**No. 25-1043**

# In the United States Court of Appeals for the Fourth Circuit

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Suhail Al Shimari, *et al.*,
*Plaintiffs-Appellees*,

v.

CACI Premier Technology, Inc.
*Defendant-Appellant*.

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On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division
(No. 1:08-cv-00827) (The Hon. Leonie M. Brinkema)

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## BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY NIKOLAS BOWIE, WILLIAM R. CASTO, MARTIN S. FLAHERTY, ELIGA H. GOULD, STANLEY N. KATZ, SAMUEL MOYN, AND ANNE-MARIE SLAUGHTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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Tyler R. Giannini
Emily A. Ray
Human Rights Entrepreneurs Clinic
Harvard Law School
23 Everett Street, Suite 303
Cambridge, MA 02138
[redacted]

*Counsel for Amici Curiae*

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* respectfully submit this brief in support of Appellees.[1] *Amici* (listed in Appendix A) are professors of legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Supreme Court's decisions in *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021), *Jesner v. Arab Bank*, PLC, 138 S. Ct. 1386 (2018), *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Amici* include individuals who filed an *amicus curiae* brief in *Sosa*,[2] the position of which the Supreme Court adopted in Part III of its opinion. *Id*. at 713–14. Several *amici* also filed *amicus curiae* briefs in *Nestlé*, *Kiobel*, and *Jesner* concerning the history of the ATS.[3] In line with the history, text, and purpose of the ATS, *amici* respectfully urge this Court to recognize liability under the ATS for wrongs committed in U.S.-controlled territory or by U.S. subjects.

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

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

[3] The *amici* who joined one or more of these previous briefs are Nikolas Bowie, William R. Casto, Martin S. Flaherty, Eliga H. Gould, Stanley N. Katz, Samuel Moyn, and Anne-Marie Slaughter.

## SUMMARY OF ARGUMENT

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, codified the basic tenets of the law of nations into the fledging American legal system, thereby allowing the country to join the international community on equal footing. The law of nations obligated a sovereign, at a minimum, to provide a remedy for wrongs by its subjects and wrongs that occurred on its territory, as well as territory it controlled or where its laws applied, and made clear that the sovereign could not provide safe harbor to violators of the law of nations. That the First Congress explicitly included "law of nations" in the text of the ATS signified their affirmative commitment to meet these well-established international obligations to address wrongs by private parties in their territory as well as by their subjects both in and outside of the United States.

The First Congress passed the ATS as one part of its broader effort to federalize the foreign affairs powers and meet its law of nations obligations as it joined the international community. Incidents before and after the passage of the ATS affirm that those who interpreted the ATS understood it to be an immediately actionable remedial tool for foreigners who had experienced law of nations violations. *See* Thomas Jefferson, *Opinion on Offenses against the Law of Nations*, Dec. 3, 1792, *reprinted in* 24 *The Papers of Thomas Jefferson* 693 (John Catanzariti ed., 2018) ("*Jefferson Opinion*" and "*Jefferson Papers*"). Subsequent interpreters in the 1790s followed suit, whether they were examining violations for breach of

neutrality, plunder, or piracy. Indeed, the text and history of the ATS of the Founding era indicate that it was a statute passed to generally address law of nations violations in situations that involved U.S. subjects or territory. Notably, as the lower court properly found, *Al Shimari v. CACI Premier Tech., Inc.*, 684 F. Supp. 3d 481, 493–96 (E.D. Va. 2023), territorial jurisdiction overlapped and interacted with particular concerns about the actions of U.S. subjects, as one of the central aims of providing remedies through the ATS was to avoid foreign entanglements. *Amici* thus urge this Court to affirm the judgment below.

