No. 10-1491

In the
Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PROFESSORS OF INTERNATIONAL LAW, FOREIGN RELATIONS LAW AND FEDERAL JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SAMUEL ESTREICHER
Counsel of Record
PAUL HASTINGS
75 East 55th Street
New York, New York 10022
(212) 318-6000
samuelestreicher@
paulhastings.com

MEIR FEDER
PATRICK J. SMITH
JONES DAY
222 East 41st Street
New York, New York 10017
(212) 326-3939
mfeder@jonesday.com

Counsel for Amici Curiae

August 8, 2012

LIST OF AMICI*

Kenneth Anderson is Professor of Law at Washington College of Law, American University, where he teaches international law, a visiting fellow of the Hoover Institution, Stanford University, and a member of its task force on national security and law, and a non-resident senior fellow of the Brookings Institution. He writes extensively on international law, human rights, international organizations, and the laws of war; his new book, Living with the UN: US Responsibilities and International Order, will appear from The Hoover Press in April 2012.

Samuel Estreicher is the Dwight D. Opperman Professor of Law at New York University School of Law, director of its Center for Labor and Employment, and co-director of its Opperman Institute of Judicial Administration. He has taught and lectured widel on matters federal jurisdiction and on international arbitration and litigation. In recent years, he has authored studies of customary international law and the laws of armed conflict. He is also the chief reporter of the Restatement of Employment Law.

Eugene Kontorovich is a Professor at Northwestern University School of Law, and a member of the Institute for Advanced Study, School of Social Science. He teaches courses in constitutional and international law, and federal courts. He is the

---

* Affiliations are provided for identification purposes only.

author of numerous articles on the ATS, piracy, and universal jurisdiction. He is writing a book on piracy and international criminal law for Harvard University Press. He is this year's winner of the Paul Bator award given by the Federalist Society to an outstanding academic under 40.

Julian Ku is Professor of Law at the Maurice A. Deane School of Law at Hofstra University. His research, which focuses on the relationship between international and domestic law, and has been published in the Yale Law Journal, Constitutional Commentary, and the Supreme Court Review. His book with John Yoo, Taming Globalization: International Law, Sovereignty, and the U.S. Constitution, was published by Oxford University Press in March 2012.

John O. McGinnis is Professor of Law at Northwestern University School of Law. A former deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice. Professor McGinnis is a scholar in both the areas of constitutional and international law. The Office of the U.S. Trade Representative has added him to the roster of Americans who can be appointed as panelists to resolve World Trade Organization disputes. His international law writings include Should International Law Be Part of Our Law?, 59 STAN L. REV. 1175 (2007) (with I. Somin) and The World Trade Constitution, 114 HARV. L. REV. 511-605 (2000) (with M. Movsesian). He is a past winner of Paul Bator award given by the Federalist Society to an outstanding academic under 40.

Jide Nzelibe is Professor of Law and the Associate Dean for Faculty Affairs at Northwestern University School of Law. He served as the Bigelow Teaching Fellow and Lecturer in Law at the University of Chicago before joining Northwestern Law. His research and teaching interests include international trade, foreign relations law, public and private international law and contracts. He has written on issues as diverse as separation of powers, war powers, international trade, foreign relations law, and international courts.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are professors who teach international law, foreign relations law, and/or federal jurisdiction at law schools, and have written and taught on the legal issues concerning the scope and application of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. *Amici* have a professional interest in the proper interpretation of the ATS, the historical and legal context of that statute, and the limited role of the federal courts in creating rights of action based on international law norms, all of which are implicated in this case.

SUMMARY OF ARGUMENT

The Alien Tort Statute, as construed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), is not properly read as providing for a cause of action based on international law violations which the United States has no law of nations responsibility to redress. *Sosa* held that any cause of action under the ATS must be justified as a creation of federal common law, and recognized that the ATS had a limited and practical purpose: to remedy violations of the law of nations, typically occurring in the United States, for which the U.S. would be held responsible, such that the failure to provide a remedy threatened "serious consequences in international affairs." *Id.* at 715.

