards of conduct enforceable under the ATS apply to corporations. Under the second *Sosa* prong, domestic corporate liability here does not present separation of powers issues. Hopkins has certainly not put forth any specific evidence of serious foreign policy implications here, either *Jesner*-level or otherwise.

This Court should follow the overwhelming consensus of U.S. Circuit Courts, and all U.S. District Courts in the Fourth Circuit, both before and after *Jesner*, which permitted domestic corporate liability under the ATS, and affirm the ruling of the District Court.

STANDARD OF REVIEW

This Court reviews the District Court's grant or denial of a motion for judgment on the pleadings *de novo*. *Bakery & Confectionary Union & Indus. Int'l Pension Fund v. Just Born II, Inc.*, 888 F.3d 696, 701 (4th Cir. 2018) (citation omitted). "The same standard applies to questions of statutory interpretation." *Id.* "The standard for Rule 12(c) motions is the same as applied to Rule 12(b)(6) motions, which should only be granted if, accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Priority Auto Grp., Inc. v. Ford Motor Co.*, 757 F.3d 137, 139 (4th Cir. 2014) (citation omitted).

ARGUMENT

I. *Jesner* only barred foreign corporate liability under the ATS, but it did not limit, much less bar, domestic corporate liability

The Supreme Court in *Jesner* held that the ATS precluded corporate liability for foreign corporations because of serious foreign policy implications and attendant separation of powers concerns. 138 S. Ct. at 1407 (majority op.). An

examination of *Jesner* compels the conclusion that the Supreme Court did not, either explicitly or implicitly, categorically foreclosed corporate liability under the ATS. What can be gleaned from the holdings, dicta, and various opinions in *Jesner* is that a majority of the justices could have, but did not, preclude domestic corporate liability under the ATS. Additionally, *Jesner* provided no basis for this Court to hold that ATS domestic corporate liability should be barred, whether framed as a concern for creating a cause of action, for separation of powers, or for preventing diplomatic strife. Finally, the Ninth Circuit and the U.S. District Court for the Eastern District of Virginia, in addition to Judge Chuang's decision below, have all held that *Jesner* did not bar domestic corporate liability under the ATS.

A. THE VARIOUS OPINIONS IN *JESNER* EXPLICITLY DID NOT PRECLUDE DOMESTIC CORPORATE LIABILITY UNDER THE ATS

The five-justice majority, three-justice plurality, concurring opinions of Justices Alito and Gorsuch, and four-justice dissent in *Jesner* all chose not to preclude ATS domestic corporate liability. This held true even though the question on which the Supreme Court accepted certiorari addressed categorical corporate liability—both foreign and domestic—under the ATS.

1. The five-justice majority holding focused only on foreign corporate liability and did not discuss domestic corporate liability

The *Jesner* majority held that the ATS foreclosed *foreign* corporate liability. 138 S. Ct. at 1407. This holding was premised upon comprehensive concerns about

issues that had no relevance to domestic corporate defendants, namely serious foreign policy implications, diplomatic strife, affronts to the sovereignty of other governments, national security, and attendant separation of powers issues. *Id.* The *Jesner* majority did not question the legitimacy of domestic corporate liability under the ATS. *Jesner* did not provide any reason for this Court to revisit the prior holdings of the District Court, and, thus, is not relevant to the issues in the present case.

Petitioners in *Jesner*, who were foreign nationals, sued Respondent Arab Bank, a Jordanian corporation, under the ATS, alleging that Respondent financially supported terrorism. *Id.* at 1394-95. The Second Circuit in *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 158 (2015), had held below that there was no corporate liability under the ATS because it was constrained by previous Second Circuit precedent in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), *aff'd*, 569 U.S. 108 (2013) ("*Kiobel II*") (affirming on grounds of extraterritoriality). Petitioners in *Jesner* asked the Supreme Court to answer the question left open by the Court in *Kiobel II*—whether the ATS categorically foreclosed corporate liability. *Jesner v. Arab Bank, PLC*, Petition for a Writ of Certiorari, No. 16-499 (filed Oct. 6, 2016). The Supreme Court granted *certiorari* to answer that question. *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017) (Mem.).

Before analyzing Petitioners' claims, a five-justice majority of the Supreme Court acknowledged the foundational argument between the majority opinion and the concurrence in the Second Circuit in *Kiobel I*, which stemmed from the proper understanding of footnote 20 in *Sosa v. Alvarez-Machain*, 542 U.S. 692 n.20 (2004), as to whether the ATS categorically precluded corporate liability. The majority opinion in the Second Circuit, written by Judge Jose Cabranes, held that the ATS precluded corporate liability because corporate liability was not an obligatory international norm. *Kiobel I*, 621 F.3d at 120. The concurrence, written by Judge Pierre Leval, posited that international norms refer to standards of conduct, and that the enforcement of international norms, in the form of civil compensatory liability, was to be decided by each individual nation. *Id.* at 153 (Leval, J., concurring in judgment). The *Jesner* majority noted that decisions of the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval's concurrence in *Kiobel*, and held that corporate liability was permitted under the ATS. 138 S. Ct. at 1396. The Court also noted that "the respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court." *Id.*

The *Jesner* majority then traced the origins of the ATS, culminating in the two-step ATS inquiry set forth in *Sosa*: (1) whether the plaintiff can demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory";

and (2) a "judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33 (citations omitted); *see also Jesner*, 138 S. Ct. at 1394, 1399. The disagreement between Judge Cabranes and Judge Leval about whether the ATS categorically precluded corporate liability, and the resulting federal circuit split, was contained in the first *Sosa* question. *Jesner*, 138 S. Ct. at 1402. The *Jesner* Court, however, could not gather majority support to answer that question—the very question that the Court granted *certiorari* to decide. *Id.* Instead, the Court could only gather a majority on parts of its discussion of the second *Sosa* question, which addressed the serious foreign policy implications and attendant separation of powers issues inherent in granting a federal common law cause of action under the ATS for foreign corporate liability. *Id.* at 1402-03, 1406-07. The legitimacy of domestic corporate liability, therefore, was left unquestioned by *Jesner*, and the general understanding of that issue has not materially changed since Judge Garbis permitted the claims of Plaintiffs-Appellees to proceed.

The basis of the majority holding in *Jesner* was in Part II-B-1 of the opinion, where the majority stated that the separation of powers issues naturally bound up with serious foreign policy implications prevented the Court from recognizing a federal common law cause of action under the ATS for foreign corporate liability. *Id.* at 1403. In Part II-C of the opinion, the majority emphasized the foreign policy

problems and diplomatic tensions that could, and have, occurred because of ATS litigation against foreign corporations. The Court stated:

> The ATS was intended 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. But here, and in similar cases, the opposite is occurring. … For 13 years, this litigation has caused significant diplomatic tensions with Jordan, a critical ally in one of the world's most sensitive regions. … Jordan considers the instant litigation to be a "grave affront" to its sovereignty.