## ARGUMENT

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

The usage of the term "law of nations" in the text of the ATS connoted the understanding that a sovereign must—at a minimum—provide a remedy for wrongs by its subjects and for wrongs that occurred on its territory, and that it could not provide safe harbor to violators of the law of nations. The law of nations created both general obligations for the United States to uphold the rule of law, as well as specific obligations, including providing redress for violations of established international norms by private parties that could be attributed to the nation.[4]

The Framers understood that failure to provide such redress would itself constitute a violation of the law of nations and could embroil the country in foreign entanglements. To address these concerns, the First Congress passed the ATS as part of a mix of approaches to federalize foreign affairs powers. *See Jesner v. Arab Bank,*

[4] These obligations applied to both principal violators and accomplices as well as juridical entities. *See* Brief of Professors of Legal History as Amici Curiae in Support of Respondents, at Parts II-III, *Nestle v. Doe*, 141 S. Ct. 1931 (2019) (Nos. 19-416, 19-453). In the eighteenth century, the Framers would have expected juridical entities—the historical analogs to modern corporations—to be treated as defendants under the law of nations. *Id*. Nothing in the text of the ATS suggests the Framers would have wanted to provide an exemption for juridical entities. Indeed, to read such an exemption into the ATS would have undermined the Statute's purpose and text as understood at the time.

*PLC*, 138 S. Ct. 1386, 1397 (2018) ("The principal objective of the statute… was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–19 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 123–24 (2013); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 642 (2021) (Gorsuch, J., concurring).

Historical sources dating to Washington's first administration that have been uncovered since *Sosa* and were first provided to the Supreme Court in *Nestlé v. Doe* by *amici* affirm those who interpreted the ATS in the 1790s all understood the Statute as a key part of the effort to meet international obligations as defined by the law of nations. *See, e.g.*, *Jefferson Opinion*, in *Jefferson Papers* at 693; *see also Sosa*, 542 U.S. at 724.

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

The law of nations of the eighteenth century outlined the obligations of nations, detailing where those obligations applied and against whom they must be enforced. It identified three arenas—subjects, territory, and safe harbor—wherein nations were obligated to provide redress for the violations of private wrongdoers. Emmerich de Vattel, a preeminent law of nations scholar, heavily influenced early

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

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

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

(1) committed by their subjects wherever they occurred; (2) committed on their territory; and (3) where a violator took safe harbor within their territory. In practice, these arenas for redress often overlapped and reinforced one another, and also included accomplices as well as the principal actors. *See* Part II, *infra*; *see also Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57 (1795); *Henfield's Case*, 11 F.Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6360).

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

sovereigns attend to the actions of their subjects wherever they occurred. Vattel, bk. 2, ch. 6, § 72.

The obligation to redress harms also extended to violations committed within the sovereign's territory or under its governance: it was the sovereign's responsibility "to exercise justice in all the places under [its] obedience, [and] to take cognizance of the crimes committed." Vattel, bk. 2, ch. 7, § 84; *see also id*., bk. 1, ch. 18, §§ 203–205 (discussing "domain" and "empire"), § 210 (discussing colonies and "taking possession of distant country" where its law will "extend"); Rutherforth, bk. 2, ch. 9, § 12 at 509 ("Connivance, or neglect to prevent an injury, cannot make a nation a party to the injury, unless the offender is one of its own subjects; or, at least, was within its territories when the injury was done."). The notion that violations of the law of nations that occur within the sovereign's territory could give rise to jurisdiction over defendants was so well-established and uncontroversial that *amici* are aware of no contrary treatment in the historical literature.[5]

In order to avoid violations by private parties escalating to full international conflict or irrevocably damaging the state's reputation, nations could satisfy their

[5] The district court below and a previous panel of this Court found that Plaintiffs alleged "substantial" domestic conduct by Defendant. *Al Shimari*, 684 F. Supp. 3d at 497; *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014). Historically, substantial conduct in the United States would have triggered the exercise of territorial jurisdiction, which would have been reinforced where—as here—the defendant was a U.S. subject.