---

[1] Both Petitioners and Respondents have filed letters with the Clerk consenting to the submission of all *amicus* briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or counsel made a monetary contribution to the preparation or submission of this brief.

The Congressional purpose in enacting the ATS simply does not extend to—and in many circumstances is disserved by—ATS lawsuits based on conduct in foreign countries for which the United States has no responsibility. Here, for example, as in many modern ATS suits, the claims are based on a foreign government's alleged violation of the rights of its own citizens and residents within its own territory. This category of claim is different in kind from the category of claim the 1789 Congress envisioned in enacting the ATS. Indeed, the Congress that passed the ATS would have viewed opening the federal courts to such claims as a violation of the law of nations rights of the sovereign nation at issue, and even today providing for such a federal judicial role would likely invite the adverse foreign relations consequences the ATS was designed to avert. Congress has never weighed the serious consequences of subjecting conduct in foreign countries to U.S. judicial scrutiny at the instance of any aggrieved alien claiming an international law violation—without regard to any U.S. involvement in or responsibility for the conduct. It is not the role of the federal courts to provide such U.S. judicial scrutiny without clear Congressional authorization to do so.

ARGUMENT

Recognition of an ATS action arising from extraterritorial conduct for which the United States has no responsibility cannot be squared with the purposes of the ATS, the strict limits on the creation of federal common law rights of action, or the framework dictated by *Sosa*.

First, *Sosa* established that an ATS cause of action exists, if at all, only to the extent properly created by the courts as a federal common law right of action. The severely constrained role of the federal courts in fashioning new rights of action sets a high hurdle for judicial recognition of causes of action—and most particularly for novel causes of action—under the ATS.

Second, *Sosa* rightly emphasized the limited and deeply practical purpose of the ATS: to provide redress for violations for which the United States would be held responsible by the sovereign of the injured alien—violations which, if not "adequately redressed," could give rise to "serious consequences in international affairs," or even war. The historical and legal context in which the ATS was enacted confirms this U.S.-responsibility oriented motivation for the enactment of the ATS.

Third, the extraterritorial claims at issue here fall into a fundamentally different category from those the ATS was enacted to address. In particular, the claims in this and many other modern international law cases arise from a foreign government's alleged violation of its obligations to its own citizens or residents in its own territory. Such claims involve no U.S. affront to the foreign nation that must be redressed, and the adjudication of such claims by U.S. courts would itself have been regarded in 1789 as a violation of the law of nations—thereby threatening precisely the adverse foreign relations consequences the ATS was designed to avert.[2]

---

[2] The instant case does not require the Court to consider the applicability of the ATS to suits that do not require, as this case does, inquiry into the actions of foreign sovereigns. But, *amici*

Accordingly, in enacting the ATS to redress wrongs for which the United States *was* deemed responsible under the law of nations, Congress never made the policy choice to authorize what Petitioners now seek: a universal cause of action for international law violations that occur in foreign countries and implicate *no* law of nations responsibility on the part of the United States. Nor has Congress done so in the more than two centuries since 1789—with the sole, and instructively limited, exception of the Torture Victim Protection Act, 28 U.S.C. § 1350 note (2006). There is therefore no warrant for extending federal common law to authorize this new and different category of claims based on extraterritorial conduct implicating no U.S. law of nations responsibility—particularly in a case, like this one, that challenges the conduct of a foreign nation toward its own citizens or residents within its own territory.

(continued…)

submit, even where foreign sovereign conduct is not at issue, the same principle should apply and would require rejection of most or all extraterritorial claims that do not involve U.S. government conduct: Simply stated, the ATS does not provide a basis for judicial recognition of a cause of action where the United States as a nation would not be held responsible under the law of nations for the underlying conduct.