Id. at 1406-07 (internal citations omitted). The Court concluded by emphasizing judicial caution in the *foreign* policy arena:

> [J]udicial caution under *Sosa* guards against our courts triggering [] serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches. … Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

Id. at 1407 (internal citations omitted). The majority decision, therefore, specifically relied on the separation of powers concerns inherent in foreign relations matters to decide that the ATS precluded foreign corporate liability.

The majority's reasoning for precluding foreign corporate liability under the ATS had no relevance or applicability to domestic corporate liability here. The majority relied exclusively on foreign policy and associated separation of powers issues between the roles of the Judiciary, Congress, and the Executive. These

concerns do not apply to the private domestic corporate Defendants in this case—Johns Hopkins, Bristol-Myers Squibb, and The Rockefeller Foundation. Hopkins has not put forth any specific evidence that imposing liability here has affected, or will affect, relations between the United States and any foreign government or interest. Neither the United States nor Guatemala has intervened in this litigation in any way, nor has either country filed an amicus brief here, as the United States and the country of Jordan did in *Jesner*. The United States Government also did not file a Statement of Interest.[3] Both the United States and Guatemala established commissions to investigate the non-consensual human experiments that are the subject of the underlying litigation after the abuses came to light. In fact, domestic corporate liability in general, and here, furthers the original purpose of the ATS—by serving as a vehicle to address wrongs committed by United States defendants against citizens of another country to **avoid** international tension.

In sum, *Jesner* did not hold, or even suggest, that domestic corporate liability was precluded under the ATS. *Jesner* did not call into question any of the decisions that have permitted ATS domestic corporate liability. Rather, *Jesner* only held that serious foreign policy implications and attendant separation of powers

[3] "A statement of interest, which is authorized by 28 U.S.C. § 517, is designed to explain to a court the interests of the United States in litigation between private parties." *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272, 291 (4th Cir. 2010) (citation omitted). "It goes without saying that a statement of interest can affect the outcome." *Id.* (citation omitted).

issues, concerns that have no application to this case, precluded foreign corporate liability. Because the *Jesner* majority's concerns simply do not apply here, there is no reason for this Court to alter the District Court's conclusion that corporate liability was not precluded under the ATS.

2. The three-justice plurality did not conclusively state whether it would preclude domestic corporate liability

The *Jesner* plurality, written by Justice Kennedy, and supported by Chief Justice Roberts and Justice Thomas, had the opportunity to answer whether the ATS categorically precluded corporate liability, but explicitly did not do so. *Id.* at 1402. Instead, the plurality deferred on the first *Sosa* question:

> In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations. **There is at least sufficient doubt on the point** to turn to *Sosa*'s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

Id. (emphasis added). The plurality opinion pivoted instead to the second *Sosa* question and discussed serious foreign policy implications and attendant separation of powers issues. The only explanation for the plurality's deferral on the question is that the potential views of the three-justice plurality did not have the support of the remaining six justices on the Court. Even if the three-justice plurality accepted

the reasoning of Judge Cabranes, no other justice did. The plurality opinion turned to the second *Sosa* question, not merely because there was a foreign corporate defendant in *Jesner*, but because the categorical corporate liability question, on which the Supreme Court granted *certiorari*, could not be agreed upon by a majority of the Court.

3. Justice Alito's concurring opinion was silent as to domestic corporate liability and instead focused on the potential diplomatic and separation of powers issues associated with foreign corporate liability

Justice Alito's separate opinion, concurring in part and concurring with the judgment, was based entirely on the second *Sosa* question—the separation of powers issues inherent in the diplomatic strife that may be caused by holding foreign corporations liable under the ATS. Justice Alito's discussion of separation of powers and the hesitancy to create new federal common law rights of action for foreign corporations pertained to the foreign policy and diplomatic strife aspects of the inquiry. As Justice Alito stated:

> Creating causes of action under the Alien Tort Statute against *foreign* corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent. … I write separately to elaborate on why that outcome is compelled not only by 'judicial caution'… but also by the separation of powers.
>
> * * *
>
> Creating causes of action under the ATS against foreign corporate defendants would be a no-win proposition. Foreign corporate liability would not only fail to

> meaningfully advance the objectives of the ATS, but it would also lead to precisely those serious consequences in international affairs that the ATS was enacted to avoid. … Declining to extend the ATS to foreign corporate defendants is thus … about furthering the purpose that the ATS was actually meant to serve—**avoiding diplomatic strife.**

Id. at 1408, 1412 (Alito, J., concurring) (emphasis added) (citations omitted). Justice Alito did not weigh in on whether the ATS categorically precluded corporate liability, contained in the first *Sosa* question. Therefore, his concurrence provided no insight into the question of domestic corporate liability.

Justice Alito had the opportunity to join the plurality's discussion of the categorical corporate liability under the ATS—the question on which the Supreme Court accepted *certiorari*—and create a holding on that issue, but did not do so. Instead, he limited his concurrence to the second *Sosa* question and the issue of warding off diplomatic strife by adhering to separation of powers principles in cases where foreign affairs were implicated. Therefore, this Court should not reverse the District Court based on Justice Alito's concurrence.

4. Justice Gorsuch did not address the first Sosa *question and was indifferent as to whether a particular defendant was a corporation or a natural person, and only examined foreign corporate liability*

Like Justice Alito, Justice Gorsuch chose not to join with other justices to categorically foreclose corporate liability under the ATS. Instead, Justice Gorsuch wrote a separate opinion, concurring in part and concurring in the judgment, which

focused on the serious foreign policy implications and separation of powers issues related to allowing foreign corporate liability under the ATS against any *foreign* natural person or *foreign* corporation. In fact, the language of Justice Gorsuch's concurrence suggested that he may permit domestic corporate liability under the ATS.

Justice Gorsuch began by framing the case as one of foreign policy concerns only, and not one where a particular defendant's status as a corporation mattered:

> A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. **Not because the defendant happens to be a corporation instead of a human being.** But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. … And we should not meddle in disputes between foreign citizens over international norms.

Id. at 1412 (Gorsuch, J., concurring) (emphasis added). Justice Gorsuch was careful to point out that the reason that he would dismiss *Jesner* was "[n]ot because the defendant happens to be a corporation instead of a human being." *Id.* He actually rejected the distinction between a natural person and a corporation.