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

The law of nations specifically obligated sovereigns to address "great crimes" committed in violation of the law of nations. Vattel, bk. 2, ch. 6, § 76 (describing "great crimes, or such as are equally contrary to the laws, and safety of all nations"). While piracy, violations of safe conduct, and attacks on ambassadors were paradigmatic violations of the time, these were not all-encompassing of law of nations violations. *See* Vattel, bk. 2, ch. 6, § 71 (noting that whoever "offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever" is subject to penalty under law of nations); *id*. at bk. 2, ch. 6, § 76 ("Assassins, incendiaries and robbers, are seized everywhere…"); *see also United States v. Robins*, 27 F.Cas. 825 (D.S.C. 1799) (No. 16,175) (discussing crimes of

murder and forgery); *Breach of Neutrality*, 1 U.S. Op. Att'y Gen. 57 (discussing breach of neutrality); *Territorial Rights—Florida*, 1 U.S. Op. Att'y Gen. 68 (1797) (discussing breach of territorial rights); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 465 (2011) ("In 1789, the ATS reasonably would have been understood to encompass all tort claims for intentional injuries that a U.S. citizen inflicted upon the person or property of an alien."). Tolerating any such behavior was viewed as an attack on the civilized world.

### B. In Order to Provide Redress for Foreigners, English Courts Applied Rules Regarding Territorial and Nationality Jurisdiction, which Often Overlapped and Interacted, Including at Times to Reinforce One Another.

In considering territorial and nationality jurisdiction, English jurisprudence—that directly informed the Founding generations and the ATS—was concerned with situations where an overly restrictive jurisdictional analysis would make redress from any court impossible. *See, e.g.*, *The Case of Thomas Skinner, Merchant v. The East India Company*, (1666) 6 State Trials 710, 711 (H.L.); *Mostyn v. Fabrigas*, [1774] 98 E.R. 1021, 1032 (K.B.), 1 Cowp. 160. The jurisprudence elucidates that English courts were particularly concerned with providing redress for foreigners when English subjects, including military and state officials, such as Governors of overseas territory (or dominions), had committed alleged wrongs. *See Mostyn*, at 1031-32 (citing numerous cases tried in England involving military officers

committing wrongs in dominions outside England). Relatedly, and of particular import to the present matter, the English courts granted jurisdiction in cases outside England, including where English Governors were in control of the territory and English laws and authority applied through the issuance of the letters patent of the King. *Id.* at 1028-29, 1031–32; *Dutton v. Howell*, [1693] 1 E.R. 17, 21–23 (H.L.) (discussing importance of "Occupancy" of lands by England in justifying jurisdiction of English courts).

In the seventeenth century, courts sitting in England felt the need to provide redress for cases involving wrongs by English subjects beyond the Crown's territory. In 1666, Thomas Skinner sued the East India Company in London for various wrongs which occurred outside of England, including robbery and assault. *Skinner*, (1666) 6 State Trials at 711. Skinner's claims were based, in part, on law of nations violations. *Id*. at 719 ("the taking of his ship, a robbery committed *super altum mare*").[6] Fearing that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice," the House of Lords found the Company liable and granted Skinner damages. *Id*. at 745, 724–25.

English courts also provided redress for wrongs committed in "Subordinate Dominions" abroad where England was an "Occupant." *Dutton*, 1 E.R. at 21–23. In

[6] The taking of a ship on the high seas (*super altum mare*) was considered piracy. *See* James Kent, 1 *Commentaries on American Law* (1826).

a 1693 suit against the English Governor of Barbados for false imprisonment and trespass (claims arising in Barbados), the House of Lords held that "the Right of these Lands was gained to the Crown, or to the Planters, by the Occupancy; and either way the Common Law [of England] must be their Rule." *Id.* at 22. Importantly, Barbados was a "Subordinate Dominion" of the Crown "tho' not within the Territorial Realm" of England. *Id*. at 22–23. The Lords found "English Laws" should follow "Englishmen." *Id*. at 22. English law applied equally to English subjects in conquered lands, to settlements in "uninhabited" lands, and on English ships on the high seas. *Id*. (stating that wherever English subjects traveled, "they no more abandoned English laws, than they did their Natural Allegiance"). The Lords further deemed the suit properly brought in London, even though the violation occurred in Barbados. *Id*. at 21 ("[A] Man may as well be sued in England for a Trespass done beyond Sea, as in Barbadoes [sic], or the like Place.").