I. *SOSA* REQUIRES THAT RECOGNITION OF ANY ATS CAUSE OF ACTION SATISFY THE STRICTURES COUNSELING AGAINST CREATION OF FEDERAL COMMON LAW AND IMPLIED RIGHTS OF ACTION

While *Sosa* did not close the door entirely to the recognition of a "narrow class" of modern international norms that might give rise to an ATS-based federal common law cause of action, 542 U.S. at 729, the Court did not recognize any modern international norm as actionable, and did set a high hurdle—rooted in the strict constraints on the judicial creation of private rights of action—to the future recognition of such actions.

Petitioners thus err in framing the issue as whether extraterritorial violations of international law are excluded from an otherwise general authorization of claims based on violations of international law; they likewise err in contending that *Sosa* endorsed the holdings in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and other ATS cases in the lower courts. Petrs' Supp. Opening Br. 12-13. This Court has *never* held that any modern international law norm is actionable pursuant to the ATS.

In particular, *Sosa* held only that the international law norms at issue in that case failed to satisfy the requirement of "definite content and acceptance among civilized nations" comparable to "the historical paradigms familiar when § 1350 was enacted." 542 U.S. at 732. It did *not* hold that satisfying the "definite content and acceptance" requirements would be sufficient to state a cognizable ATS claim. To the contrary, the Court expressly contemplated

additional limits on the statute's reach: "This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action." 542 U.S. at 733 n.21; *see also id.* at 732 ("Whatever the ultimate criteria for accepting a cause of action [under the ATS] . . . .").

As a framework for analyzing whether to recognize a cause of action, moreover, this Court emphasized that recognition of any new category of ATS claims would be subject to a heavy burden of justification analogous to the constraints that as a practical matter place severe limits on the judicial creation of implied rights of action or novel federal common law. *Id.* at 725-28; *id.* at 727 (drawing express analogy to implied rights of action and citing the rejection of an implied constitutional cause of action in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001)).

It is well established in those contexts that such judicial lawmaking can rarely be justified. The policy decision to create a private right of action is ordinarily reserved for Congress and is not a proper function of the courts, "no matter how desirable [recognizing a cause of action] might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). And the same principle applies to extending an existing cause of action to new claims not contemplated by Congress. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) ("Concerns with the judicial creation of a private cause of action caution against its expansion.").

II. CONGRESS ENACTED THE ATS TO ADDRESS TORT CLAIMS BY ALIENS, TYPICALLY ARISING WITHIN THE UNITED STATES, THAT THREATENED TO GIVE THE ALIEN'S SOVEREIGN "JUST CAUSE" FOR WAR IF THE UNITED STATES DID NOT PROVIDE ADEQUATE REDRESS

A. The ATS Addresses Only the Subset of Law of Nations Violations That Could "Threaten[] Serious Consequences" for the Diplomacy or Security of the United States.

As *Sosa* makes clear, the ATS was designed to address a subset of the violations of the law of nations that were recognized in the Eighteenth Century—those for which the United States as a sovereign would be held responsible by the sovereign of the injured alien. It was only the "narrow set of violations . . . threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS[.]" 542 U.S. at 715. Other law of nations violations—such as violations of the "law merchant," the "law maritime" and related legal rules—were not within the contemplation of the 1789 Congress in passing the ATS. *Id*.