Justice Gorsuch's focus on foreign relations problems, and his lack of concern for corporate liability issues, was evident from other sections of his opinion:

> This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts **to require a domestic defendant** before agreeing to exercise any *Sosa*-generated discretion to entertain an ATS suit.

Id. at 1414 (Gorsuch, J., concurring) (emphasis added). Justice Gorsuch interpreted the ATS statute, other clauses of the Judiciary Act of 1789, and applicable precedent to necessitate a *domestic* defendant. *Id.* at 1414-18 (Gorsuch, J., concurring). And Justice Gorsuch concluded by stressing the overriding foreign policy and separation of powers issues inherent in an ATS case with foreign defendants. *Id.* at 1419 (Gorsuch, J., concurring). Nowhere did he suggest that such a defendant must be an individual, or that a domestic corporation was not an appropriate defendant under the ATS.

This case fulfills Justice Gorsuch's primary requirement for ATS jurisdiction—domestic defendants. Indeed, Justice Gorsuch posited that a domestic defendant, whether a natural person or a corporation, was necessary before the Court would agree "to exercise any *Sosa*-generated discretion to entertain an ATS suit." *Id.* at 1414 (Gorsuch, J., concurring)

Like with Justice Alito, it is significant that Justice Gorsuch was silent on the first *Sosa* question, the question that the Supreme Court granted *certiorari* to

decide. Justice Gorsuch's concurrence confirms that he considered that the ATS permitted domestic corporate liability. Because this case involves domestic defendants without the foreign relations and attendant separation of powers pitfalls analyzed by Justice Gorsuch, there is no indication that he would oppose ATS liability.

5. The four-justice dissent in Jesner expressly supported domestic corporate liability under the ATS

The *Jesner* dissent, written by Justice Sotomayor, and joined by Justices Ginsburg, Breyer, and Kagan, advanced the opinion of four justices that fully supported domestic corporate liability under the ATS. This position is in accordance with the majority of U.S. Circuit Courts, and all of the U.S. District Courts in the Fourth Circuit that have addressed the issue, both before and after *Jesner*.

The dissent discussed the "text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort," to argue for foreign corporate liability under the ATS. 138 S. Ct. at 1419 (Sotomayor, J., dissenting). The dissent also advocated for, and fully adopted, Judge Leval's position on the question that the plurality discussed but did not decide—whether corporate liability was categorically precluded under the ATS. *Id.* at 1419-27 (Sotomayor, J., dissenting). According to the dissent, *Sosa* only required obligatory international norms for the substantive prohibition itself, *e.g.*, piracy or torture. *Id.* at 1420

(Sotomayor, J., dissenting). The first *Sosa* question did not require international consensus for the "mechanism of enforcing these norms," because international law is not concerned with questions of enforcement. *Id.* Those conditions of enforcement were left to each individual nation. *Id.* The dissent proved its argument from: (a) the language of the *Sosa* opinion and footnote 20; (b) the text and history of the ATS; (c) an ATS Attorney General opinion; (d) positions taken by the United States and U.S. senators in amicus briefs, and (e) a review of the enforcement efforts of individual states and countries for obligations on corporations. *Id.* at 1419-27 (Sotomayor, J., dissenting).

It is clear that the four-justice *Jesner* dissent supported domestic corporate liability under the ATS. More importantly, none of the justices have expressly concluded that the ATS categorically precluded corporate liability. Thus, the entirety of the *Jesner* opinion provided this Court with no reason to reverse Judge Chuang's ruling allowing ATS domestic corporate liability.

B. THE "BARRIERS" ASSERTED BY HOPKINS TO CREATING NEW CAUSES OF ACTION IN ATS SUITS ARE BASED ON A MISREADING OF *JESNER* AND ARE NOT SUPPORTED BY THE RECORD BEFORE THIS COURT

Having struck out with the text of the various opinions in *Jesner*, Hopkins instead asks this Court to examine and apply what it refers to as the "teachings" of *Jesner*. Hopkins contends that *Jesner* taught that a new federal common law cause of action should not be recognized when Congress might question the necessity of

a damages remedy or when there might be significant foreign policy consequences. Both contentions are incorrect.

The source of the *Jesner* majority's discussion in dicta about creating new causes of action is *Sosa*. Following abrogation of the Court's power to derive a general federal common law in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the *Sosa* majority rejected the minority view that meant to "close the door to further independent judicial recognition of actionable international norms." *Sosa*, 542 U.S. at 729; *see also id.* at 730 ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."). Instead, the *Sosa* majority recognized that courts could award damages arising under new "international norm[s] intended to protect individuals." *Id.* at 730. Because of the "good reasons for a restrained conception of the discretion federal courts should exercise in considering a new cause of action of this kind," the Court instituted a two-pronged approach to approving causes of actions under the ATS. *Id.* at 725. These two prongs included: (1) "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms"; and (2) "judgment[s] about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 725, 732-33.

1. The "caution" urged by Hopkins to be exercised in creating causes of action or in handling "difficult policy choices" is premised on a misunderstanding and misapplication of Jesner

Hopkins first looks to the *Jesner* majority's "caution" in dicta, which stated that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy … courts must refrain from creating the remedy in order to respect the role of Congress." *Jesner*, 138 S. Ct. at 1402-03. Hopkins interpreted this statement to mean that *Jesner* cautioned future courts against, among other things, permitting ATS suits alleging domestic corporate liability. Hopkins's argument, however, is fundamentally flawed and illustrates an inattentive reading of *Jesner*.

The *Jesner* majority **predicated** its caution on the idea that *Sosa*, which permitted ATS suits to proceed provided that the suits fit its two prongs, "is consistent with this Court's general reluctance to extend judicially created private rights of action." *Id.* at 1402 (emphasis added). *Sosa* openly discussed this general reluctance at length and still determined that "other considerations persuade us that the judicial power should be exercised … and thus open to a narrow class of international norms today." 542 U.S. at 729. This means that the *Sosa* test necessarily already adjusted for this "general reluctance." If an ATS suit passed the *Sosa* test then the suit would continue, notwithstanding any "general reluctance" of the Court to create causes of action. *Jesner* did not tell future courts to first run a

potential ATS cause of action through the *Sosa* prongs and then check it again against some amorphous "general reluctance" standard before creating an ATS cause of action. And importantly, this so-called "caution" was explicitly not extended to domestic corporate liability by the *Jesner* majority. The *Jesner* majority's refusal to extend this caution to ATS domestic corporate liability is, in and of itself, dispositive as to the inapplicability of Hopkins's argument.