Eighteenth-century English courts continued to adjudicate similar claims against English defendants, repeatedly granting jurisdiction in cases emanating from "possessions" occupied by England where its law was deemed to apply. In *Mostyn v. Fabrigas*, the court upheld a verdict against Minorca's Governor, an English citizen, for wrongs done to a Minorcan in Minorca. *Id*. at 1021-22, 1032; *see also Rafael v. Verelst*, [1775] 96 E.R. 579, 579 (K.B.), (Armenian merchants sued Verelst, English Governor of Bengal and official of the East India Company, for trespass,

assault, and false imprisonment on foreign territory); *Nicol v. Verelst*, [1779] 96 E.R. 751, 751 (K.B.) (same cause of action, but English plaintiff).[7]

In *Mostyn*, the facts again involved an imprisonment and allegations of an abuse of power by an English Governor. *Mostyn*, at 1028–29. The judge—Lord Mansfield—noted that English laws were deemed to control. *Mostyn*, at 1028 (discussing delegation of "authority" to English Governor ruling "proprietary Governments" [possessions] meaning "emphatically the governor must be tried in England, to see whether he has exercised the authority delegated to him by the letters patent legally and properly; or whether he has abused it in violation of the laws of England, and the trust so reposed in him."). As in *Dutton*, there was not a concern of intruding on the sovereignty of foreign nations that might embroil the nation in foreign entanglements. Instead, the failure to provide a remedy under such circumstances would have been viewed an affront to justice itself. *See Mostyn*, at 1029 ("There may be some cases arising abroad, which may not be fit to be tried

[7] These cases were well known to nineteenth-century U.S. courts. *See, e.g.*, *Eachus v. Trs. of the Ill. & Mich. Canal*, 17 Ill. 534, 535–36 (1856) (citing *Mostyn*, 98 E.R. 1021, and *Skinner*, 6 State Trials 710); *Gardner v. Thomas*, 14 Johns. 134, 135 (N.Y. Sup. Ct. 1817) (citing *Rafael*, 96 E.R. 579). Indeed, they continue to be informative to modern jurists. *See, e.g.*, *Smith v. United States*, 507 U.S. 197, 212–13 and n.13 (1993) (Stevens, J., dissenting, citing *Mostyn*, at 1032 and *Dutton*, at 21 and discussing U.S. application of laws in Antarctica associated with Americans living there).

here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the King's commission.").

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

In order to achieve legitimacy among its European peers, the United States followed the English tradition, which adhered to established law of nations rules espoused by courts as well as eminent scholars, such as Blackstone and Vattel. *See* Parts I.A-B, *supra*. The First Congress thus understood that failing to provide redress for private law of nations violations was in and of itself a violation of that law. *See, e.g.*, The Federalist No. 80 (Alexander Hamilton) (J. & A. McLean ed., 1788) ("The union will undoubtedly be answerable to foreign powers for the conduct of its members."); Vattel, bk. 2, ch. 6, § 77. Violations included those "great crimes" that threatened America's reputation as a "civilized" nation. *Id*. at bk. 2, ch. 6, § 76; *see also id*. at bk. 2, ch. 6, § 72 (noting prohibition of "all injury", "all offense", "all abuse").

Being a "civilized" nation was no mere title—the United States aspired to diplomatic recognition from the European powers in order to be seen as a treaty-worthy nation on the global stage. *See* Eliga H. Gould, *Among the Powers of the Earth: The American Revolution and the Making of a New World Empire* (2012). The commitment to provide redress was necessary for the United States to join the

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

As a preliminary step, the Constitution federalized control over foreign affairs, including through the courts. *See, e.g.*, Flaherty, *supra*, at ch. 3. The Framers intended the federal government to handle matters involving aliens and the law of nations to ensure proper oversight of potentially volatile matters of international relations. *See, e.g.*, The Federalist No. 42, at 264 (James Madison) (C. Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). In order to further centralize foreign affairs powers, the First Congress passed the ATS to provide a civil remedy for aliens who had suffered law of nations violations. By explicitly including the words "law of nations" in the text of the ATS, the First Congress signified its affirmative commitment to meet *all* of its

international obligations.[8] After its passage, the federal government almost immediately faced the need to consider the application of the ATS.