This "U.S. responsibility"-oriented focus on violations for which the United States as a nation would be answerable—rather than on any and all international law violations anywhere in the world—is reflected not only in the history but in the text of the ATS, which is conspicuously directed to torts in

violation of "the law of nations *or a treaty of the United States*." Treaty violations are, by definition, offenses that the nation as a sovereign has agreed to prevent and for which it is responsible. And it seems clear, even though the treaty clause is not in terms limited to violations of the United States' *own* obligations under such treaties, that it was not intended (and would not have been understood) to extend to the obligations of other signatories to those treaties. [3]

This focus of the drafters of the ATS on "serious consequences in international affairs" for the United States is readily understandable in light of the legal and political realities of the late Eighteenth Century. Under the prevailing understanding of the law of nations, the commission of the paradigmatic violations discussed in *Sosa*—such as offenses, including those committed by private parties within a nation's territory, against ambassadors or infringement of safe conducts, *see* 542 U.S. at 715—constituted a diplomatic affront to the foreigner's sovereign that obligated the offending nation as a whole to provide proper redress. The failure to provide such redress could result in diplomatic

---

[3] As Judge Rogers has written: "If we assume that Congress wanted to protect the international relations of the federal government, it was sensible to extend federal court jurisdiction only to individual actions which might result in international responsibility on the part of the United States. The words of the statute, 'committed in violation of the law of nations or a treaty *of the United States,'* suggest this limit. Clearly Congress was concerned with the international law obligations of the United States and not of other countries." John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 55 (1988) (emphasis in original).

conflict or even "rise to an issue of war." *Sosa*, 542 U.S. at 715 (citing Emmerich de Vattel, *The Law of Nations*, bk. IV, at 463-64 (J. Chitty ed. 1883) (1758)).

For example, Blackstone emphasized that private infringements of safe-conducts were a cause of international conflict, writing that such offenses

> are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: *and such offences may, according to the writers upon the law of nations, be a just ground of a national war*; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community.

4 William Blackstone, *Commentaries on the Laws of England* (photo. reprint 1983) (1769), at 68-69 (emphasis added).

Likewise, Vattel emphasized each nation's responsibility for redressing mistreatment of foreigners within their territory. Once a sovereign admits foreigners, "he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him." Vattel, bk. II, § 104 at 154. This responsibility extended even to injuries privately inflicted on foreigners within the host country, because that nation "ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less to give open, audacious offence to foreign powers." *Id.* at bk. II, § 76 at 145.

Importantly, this state responsibility included the after-the-fact obligation to provide a civil or criminal

remedy. "It is therefore incumbent upon the nation injured," Blackstone wrote, "first, to demand satisfaction and justice to be done on the offender by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and *draws upon his community the calamities of foreign war."*) 4 Blackstone, *Commentaries* *67–68 (emphasis added).[4]

In the United States, these responsibilities under the law of nations contributed powerfully to the perceived need for a stronger national government than existed under the Articles of Confederation, and, ultimately, to the enactment of the ATS. The period prior to the adoption of the Constitution saw repeated instances in which actions by American states violated law of nations rules, highlighting the flaws of the existing system of government. *See* James Madison, *Vices of the Political System of the United States* (Apr. 1787), *reprinted in* 9 *The Papers of James Madison* 345, 349 (Robert A. Rutland, et al., eds., 1975).

---

[4] The full quote from Blackstone reads: "But where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war."

After one notable 1787 incident, for example, the Dutch minister plenipotentiary protested the entry of a local constable into the minister's New York City residence with an arrest warrant for a "domestic." John Jay, the American minister of foreign affairs, asked the Mayor of New York to act on the "Aggression," noting that it was not the first such incident the Dutch minister had experienced. Jay reported to Congress that "the federal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." 34 *Journals of the Continental Congress*, 1774-1789, at 111 (G. Hunt ed., 1912).

As recounted in *Sosa*, "the Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" 542 U.S. at 716 (quoting J. Madison, Journals of the Constitutional Convention 60 (E. Scott ed. 1893)). Recognizing the importance of remedying violations of safe conducts, the rights of ambassadors, and treaties—and its own impotence to provide the necessary remedies—Congress passed a resolution imploring the states to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States [a form of safe-conduct violation], . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress* 1136–1137 (G. Hunt ed. 1912). This resolution, a precursor to the ATS, confirms that "a private remedy was thought necessary for diplomatic

offenses under the law of nations," *Sosa*, 542 U.S. at 724.