Hopkins's hand-wringing about the "difficult policy choices" that would stem from allowing domestic corporate liability is a red herring. *First*, this is Hopkins's attempt to sneak *Sosa* first-prong issues, regarding customary norms of international law, into the discussion of the *Jesner* majority, which expressly skipped the first prong of *Sosa* and focused only on *Sosa*'s second question regarding foreign entanglements. The *Jesner* majority did not deal with customary norms of international law, and therefore, that question is not relevant to the interlocutory appeal. *Second*, as explained in detail in Part III.A.2, *Sosa*'s first prong does not require a specific, universal, and obligatory norm of imposing domestic corporate liability for violations of international law. Only a gross misreading of footnote 20 in *Sosa* would suggest such a conclusion. Customary international norms concern standards of conduct accepted by international law (*e.g.*, torture, piracy, and non-consensual human experimentation), not methods of enforcement or avenues of legal liability. The methods of enforcement of the

customary international norm, including answers to the imagined legal questions about corporate liability raised by Hopkins, are to be answered by the legal system of each individual nation, not by a consensus of the international community.

Sosa's first prong simply required the norm—the standard of conduct—to be specific, universal, and obligatory in international law. The District Court found below that the international law norm, "a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent," fits that bill. *See Estate of Alvarez*, 275 F. Supp. 3d at 683; JA281-82; *see also* JA64 (citing *Abdullahi*, 562 F.3d at 187). And Judge Garbis's ruling on that point is not part of the question on interlocutory appeal.[4]

[4] Although the propriety of the customary international norm of non-consensual human experimentation is not a subject of the interlocutory appeal, Hopkins still manages to suggest that no norms "beyond those few *Sosa* identified as the impetus for the statute," would be acceptable under the ATS. Brief of Appellant at *30. This is a stunningly incorrect characterization of *Sosa* and the state of ATS law. *Sosa* identifies "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," as acceptable international norms that could lend themselves to ATS causes of action. 542 U.S. at 725. Only the *Sosa* dissent would have the international norms, and resulting causes of action, limited in the way that Hopkins suggests. Additionally, it is quite possible that the customary international norm of non-consensual human experimentation, if somehow not acceptable as a norm in its own right, would fit in the "Breyer four" category of crimes against humanity. *See Doe VIII v. Exxon Mobil Corp*. 654 F.3d 11, 73 n.2 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

2. There is absolutely no evidence here of any of the serious foreign policy implications, diplomatic strife, affronts to the sovereignty of other governments, or national security issues warned about by Jesner

Hopkins's second argument—that a new federal common law cause of action should not be recognized when there might be any aspect of foreign consequences—is faulty as well.

The foundational purpose of the ATS was to avoid international tension by holding domestic perpetrators responsible for actions against foreign citizens. *See Jesner*, 138 S. Ct. 1406 ("The ATS was intended 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."); *Kiobel I*, 621 F.3d at 140 ("[T]he statute was rooted in the ancient concept of comity among nations and was intended to provide a remedy for violations of customary international law that threaten serious consequences in international affairs.") (Citing *Sosa*, 542 U.S. at 715). Meaning, notwithstanding any view on customary international norms or on corporate liability, **the ATS was created to address foreign policy issues**. The original "Blackstone three,"[5] and subsequent "Breyer four,"[6] customary

[5] The "Blackstone three" includes offenses against ambassadors, violations of safe conducts, and piracy.

[6] The "Breyer four" includes torture, genocide, crimes against humanity, and

international norms, as dubbed by then-Judge Kavanaugh in his dissent in *Doe VIII v. Exxon Mobil Corp.*, that are considered acceptable ATS causes of action by all, necessarily involve foreign affairs. 654 F.3d 11, 73 n.2 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). Moreover, the historical impetuses for the enactment of the ATS were the assault on the Secretary of the French Legation and arrest of one of the Dutch Ambassador's servants—all issues of foreign affairs. *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting).

Hopkins's argument is simply wrong. Any concern or so-called "teaching" by the *Jesner* majority in the second step of *Sosa* does not caution courts against permitting ATS suits when the subject of the suit merely includes foreign plaintiffs or foreign affairs. That would obviate many, if not all, proper ATS suits. Rather, the *Jesner* majority warned about ATS suits that create serious foreign policy implications. *See, e.g.*, *id.* at 1406-07.

As explained above in Part I.A.1, Hopkins has put forth no evidence, nor can it point to any specific foreign policy concerns here because those concerns do not exist. The lawsuit was filed in 2015 and the U.S. government has not filed a Statement of Interest. More importantly, no objection of any kind has been lodged by either the U.S. government or the Guatemalan government. There is no friction

---

war crimes.

between the countries on the issue of the lawsuit.[7] Both countries published lengthy reports after investigations into the experiments. There is no reason to think that Guatemala would oppose a remedy for their citizens who suffered as a result of the experiments.[8] This case necessarily illustrates the types of ATS claims that avoid foreign policy concerns.

Simply put, if this issue is properly before the Court on interlocutory appeal, then Hopkins misconstrues the "teachings" of *Jesner* and misapplies any such "teachings" to this case. This Court should quickly reject these arguments.

---

[7] President Barack Obama, Secretary of State Hillary Clinton, and Secretary of Health and Human Services Kathleen Sebelius even issued official apologies to the Guatemalan people for the experiments. *See, e.g.*, *US Apologizes for Infecting Guatemalans with STDs in the 1940s*, CNN.COM, Oct. 1, 2010, http://www.cnn.com/2010/WORLD/americas/10/01/us.guatemala.apology/index.html.

[8] In fact, the Guatemalan Presidential Commission Report concluded:

> Guatemala, on behalf of its citizens, has a double condition of holder and claimant of rights of bioethical concern; first of all, the protection of life and health, access to justice to investigate, knowledge of the truth, **and adequate reparation when violations are demonstrated to exist**.

PRESIDENTIAL COMMISSION FOR THE ELUCIDATION OF THE EXPERIMENTS CONDUCTED ON HUMAN SUBJECTS IN GUATEMALA DURING THE PERIOD OF 1946 TO 1948, CONSENT TO DAMAGE: USA MEDICAL EXPERIMENTS IN GUATEMALA. 1946-1948 118 (2011).

C. THE NINTH CIRCUIT AND U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA HAVE CORRECTLY HELD THAT *JESNER* DID NOT LIMIT OR BAR DOMESTIC CORPORATIONS FROM BEING HELD LIABLE UNDER THE ATS

In addition to Judge Chuang's decision in the District Court below, two different courts, the Ninth Circuit, and the U.S. District Court for the Eastern District of Virginia, have expressly held that *Jesner* does not preclude domestic corporate liability under the ATS.