## II. From Independence, American Courts and Jurists Understood the Nation Had to Provide Redress for Law of Nations Violations Associated with U.S. Subjects or Territory.

Both before and after the passage of the ATS, the American jurists from the Founding generation viewed their law of nations obligations to include providing redress for wrongs committed by U.S. subjects or on its territory.[9] Six incidents—three in the lead up to the passage of the ATS and three in the immediate aftermath

[8] The drafters of the ATS would not have understood the "focus" or "touch and concern" inquiries as discussed in *Nestlé*, 593 U.S. at 632–34, and *Kiobel*, 569 U.S. at 124–25, respectively. However, as the lower court noted, the history indicates that the ATS was understood to meet the sovereign's obligation to redress violations of the law of nations. *See Al Shimari*, 684 F. Supp. 3d at 493 (holding that the focus of the ATS is to "provide foreign citizens with redress . . ."). Similarly, the lower court correctly recognized how territorial jurisdictional analysis interacted with the historical import of addressing wrongs by U.S. subjects, lest the nation risk being embroiled in foreign entanglements. *Id.* at 493–96 (analyzing relevance of U.S. actor as well as status of territory, which the United States controlled and where U.S. law applied).

[9] Outside the ATS context, American jurists and courts understood the more general law of nations obligations to provide civil or criminal redress, or extradite for "great crimes" by U.S. subjects or connected to U.S. territory. *See, e.g.*, *United States v. Robins*, 27 F. Cas. at 861 (summary of speech by John Marshall) ("The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world."); *Henfield's Case*, 11 F.Cas. 1099 (criminal aiding and abetting prosecution of U.S. citizen for law of nations violation); Neutrality Proclamation No. 3 (1793), *reprinted in* 11 Stat. 753 (1859) (stating that private citizens' aiding and abetting of hostilities that breached neutrality constituted law of nations violation). *See also Territorial Rights—Florida*, 1 U.S. Op. Att'y Gen. 68.

of its enactment—demonstrate how American officials and courts as well as foreign nations understood the law of nations to operate. There was particular concern related to wrongs by U.S. subjects that might embroiling the nation in foreign entanglements. *See, e.g.*, *Jesner*, 138 S. Ct. at 1397; *Al Shimari*, 684 F. Supp. 3d at 494–96. The six incidents involved major powers of the time—the English, Dutch, Spanish, and the French—interacting with American officials and demonstrate how all the nations of the time viewed the law of nations obligations in practice.

### A. Incidents in the Pre-constitutional Period Highlighted the Importance to the Founders of Providing Redress for Law of Nations Violations by U.S. Subjects or Occurring on U.S.-Controlled Territory.

Pre-constitutional incidents demonstrated that the Founders were familiar with the law of nations obligations articulated by Vattel and Blackstone. *See* Part I.A, *supra*. During this period, the Founders had been repeatedly frustrated by the Articles of Confederation's limited powers to address such law of nations violations committed by U.S. subjects or individuals in the United States. As this Court has noted previously, two incidents—the 1784 "Marbois Incident"[10] in Pennsylvania and

[10] A Pennsylvania court convicted a Frenchman of a law of nations violation for an attack on a French diplomat in the French Minister's residence. *Respublica v. De Longchamps*, 1 U.S. 111, 115–16 (Pa. O. & T. Oct. 1784). Chief Justice M'Kean said the residence was a "Foreign Domicil [sic]" and not part of U.S. sovereign territory but nevertheless adjudicated claims arising from this foreign territory. *Id.* at 114.

a case involving the Dutch ambassador[11] in New York—demonstrated that remedial efforts were dependent on state actors and courts, rather than federal ones, during this time period. *Al Shimari*, 684 F. Supp. 3d at 493 n.9 (citing *Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 787 (E.D. Va. 2018) (*quoting Kiobel*, 569 U.S. at 120)). The two incidents raised sufficient concerns for the First Congress to seek a federal solution—the ATS—to preempt and rectify such incidents in the future. *See* Part I.C, *supra*.