The decentralized system under the Articles of Confederation proved incapable of preventing "disputes with other nations" stemming from continued violations of treaties and the law of nations. James Madison warned in 1787 that

> The Treaty of peace [with England]—the treaty with France—the treaty with Holland have each been violated. . . . The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects. As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst.[sic] those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.

Madison, Vices of the Political System of the United States, *supra*, at 349.

The call for a stronger national government, culminating in the Constitution, was in part a response to concern about such violations, and the potentially severe consequences of leaving them unredressed. James Madison questioned William Paterson at the Constitutional Convention as to whether the so-called New Jersey Plan for unicameral national governance would provide the means to prevent violations of the law of nations "which if not prevented must involve [the nation] in the calamities of foreign wars." 1 The Records of the

Federal Convention of 1787, at 247 (Max Farrand ed. 1911). Madison further expounded that "[a] rupture with other powers is among the greatest of national calamities . . . [and so it] ought therefore to be effectually provided that no part of the nation shall have it in its power to bring them on the whole." *Id.*

To similar effect, Edmund Randolph noted at the Convention that one of the principal defects of the Articles of Confederation was its inability to prevent infractions of the law of nations, raising the concern "that particular states might by their conduct provoke war without control." *Id.* at 27.[5] And John Jay explained in The Federalist No. 3: "It is of high importance to the peace of America that she observe the laws of nations . . . , and to me it appears evident, that this will be more perfectly and punctually done by one National Government, than it could be either by thirteen separate States, or by three or four distinct confederacies." The Federalist No. 3, at 20 (John Jay).[6]

---

[5] In the same vein, Randolph further critiqued the Confederation, arguing: "If a State acts against a foreign power contrary to the law of nations or violates a treaty, [the confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war." 1 The Records of the Federal Convention of 1787, at 33.

[6] *See also* 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 263 (John P. Kaminski, et al., eds. 1988) (public letter of Edmund Randolph, Oct. 10, 1787) ("[In] the constitution and laws of the several states . . . the law of nations is unprovided with sanctions in many cases which deeply affect public dignity and public justice," and as the Congress lacked power "to remedy these defects," it might be "doomed to be plunged into war, from its wretched impotency to check offences against this law."); *cf.* The Federalist, No. 42, at 233 (James

In short, the Founders recognized that provoking foreign powers by failing to provide redress for conduct within the United States that violated the law of nations, such as "violation of safe conducts or passports," 21 Journals of the Continental Congress, *supra*, posed real dangers to the young republic. They further recognized that such provocation could come from actions or failures of state courts as well as other branches of government.

The Founders dealt with this problem through a number of mechanisms, both constitutional and statutory. As Alexander Hamilton wrote in The Federalist 80:

> The Union will undoubtedly be answerable to foreign Powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. *As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war,* it will follow that the Federal Judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

(continued…)

Madison) (noting as a deficiency in the Articles of Confederation that they "contain no provision for the cases of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations").

The Federalist No. 80, at 435 (Alexander Hamilton) (emphasis added); *see also* The Federalist, No. 3, at 21 (John Jay) ("The wisdom of . . . committing such [law of nations] questions to the jurisdiction and judgment of courts appointed by and responsible only to one National Government, cannot be too much commended.").

Against this background of concern over the need to ensure this country's compliance with its obligations under the law of nations, Congress enacted the ATS—as part of the first Judiciary Act in 1789—"to grant federal jurisdiction over cases in which an individual has committed a tortious act in the United States which, if unredressed, would result in international legal responsibility on the part of the United States." John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 47 (1988); *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is evidence . . . that the intent of [the ATS] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

In addition to the ATS, the Judiciary Act of 1789 addressed foreign relations concerns in several of its other provisions, including by giving this Court original jurisdiction over cases by or against ambassadors and other public ministers; giving district courts original jurisdiction over admiralty and maritime cases; and giving circuit courts original jurisdiction over alien diversity cases in which the amount in controversy exceeded $500. Judiciary Act of 1789 §§ 13, 9, 11, 1 Stat. at 78-80. The Crimes Act

of 1790 subsequently made it a crime to violate "any safe-conduct or passport duly obtained and issued under the authority of the United States" or to "assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister." Crimes Act of 1790 § 28, 1 Stat. at 118.