The Ninth Circuit, in *Doe*, noted that *Jesner* precluded *foreign* corporate liability under the ATS. 906 F.3d at 1124. It held, however, that:

> *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding [permitting ATS corporate liability] as applied to domestic corporations.

Id. Thus, the Ninth Circuit did not read *Jesner* to preclude all corporate liability. The corporate defendants petitioned the Ninth Circuit for a rehearing, but that request was denied. *Doe v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2019)

The U.S. District Court for the Eastern District of Virginia, in *Al Shimari*, came to the same conclusion. 320 F. Supp. 3d at 788. Judge Leonie Brinkema addressed the question of whether *Jesner* should be read to preclude domestic corporate liability, and concluded that it should not. *Id.* at 787 n.6. Judge Brinkema succinctly stated:

> The Court believes that it is necessary to underscore this distinction between *Jesner* and the present lawsuit. In

> *Jesner*, the question presented by the petition for a writ of certiorari, on which the circuits were and are split, involved whether the ATS categorically forecloses corporate liability, regardless of whether the corporation in question is foreign or domestic. In spite of this broad question presented, the Supreme Court's holding is explicitly confined to foreign corporations, and the focus of the Court's analysis involved the role of the political branches in conducting foreign relations. The vast majority of the circuits to have considered the question have adopted a rule allowing ATS claims to proceed against corporate defendants, and *Jesner*'s careful limiting of the analysis and holding suggests to this Court that the *Jesner* Court did not intend to disturb this status quo with respect to domestic corporations.

Id. In sum, the Court found that *Jesner* was confined to *foreign* corporate liability only.

Judge Brinkema also addressed Defendants' arguments regarding separation of powers and preventing friction between the United States and other nations. 320 F. Supp. 3d at 784-88. She first held that the Fourth Circuit had already determined that the claims advanced by the *Al Shimari* plaintiffs did not infringe on the separation of powers. *Id.* at 785-86. She also held that an ATS lawsuit involving foreign plaintiffs suing domestic corporate defendants, as in this case: (1) "fully aligns with the original goals of the ATS: to provide a federal forum for tort suits by aliens against Americans for international law violations"; and (2) includes no risk of offending any foreign government. *Id.* at 787. Finally, Judge Brinkema noted that "neither the United States government nor any foreign government has

expressed any objection to this litigation or appeared as an *amicus* to express any concern with the Court's exercise of jurisdiction over plaintiffs' claims." *Id.*

Judge Garbis previously determined below that the majority consensus among the U.S. Circuit Courts and in U.S. District Courts in the Fourth Circuit, is that corporations can be held liable under the ATS.[9] *Estate of Alvarez*, 275 F. Supp. 3d at 687 n.21; JA291. Nothing in *Jesner* altered what this Court has already determined in its earlier rulings. This Court should uphold the District Court's decision to follow the majority consensus and allow domestic corporate liability under the ATS.

[9] Recently, the U.S. District Court for the District of Columbia became the first court post-*Jesner* to bar domestic corporate liability due to unique circumstances not present here. *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2019 WL 2343014 (D.D.C. Jun. 3, 2019). A focus in that Court's analysis, in both its discussion of *Jesner* and of the *Sosa* prongs, was that the case had already "caused significant diplomatic strife." *Id.* at *7, 14. The District Court explained that "the executive branch ha[d] repeatedly explained that adjudication of plaintiffs' ATS claims against Exxon in this case would harm U.S. foreign policy interests." *Id.* at *7. Additionally, the State Department had filed a Statement of Interest in that case with the District Court. *Id.* The District Court concluded that because "the executive branch ha[d] repeatedly articulated its concern that allowing plaintiffs' ATS claims to proceed would harm U.S. foreign policy interests … [and] Indonesia reaffirmed its position that it consider[ed] this litigation to be a severe affront to its sovereignty … [t]his is the type of foreign relations tension the First Congress sought to avoid when passing the ATS." *Id.* at *9. In effect, the District Court determined that the case-specific facts in *Doe*, although dealing with a domestic corporation, presented similar foreign policy and diplomatic strife concerns expressed in *Jesner* for foreign corporations. Importantly, Hopkins has not shown, and cannot show, that the specific foreign policy and diplomatic strife concerns present in *Jesner* and *Doe* apply here in any manner.

II. The only issue before this Court on interlocutory appeal is whether *Jesner* implicitly barred domestic corporations from being held liable under the ATS; the issue of categorical corporate liability under *Sosa* is not before this Court and should not be considered

The District Court already decided that it would follow the majority consensus among the federal circuits and in federal district courts in the Fourth Circuit, that corporations could be held liable under the ATS. *Estate of Alvarez*, 275 F. Supp. 3d at 687 n.21; JA291. The District Court's one reservation was that it would consider readdressing its holding, if necessary, after the Supreme Court's decision in *Jesner*. *Id.*

There is no question that *Jesner*, on its face, only barred *foreign* corporate liability under the ATS. Nevertheless, Hopkins argued in its Motion for Judgment on the Pleadings that although *Jesner* only explicitly barred *foreign* corporate liability under the ATS, its language implicitly barred domestic corporate liability. Hopkins then hypothesized that *if* the issue was presented to the Supreme Court in some future case, the Supreme Court *might* expressly bar domestic corporate liability. Judge Chuang resoundingly rejected Hopkins's arguments, and denied the motion.

The issue that Hopkins was permitted to appeal was not whether the Fourth Circuit should adopt the overwhelming majority or an outlier minority view on categorical corporate liability under the ATS. Judge Garbis already decided that issue, and that issue was not the subject of Judge Chuang's ruling on the Motion

for Judgment on the Pleadings. Rather, the issue before the District Court on the Motion for Judgment on the Pleadings and the Motion to Certify Interlocutory Appeal, and before this Court on interlocutory appeal, is the far narrower question of whether *Jesner* implicitly barred ATS domestic corporate liability.

Hopkins should not be permitted to raise the issues of categorical corporate liability under the ATS and the two prongs of *Sosa*, on interlocutory appeal, in an attempt to re-litigate the decision of the District Court below.

III. If this Court decides to expand the scope of the interlocutory appeal, it should follow the reasoning of the vast majority of U.S. Circuit Courts and all U.S. District Courts in the Fourth Circuit and find that domestic corporate liability satisfies the two prongs of *Sosa*

Even if this Court chooses to examine the majority and minority views among the U.S. Circuit Courts about corporate liability under the ATS, both prongs of *Sosa* have been met. Plaintiffs-Appellees have alleged an international norm that is specific, universal and obligatory, and there are no serious foreign policy implications here that pose any challenges. This Court should, therefore, follow the overwhelming majority of U.S. Circuit Courts and District Courts in the Fourth Circuit, both before and after *Jesner*, which have permitted domestic corporate liability under the ATS.