A third incident from 1786-1787 is particularly relevant here as it involved the actions of a U.S. citizen—General George Rogers Clark—in what was about to become the Northwest Territory. This land had been conquered during the American Revolution and became part of Virginia until it was ceded to the Confederation in 1784; the land was thus U.S.-controlled territory under the Confederation's control but did not have the status of a "state" in 1786 and 1787. *See* L.C. Helderman, *The Northwest Expedition of George Rogers Clark, 1786-1787*, 3 The Mississippi Valley Historical Review 317, 321 (1938). In late 1786, General Clark, who had been commissioned by Virginia, "convened a military court" in Vincennes (in what is now

[11] New York authorities arrested a servant in the Dutch ambassador's household. The Dutch government sought relief from the U.S. Foreign Affairs Secretary, who could only recommend that Congress pass a resolution urging New York to institute judicial proceedings. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 495 n.152 (1986).

Indiana) and tried three "Spanish subjects for trading in American territory without permission," confiscating their stores. *Id*. at 329.

Prominent officials from Kentucky (then a district of Virginia) sent a report on the Vincennes incident to Virginia Governor Edmund Randolph and "insinuated the property had been plundered and 'appropriated to private purposes.'" *Id*. at 330. Governor Randolph and other Virginia officials then "disavow[ed]" General Clark's commission and powers and noted "the seizure of Spanish property" was an "*offence against the law of Nations*." *See* "Wednesday February 28th 1787," IV Journals of the Council of the State of Virginia (December 7, 1786-November 10, 1788) 46–47 (George H. Reese, ed. 1967) (emphasis added). Officials emphasized that with a law of nations violation "having been committed, it becomes the Executive [of Virginia] to Declare their displeasure at the act; and to cause the national honor to be vindicated by the institution of legal proceedings against all persons, appearing to be culpable." *Id*. (noting request to Attorneys General of Virginia or Kentucky "to take such steps as may subject to punishment all persons guilty in the premises").

Congress was notified of the incident and Virginia's disavowal of Clark's actions. *See* Journals of the Continental Congress 1774-1789, Vol. XXXII, 189–204 (Report to Congress of Secretary of Foreign Affairs John Jay on April 12, 1787). Clark's actions had threatened treaty negotiations between the United States, led by Secretary Jay, and Spain's envoy in New York, Diego de Gardoqui. *Id*. at 192–94

(noting Secretary Jay's support for Virginia's actions and concern that "certain Citizens" of Virginia had violated "*the Laws of Nations*" in "violently seizing the property" of Spanish subjects) (emphasis added). Indeed, avoiding such foreign entanglements is exactly what leaders of the time were trying to do when they disavowed Clark and others during negotiations with the Spanish in 1787. *Id.*; *see also* Samuel Flagg Bemis, *Pinckney's Treaty; a Study of America's Advantage from Europe's Distress, 1783-1800* at 133–34 (1926).

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

During George Washington's first administration, Secretary of State Thomas Jefferson and Attorney General Edmund Randolph explicitly affirmed that the ATS provided an immediately actionable civil remedy for incidents of robbery, a law of nations violation, committed by U.S. citizens extraterritorially. *See Jefferson Opinion*, in *Jefferson Papers* at 693; *Edmund Randolph's Opinion on Offenses against the Law of Nations*, Dec. 5, 1792, in *Jefferson Papers* at 702.

Two separate incidents of "robbery" by U.S. citizens who unlawfully captured enslaved persons in foreign territory raised the urgent need for effective federal redress for law of nations violations. In the first incident, three U.S. citizens—Thomas Harrison and two accomplices—residing in Georgia entered San Agustin de la Florida, a Spanish territory, and stole five enslaved persons belonging to Spanish

subject John Blackwood in order to satisfy a debt owed by Blackwood to Harrison. *See Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson*, June 26, 1792, in *Jefferson Papers* at 129–31. They then returned to U.S. territory, claiming that they owned the five persons. *Id*.