This history fully confirms the *Sosa* Court's determination that the ATS reflects Congress' intensely practical purpose of remedying the subset of law of nations and treaty violations that "if not adequately redressed could rise to an issue of war." 542 U.S. at 715; *see also id.* at 724 (referring to the precursor 1781 resolution as addressing "diplomatic offenses under the law of nations"). The ATS provided the remedy the United States was obligated to provide in such cases so as to satisfy the nation's international obligations and avoid diplomatic crisis or war.

B. Recognizing an ATS Claim For Alleged International Law Violations Implicating No U.S. Responsibility Would Run Counter To, Rather Than Advance, the Purpose of the ATS

The ATS, fairly and properly read in light of its purposes and the practical foreign-affairs concerns that animated its enactment, does not authorize the federal courts to create a cause of action for claims based on alleged international law violations that the U.S. has no law of nations responsibility to redress. Unlike the paradigm offenses noted in *Sosa*, a foreign government's conduct in its own territory towards its own citizens and residents, as in this case, may

violate human rights precepts of modern international law, but it does not create any corresponding United States responsibility to provide a remedy; nor would the failure to provide such a remedy constitute a diplomatic affront against another nation. [7] To the contrary, U.S. actions providing for a cause of action in its courts that

---

[7] The U.S. in its supplemental *amicus* brief, while generally agreeing with the position of the instant brief, suggests that there can be cases, such as *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), where even if the United States does not have a law of nations responsibility to provide a remedy for the underlying conduct, the ATS may provide a cause of action to ensure the United States is not "viewed as having harbored or otherwise provided refuge to an actual torturer or other 'enemy of all mankind.'" Supplemental Brief For The United States As Amicus Curiae 19.

The government offers no support for its suggestion, which, in any event, is in serious tension with longstanding rulings of this Court that, in the absence of a treaty provision, the United States has no customary international law obligation to extradite even its own citizens that have committed violent acts abroad. See *United States v. Rauscher*, 119 U.S. 407, 426 (1886). Moreover, absent any *legal* responsibility on the part of the United States, the government's argument reduces to a policy judgment—one that Congress has never addressed—about the costs and benefits of recognizing a cause of action in such "harboring" circumstances. Even if the result of that cost/benefit policy analysis was clear (and the government does not pretend it is), executive or judicial policy judgments cannot justify judicial creation of a private right of action in circumstances not addressed by Congress. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

presumes to judge conduct in foreign countries—particularly when the court must inevitably pass judgment on a foreign sovereign's actions towards its own citizens and residents in its own territory—invites the very adverse foreign-affairs consequences the ATS was enacted to prevent.

This risk of adverse foreign-affairs consequences would have been even greater under the law of nations at the time of the ATS' enactment. For it was settled that the United States had no authority to interfere in the internal affairs of any other nation. The founding generation's understanding of the obligations of nations made clear that "[i]t is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another." Vattel, bk. II, § 54, at 154-55. As Chief Justice John Jay wrote in *Henfield's Case*, "[i]t is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction." 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (No. 6,360).