A. THE FIRST *SOSA* PRONG, REQUIRING AN INTERNATIONAL NORM THAT IS SPECIFIC, UNIVERSAL, AND OBLIGATORY HAS BEEN MET

This case passes the first prong of *Sosa*.

1. The District Court below ruled that the non-consensual human experimentation at issue satisfied the first Sosa *prong, and this issue is not before this Court on interlocutory appeal*

As explained above in Part I.B.1, Judge Garbis found below that the norm in international law applicable here, "a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent," is a specific, universal, and obligatory norm accepted in international law. *See Estate of Alvarez*, 275 F. Supp. 3d at 683; JA281-82; *see also* JA64 (citing *Abdullahi*, 562 F.3d at 187). The District Court's ruling on that point is not part of the question on interlocutory appeal. Therefore, the first *Sosa* prong has been met.

2. The first prong of Sosa *does not require that* ***corporate liability*** *must be accepted as a specific, universal, and obligatory international norm*

Sosa used the word "norm" to refer to substantive conduct, such as non-consensual human experimentation, not to methods of enforcement or avenues of legal liability, such as domestic corporate liability. One clear example of this is *Sosa*'s statement that:

> [W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

542 U.S. at 732. There is no question that the "international law norm" in this

command referred only to standards of conduct—one cannot violate corporate liability. Additionally, the phrase "historical paradigms familiar" led into the next sentence of *Sosa*, which continued the discussion of standards of conduct to be addressed by the ATS, such as torture, piracy, slave trading, and other "heinous actions." *Id.*

Hopkins contends that *Sosa* requires that the standard of conduct must be a specific, universal, and obligatory norm of international law, **and** the method of enforcement of the norm, or avenue of legal liability, must be accepted under customary international law. Hopkins' position fundamentally misreads *Sosa*.[10]

The confusion stems from footnote 20 in *Sosa*. The footnote reads, in its entirety:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private

[10] This position also runs contrary to recognized scholarship on international law. *See, e.g.*, L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (2d ed. 1996) ("International law itself ... does not require any particular reaction to violations of law"); Eileen Denza, *The Relationship Between International and National Law, in* INTERNATIONAL LAW 423 (M. Evans ed. 2006) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. h ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations").

> actors violates international law), with *Kadic v. Karădzíc*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

Sosa, 542 U.S. at 732 n.20. The correct interpretation of footnote 20 is clear from the context and from the cases cited.

Footnote 20 compared private action with state action. Cases such as *Tel-Oren* and *Kadic* were concerned "that some forms of noxious conduct are violations of the law of nations when done by or on behalf of a State, but not when done by a private actor independently of a State, while other noxious conduct violates the law of nations regardless of whether done by a State or a private actor." *Kiobel I*, 621 F.3d at 165 (Leval, J., concurring in judgment).[11] Footnote 20 meant that before permitting an ATS claim to continue, a court must examine whether "the violated norm is one that international law applies only against States," or whether "the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor." *Id.* Far from distinguishing between actions by individuals and corporations, or requiring that there be a consensus of corporate liability under international law before permitting an ATS suit, footnote 20 actually **compared** actions by

[11] For example, the international law norm against genocide applies to both state actors and private actors, while the international law norm against torture only applies to state actors. *See Jesner*, 138 S. Ct. at 1421-22 (Sotomayor, J., dissenting).

individuals and corporations and **supported** similar liability. "The intended inference of the footnote is that [individuals and corporations] are treated *identically*." *Id.* (emphasis in original). Hopkins's interpretation and basis of its argument under the first prong of *Sosa*, is, therefore, incorrect.

3. The text, purpose, and history of the ATS demonstrate that domestic corporations can have ATS liability

The ATS permits domestic corporate liability.

Beginning with the text of the ATS:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. The text of the ATS is devoted solely to a federal court's subject matter jurisdiction, namely the grant of jurisdiction over a "civil action" for a "tort" that is "committed in violation of the laws of nations." When using a term of art, Congress "presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette v. United States*, 342 U.S. 246, 263, (1952). "Corporations have long been held liable in tort under the federal common law." *Jesner*, 138 S. Ct. 1425 (Sotomayor, J., dissenting) (citing *Philadelphia, W., B.R. Co. v. Quigley*, 62 U.S. 202, 2010 (1859); *Chestnut Hill & Spring House Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818)). Additionally, the text limits the class of ATS plaintiffs,

"aliens," but "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 438 (1989). Finally, the phrase "of the law of nations" modifies "violation," not "civil action." *Id.* at 1421 (Sotomayor, J., dissenting). "The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses." *Id.*

The context, purpose, and history of the ATS demonstrates clearly that ATS domestic corporate liability is proper. As explained above in Part I.B.2, "the statute was rooted in the ancient concept of comity among nations and was intended to provide a remedy for violations of customary international law that threaten serious consequences in international affairs." *Kiobel I*, 621 F.3d at 140. The ATS was enacted to address the assault on the Secretary of the French Legation and arrest of one of the Dutch Ambassador's servants. *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting). There is "no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so." *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 47 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). And the practice at the time of the enactment of the ATS was to

impose liability for piracy on ships, which were juridical entities. *See, e.g.*, *Skinner v. East India Co.*, 6 State Trials 710, 711 (1666); *The Marianna Flora*, 24 U.S. 1, 40-41 (1826); *The Malek Adhel*, 43 U.S. 210, 233 (1844). The U.S. Attorney General has also opined that a domestic corporation could be held liable under the ATS to Mexican nationals if the corporation's "diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty." 26 Op. Att'y Gen. 252, 253 (1907).

Precluding domestic corporate liability "conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights." *Kiobel I*, 621 F.3d at 196 (Leval, J., concurring in judgment). Thus, the text, purpose, and history of the ATS permits domestic corporate liability under the ATS.

4. Hopkins's argument that standards of conduct enforceable under the ATS do not apply to corporations is not supported by principles of international law

Judge Leval, in his concurrence in *Kiobel I*, succinctly, and correctly, summarized the operation of the ATS under *Sosa*:

> The law of nations sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts. That body of law, however, takes no position on whether its norms may be enforced by civil actions for compensatory damages. It leaves that decision to be separately decided by each nation. The ATS confers on the U.S. courts jurisdiction to entertain civil suits for violations of the law of nations. In the United States, if a

> plaintiff in a suit under the ATS shows that she is the victim of a tort committed in violation of the norms of the law of nations, the court has jurisdiction to hear the case and to award compensatory damages against the tortfeasor.