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

In resolving these transnational incidents, which risked seriously damaging U.S. relationships with powerful nations, all of the sovereigns involved worked within the well-established expectation that the United States had to address the actions of its subjects wherever they occurred. As Secretary of State, Jefferson received complaints from France and Spain. The letter from Spain "informed [Jefferson] of the robbery" and demanded "reasonable compensation for the damages caused, and the punishment the laws prescribe for offenders." *Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson*, in *Jefferson Papers* at 130.[12] Further, the letter emphasized that the matter was one of great

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

import to the foreign relations between the two countries: "We have no doubt that all this will be done, since it is the means not only of preventing in the future similar attempts, but likewise of consolidating the *harmony and good relations*, to the preservation of which our two nations are so much disposed." *Id*. (emphasis added).

Elements of these transnational "robberies" occurred both within and without U.S. territory; the U.S. territorial connection only further reinforced the obligations of the fledgling United States to properly govern its own subjects. In recognition of this obligation, Jefferson gave his assurances to the Spanish minister that "every thing shall be done on the part of this government which right shall require, and the laws authorise" to address the "robbery" by U.S. subjects. *Letter from Thomas Jefferson to Josef Ignacio de Viar and Josef de Jaudenes*, July 3, 1792, in *Jefferson Papers* at 156. Similarly, writing to the French minister, Jefferson vowed to "lend to the agent of the parties injured, every aid which the laws permit." *Letter from Thomas Jefferson to Jean Baptiste Ternant*, in *Jefferson Papers* at 603.

In opinions assessing options for redress for these incidents, both Jefferson and Randolph confidently asserted that the ATS provided jurisdiction over torts against aliens. In his December 3, 1792 memorandum, titled *Opinion on Offenses against the Law of Nations*, Jefferson identified the ATS as an option for civil remedy, directly quoting the Statute: "The act of 1789, c. 20 § 9, says the district Courts 'shall have cognizance concurrent with the Courts of the several States, or

the Circuit Courts, of all causes, where an *alien sues for a tort only*, in violation of the law of nations.'" *See Jefferson Opinion*, in *Jefferson Papers* at 694 (emphasis in original). Responding to Jefferson's memorandum, Randolph affirmed that federal courts had civil jurisdiction. *See Edmund Randolph's Opinion on Offenses against the Law of Nations*, in *Jefferson Papers* at 702. Notably, Jefferson's conclusion that the incidents did not involve piracy or wrongs against ambassadors but instead robbery as a law of nations violation affirms that the Statute applied to violations beyond Blackstone's exemplary list. *See* Blackstone at *68 (listing safe conduct, attacks on ambassadors, and piracy); *compare* Vattel, bk. 2, ch. 6, § 76. Importantly, though Jefferson expressed initial doubt about the availability of criminal jurisdiction over law of nations violations, both he and Randolph expressed certainty that the ATS provided a civil remedy for law of nations violations.

Like Jefferson and Randolph, the next executive to consider the ATS, Attorney General William Bradford, concluded the ATS provided a civil remedy for law of nations violations committed by U.S. subjects abroad, though he too had questions about criminal responsibility. In September 1794, U.S. citizens David Newell and Peter William Mariner "aided, and abetted a French fleet in attacking [a British] settlement, and plundering or destroying the property of British subjects on that

coast," thereby breaking U.S. neutrality[13] and violating the law of nations. *Breach of Neutrality*, 1 U.S. Op. Att'y Gen. at 58. In his memorandum evaluating the legal demands of this incident, Bradford wrote:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations.