Id. at 153. Thus, the norm, or standard of conduct, is determined by customary international law, and the methods of enforcement or avenues of legal liability, such as domestic corporate liability, is determined by the laws of each individual nation.

In arguing, incorrectly, that the methods of enforcement or avenues of legal liability must also be part of customary international law for ATS purposes, Hopkins points to the fact that the charters of international criminal tribunals, have chosen to punish only individuals rather than corporations. This point about international criminal tribunals is true, and yet, wholly irrelevant.

International tribunals impose criminal liability on individuals only, and not on corporations, because the "*criminal* punishment does not achieve its principal objectives when it is imposed on an abstract entity that exists only as a legal construct." *Id.* at 167 (emphasis in original). A corporation, which is a juridical construct, cannot act with criminal intent. *Id.* at 152. Also, "[a] corporation, having no body, no soul, and no conscience, is incapable of suffering, of remorse, [] of pragmatic reassessment of its future behavior … [and it cannot] be incapacitated by imprisonment." *Id.* at 168. However, "[i]f a corporation harms victims by

conduct that violates the law of nations, imposition of civil liability on the corporation perfectly serves the objectives of civil liability … [by] compensat[ing] the victims for the harms wrongly inflicted on them and restor[ing] to them what is rightfully theirs." *Id.* at 169. International law simply differentiates between criminal and civil liability and leaves the questions of enforcing civil liability to individual nations. *Id.* at 170-74.

And contrary to Hopkins's contentions, corporations **are** subject to obligations under international law. Some examples include: "the United States Military Tribunal that prosecuted several corporate executives of IG Farben declared that corporations could violate international law,"[12] … "the International Criminal Tribunal for Rwanda found that three nonnatural entities—a private radio station, newspaper, and political party—were responsible for genocide," and "the appeals panel of the Special Tribunal for Lebanon held that corporations may be prosecuted for contempt." *Jesner*, 138 S. Ct. 1423-24 (Sotomayor, J., dissenting). Also, in the International Convention for the Suppression of the Financing of Terrorism, "the international community agreed that financing terrorism is unacceptable conduct and that such conduct violates the Convention when

[12] *See Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1017 (7th Cir. 2011), for a detailed explanation of the Control Orders under international law against the German chemical company I.G. Farben following World War II.

undertaken by corporations."[13] *Id.* at 1424. Finally, as early as 1795, the U.S. Attorney General "opined that a British corporation could pursue a civil action under the ATS for injury caused to it in violation of international law by American citizens who, in concert with a French fleet, had attacked a settlement managed by the corporation in Sierra Leone in violation of international law." *Kiobel I*, 621 F.3d at 162 (Leval, J., concurring in judgment); *cf. Sosa*, 542 U.S. at 721 ("Bradford ... made it clear that a federal court was open for the prosecution of a tort action growing out of the episode.").

It is improbable "that the humanitarian law of nations, which is based in moral judgments reflected in legal systems throughout world and seeks to protect fundamental human rights, would espouse a rule which undermines that objective and lacks any logical justification." *Kiobel I*, 621 F.3d at 154 (Leval, J., concurring in judgment). "So long as they incorporate … businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims." *Id.* at 150. "Where the legal systems of the world encourage the establishment of juridical entities, endowing them with legal status by giving them authorization to own property,

[13] Interestingly, the International Convention for the Suppression of the Financing of Terrorism works in similar ways to the ATS in that it prescribes what conduct violates the Convention and then leaves the enforcement of that violation to individual nations. *Jesner*, 138 S. Ct. 1424-25 (Sotomayor, J., dissenting).

make contracts, employ labor, and bring suits, treating them as exempt from the law's commands and immune from suit would serve no rational purpose." *Id.* at 160; *see also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUMAN RIGHTS 304, 322 (2008) ("I am not aware of any legal system in which corporations cannot be sued for damages when they commit legal wrongs that would be actionable if committed by an individual.").

Thus, Hopkins's argument that standards of conduct enforceable under the ATS do not apply to corporations is not supported by customary international law.

B. THE SECOND *SOSA* PRONG, REQUIRING THE CONSIDERATION OF POTENTIAL SEPARATION OF POWERS AND FOREIGN POLICY IMPLICATIONS, IS SATISFIED

This case passes the second prong of *Sosa* as well.

1. Domestic corporate liability here does not present separation of powers issues

Hopkins argues that under the second prong of *Sosa*, the political branches must decide whether and how to render domestic corporations liable.

Hopkins does not provide any criteria by which to rule-in or rule-out separation of powers concerns for every ATS lawsuit, but there is a bigger flaw in Hopkins's argument. Both in *Jesner* and in *Kiobel II*, amicus briefs submitted by the Executive Branch and by two senators of the Legislative Branch maintained that the ATS **does not** categorically exclude corporate liability. *Jesner*, 138 S. Ct.

at 1431-32 (Sotomayor, J., dissenting). Additionally, "[C]ongress has also never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years." *Id.* at 1432 (Sotomayor, J., dissenting) (citing *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation]."")). Thus, Hopkins asks this Court to defer to the branches of government whose stated view is that the ATS permits domestic corporate liability. This carries great weight in the determination of the second prong of *Sosa*.

Hopkins next points to the Torture Victim Protection Act of 1991 ("TVPA"), which created a statutory cause of action for torture and extrajudicial killings for all individuals, but not for corporations, as proof that there is no domestic corporate liability under the ATS. The TVPA is an inapt analogy for two primary reasons. *First*, because of the textual differences between the TVPA and ATS—the TVPA used the word "individual" to denote the subject of liability, only focused on torture and extrajudicial killings, and made a cause of action available to foreign and U.S. citizens, while the ATS was silent as to the subject of liability, has been applied to all violations of customary international law, and only made a cause of action available to foreign citizens—the ATS "offers no comparative

value" in determining the scope of liability under the TVPA. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 458 (2012). "It makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS." *Jesner*, 138 S. Ct. at 1432 (Sotomayor, J., dissenting). *Second*, the legislative history of the TVPA illustrated clearly that "the statute was meant to supplement to ATS, not replace or cabin it." *Id.* In sum, the TVPA was narrowly tailored and sheds no light on the question of ATS domestic corporate liability.[14]

In terms of any separation of powers argument, this Court has already recognized in the context of extraterritoriality that when a defendant is a U.S. citizen, and specifically a domestic corporation, there will not be "any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014). This Court also noted that when dealing with violations of customary international norms, such as torture, "further litigation of these ATS claims will not require unwarranted judicial interference in the conduct of foreign policy … [as] [t]he political branches already have indicated that the United States will not tolerate acts of torture." *Id.* The same reasoning should apply

[14] In fact, "the Antiterrorism Act of 1990 … created a civil cause of action for U.S. nationals injured by international terrorism and expressly provided for corporate liability." *Id.* at 1433.

to a domestic corporate defendant in a suit about non-consensual human experimentation.

The foundational purpose of the ATS was to avoid international tension by holding domestic perpetrators responsible for actions against foreign citizens. *See Jesner*, 138 S. Ct. 1406; *Kiobel I*, 621 F.3d at 140. That is exactly what happens when a foreign citizen sues a U.S. corporation for a violation of a customary international norm. And that is exactly what is happening here. This case fits hand-in-glove with the foundational purpose of the enactment of the ATS.

2. There is no evidence suggesting that this case has any foreign policy implications

As explained above in Parts I.A.1 and I.B.2, Hopkins has not cited any specific foreign policy concerns here. The lawsuit was filed in 2015 and there has not been any objection lodged by either the U.S. government or the Guatemalan government. There is no friction between the countries on the issue of the lawsuit. Both countries published lengthy reports after investigations into the experiments. And there is no reason to think that Guatemala would oppose a remedy for their citizens who suffered as a result of the experiments. Hopkins's contrived protestations, including that the U.S. government did not waive sovereign immunity for lawsuits related to the Guatemala experiments, are not relevant to the *Sosa* prongs or the *Jesner* decision. Hopkins instead wants Plaintiffs-Appellees to prove a negative—that there will not yet be some possible foreign policy

implication of, or backlash from, this lawsuit. This is not how the second prong of *Sosa* works.

The only piece that *Jesner* added was to look for serious foreign policy implications, diplomatic strife, affronts to the sovereignty of other governments, or national security issues as concerns in the second prong of *Jesner*. The *Jesner* majority applied these concerns to ATS suits against foreign corporate defendants. It did not apply these concerns to ATS suits against domestic corporate defendants. Hopkins has not shown that there are any foreign policy implications, *Jesner*-level or otherwise, that would apply here.

C. THE VAST MAJORITY OF U.S. CIRCUIT COURTS, AND ALL U.S. DISTRICT COURTS IN THE FOURTH CIRCUIT, BOTH BEFORE AND AFTER *JESNER*, HAVE ALLOWED CORPORATIONS TO BE HELD LIABLE UNDER THE ATS

This Court should follow the overwhelming majority of U.S. Circuit Courts and District Courts in the Fourth Circuit, which have ruled both before and after *Jesner* that the ATS allows domestic corporate liability.

First, as outlined in Part I.C, in addition to Judge Chuang's ruling below, both the Ninth Circuit and the U.S. District Court for the Eastern District of Virginia have held that *Jesner* did not preclude domestic corporate liability under the ATS. *See Doe*, 906 F.3d at 1124; *Al Shimari*, 320 F. Supp. 3d at 788.

Second, as described by Judge Garbis below, the majority consensus of U.S. Circuit Courts is that the ATS did not preclude corporate liability. *Estate of*

Alvarez, 275 F. Supp. 3d at 687 n.21; JA291. The District Court listed decisions of the Ninth, District of Columbia, Seventh, and Eleventh Circuits in support of corporate liability under the ATS. *See, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). The reasoning of these cases, as applied to ATS domestic corporate liability, still holds true post-*Jesner*.[15]

The only U.S. Circuit Court to categorically preclude corporate liability under the ATS was a split decision of the Second Circuit in *Kiobel I*, 621 F.3d 111. This decision was characterized as an "outlier." *Flomo*, 643 F.3d at 1017; *see also* Susan Farbstein, et al., *The Alien Tort Statute and Corporate Liability*, U. PENN. L. REV. PENNUMBRA 99 (2011). The conclusion of *Kiobel I* was also called into question by the Second Circuit itself in *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d at 155-57. In that case, the Second Circuit stated that the implications of the Supreme Court's opinion in *Kiobel II*, and the "growing consensus" among the federal circuits (listing cases in the Fourth, Fifth, Seventh,

[15] As described above, *Jesner* did not alter any established understanding in the first step of *Sosa* about customary international norms. *Jesner* only examined serious foreign policy implications in the second prong of *Sosa*. Thus, the analysis of the majority of U.S. Circuit Courts about domestic corporate liability still stands after *Jesner*.

Ninth, Eleventh, and District of Columbia Circuits),[16] indicated that Judge Leval's concurrence in *Kiobel I* was correct and that *Kiobel I* was wrongly decided. *Id.* The Second Circuit declined to overrule the conclusion in *Kiobel I* in the end because of prudential concerns. *Id.* at 157-58.

Third, in addition to the District Court below, all of the U.S. District Courts in the Fourth Circuit that have addressed the issue have held that the ATS permits corporate liability. The District Court in *Estate of Alvarez*, 275 F. Supp. 3d at 687 n.21, cited to *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753-54 (D. Md. 2010), *rev'd sub nom. on other grounds*, *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), and *Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 599 n.4 (E.D. Va. 2017), for this proposition. The U.S. District Court for the Eastern District of Virginia also came to the same conclusion in *In re XE Serv. Alien Tort Litigation*, 665 F. Supp. 2d 569, 582 (E.D. Va. 2009), and in *Al Shimari*, 320 F. Supp. 3d at 788.

Thus, as outlined by the District Court below, this Court should continue to follow the overwhelming consensus of courts and permit ATS domestic corporate liability.

[16] The Second Circuit in *Jesner* added *Al Shimari v. CACI Premier Tech, Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014), and *Beanel v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999), to the list of U.S. Circuit Courts that explicitly or implicitly supported domestic corporate liability under the ATS.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that this Court affirm the District Court's denial of Defendants-Appellants' Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c).

/s/ Paul D. Bekman
BEKMAN, MARDER & ADKINS,
L.L.C.
Paul D. Bekman
E. Dale Adkins, III
Laurence A. Marder
Emily C. Malarkey
Gregory G. Hopper
Aryeh M. Rabinowitz
300 West Pratt Street, Suite 450
Baltimore, Maryland 21201
410-539-6633

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following:

This Brief of Plaintiffs-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,843 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This Brief of Plaintiffs-Appellees complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

CERTIFICATE OF SERVICE

I certify that on the 11th of September, 2019, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

I further certify that on the 11th of September, 2019, a true and correct copy of the Brief of Plaintiffs-Appellees was sent to the Clerk of the Court via Federal Express.

/s/ Paul D. Bekman
PAUL D. BEKMAN