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

U.S. courts shared the view of the executive branch that the ATS could provide a jurisdictional basis to hold U.S. citizens responsible for committing law of nations violations. *See, e.g.*, *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C. 1795); *M'Grath v. Candalero*, 16 F.Cas. 128 (D.S.C. 1794). For example, in *Bolchos v. Darrel*, the court found that it had ATS jurisdiction. 3 F.Cas. at 810. Darrel, a U.S. citizen acting as an agent of the British mortgagee of a Spanish ship, seized and sold enslaved persons from that Spanish ship once it had landed in the United States. *Id*. Bolchos, a French privateer who had seized that ship, sued Darrel, claiming that the enslaved persons

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

were his property and entitled to protection under the 1778 Treaty of Alliance. *Id*. The court held that even if admiralty jurisdiction would not apply since the wrong was committed on land, "[the ATS] gives this court concurrent jurisdiction" over the claims. *Id*. The court thus clearly found the ATS to allow jurisdiction over law of nations violations committed by U.S. citizens and involving U.S. territory. Two similar cases, *M'Grath v. Candalero* and *Jansen v. The Vrow Christina Magdalena*, affirmed the same analytical approach to the application of the ATS. *See M'Grath v. Candalero*, 16 F.Cas. at 128 ("If an alien sue here for a tort under the law of nations or a treaty of the United States, against a citizen of the United States, the suit will be sustained."); *see also Jansen v. The Vrow Christina Magdalena*, 13 F.Cas. 356, 358 (D.S.C. 1794) (finding ATS was source of concurrent jurisdiction where American vessel's capture of Dutch ship was held to be law of nations violation).

Altogether, all those known to have expounded on the ATS viewed it the same way. It provided general coverage over violations of the law of nations. The discussion always involved a U.S. subject, U.S.-controlled territory, or both. As a statute with broad legislative intent, it could be applied to a variety of situations, as evidenced by discussions of robbery, breaches of neutrality, piracy, and plunder, among others. A faithful interpretation of the ATS would not abandon this approach by allowing impunity for the commission of great crimes by U.S. subjects or those within U.S. territorial control.

## CONCLUSION

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

Dated: May 8, 2025

*/s/ Tyler R. Giannini*
Tyler R. Giannini
*Counsel for Amici Curiae*

On the brief:

Jonathan B. Tucker (Harvard Law School ’26)

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*/s/ Tyler R. Giannini*
Tyler R. Giannini
*Counsel for Amici Curiae*

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I hereby certify that on this 8th day of May 2025, I caused a true copy of the foregoing to be filed through the Court's CM/ECF system, which will automatically serve the counsel of record in this case.

*/s/ Tyler R. Giannini*
Tyler R. Giannini
*Counsel for Amici Curiae*

# APPENDIX A
## List of *Amici Curiae*

**Nikolas Bowie**
Louis D. Brandeis Professor of Law
Harvard Law School

**William R. Casto**
Paul Whitfield Horn Distinguished Professor
Texas Tech University School of Law

**Martin S. Flaherty**
Charles and Marie Robertson Visiting Professor
School of Public and International Affairs
Princeton University

**Eliga H. Gould**
Professor of History
University of New Hampshire

**Stanley N. Katz**
Lecturer with Rank of Professor in Public and International Affairs
Woodrow Wilson School of Public and International Affairs
Princeton University

**Samuel Moyn**
Professor of Law and History
Yale Law School

**Anne-Marie Slaughter**
Bert G. Kerstetter '66 University Professor Emerita
of Politics and International Affairs
Princeton University

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Profesors of Legal History (Nikolas Bowie, William R. Casto, Martin S. Flaherty, Eliga H. Gould,
(name of party/amicus)

Stanley N. Katz, Samuel Moyn, and Anne-Marie Slaughter)

who is amicus, 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? ☐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, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Tyler R. Giannini Date: 5/8/2025

Counsel for: Amici Curiae Profs. of Legal History



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COUNSEL FOR: Profesors of Legal History (Nikolas Bowie, William R. Casto, Martin S. Flaherty, Eliga H. Gould, Stanley N. Katz, Samuel Moyn, and Anne-Marie Slaughter) as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Tyler R. Giannini
(signature)

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Tyler R. Giannini
Name (printed or typed)

[redacted]
Voice Phone

Human Rights Entrepreneurs Clinic
Firm Name (if applicable)

Fax Number

23 Everett Street

Suite 305
Address

[redacted]
E-mail address (print or type)

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