To that end, "[i]t does not, then, belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, the nation alone is concerned in the business; and no other is called upon to oblige him to amend his conduct and follow more wise and equitable maxims." Vattel, bk. II, § 55, at 155. Accordingly, under the law of nations at the time

the ATS was enacted, as then-Circuit Justice Story explained in his 1822 opinion in *United States v. La Jeune Eugenie*, given the requirement of respecting the sovereignty of other nations, there could be no redress in this nation's courts for even obvious wrongs committed by another nation against its own citizens:

> No one has a right to sit in judgment generally upon the actions of another; *at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns.* If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. *No nation has ever yet pretended to be the custos morum of the whole world;* and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

26 F. Cas. 832, 847-848 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) (emphasis supplied).

Not only was non-interference with another nation's sovereign right to self-governance honored as a matter of principle and practice, but a failure to respect the other state's domain would itself have been viewed as a violation of the law of nations and, quite likely, a just cause for war or at least serious diplomatic consequences. *See* Vattel, bk. II, § 57, at

156 ("After having established the position that foreign nations have no right to interfere in the government of an independent state, it is not difficult to prove that the latter has a right to oppose such interference. . . . [A] sovereign has a right to treat those as enemies who attempt to interfere in his domestic affairs . . . .").

Accordingly, it would have been entirely clear in 1789 that the jurisdiction conferred by the ATS did not extend to claims arising from a foreign sovereign's conduct toward its own citizens or residents within its own territory.

Even today, when international law is understood to provide certain limits on the power of governments over their own citizens and residents, *see Sosa*, 542 U.S. at 727, allowing American courts to assert authority over such claims would "raise risks of adverse foreign policy consequences," *id.* at 728, while serving none of the purposes of the ATS; *see also id.* at 761-62 (Breyer, J. concurring in part and in the judgment) (highlighting the "comity concerns" raised by American courts exercising "universal jurisdiction" over conduct occurring elsewhere). In short, claims of the sort at issue in this case are wholly distinct from the U.S. responsibility-based claims that *Sosa* identifies as the animating concern of the drafters of the ATS. Whatever the policy arguments for and against the creation of a cause of action for such claims, the Congress of 1789 surely did not anticipate or weigh the consequences of authorizing judicial recognition of such a cause of action under the ATS, and undoubtedly would have viewed such a cause of action as an active source of new foreign-affairs difficulties, not as a prophylactic

agent to avoid such tensions. Under these circumstances, it is not the proper role of the federal courts to make the policy choice inherent in creating a federal common law cause of action for a type of international law violation Congress never addressed.

C. Neither the 1789 Treatment of Piracy Nor the 1795 Opinion of Attorney General William Bradford Supports Recognition of the Worldwide ATS Cause of Action Petitioners Seek.

1. The purported applicability of the ATS to claims of piracy, on which petitioners rely extensively, Petrs' Supplem. Opening Br. 13, 25, 36, provides no basis for recognizing an ATS right of action for claims based on conduct in foreign countries implicating no United States responsibility. As an initial matter, petitioners' premise that the ATS was intended to apply to claims of piracy is a doubtful one. None of the incidents typically cited as giving rise to the concerns that led to passage of the ATS related to piracy, and *Sosa* itself said no more than that piracy "may well also" have been contemplated as subject to the ATS. 542 U.S. at 720. Moreover, actions against pirates at the time were addressed in criminal prosecutions or in rem proceedings under maritime jurisdiction involving the unlawfully seized vessels themselves, rather than private rights of action for damages. See Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Privacy Reveals About the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111 (2004). In light of the structure of the entire First Judiciary Act (of which the ATS was a part), it is unlikely that the ATS was intended to

encompass piracy, which was provided for in the separate admiralty jurisdiction grant of § 9 of the Act.[8]

In any event, even if application of the ATS to piracy had been contemplated, that would provide no support for applying the ATS to conduct in foreign sovereign territory, let alone to the conduct of foreign sovereigns within their own territory—which would have been uniformly regarded as no proper business of the United States. Piracy as a violation of the law of nations was universally defined at the time as "robbery upon the sea," *United States v. Smith*, 18 U.S. 153, 162 (1820); or "robbery and depredation upon the high seas," Blackstone, 4 Commentaries *71; and the "sea" or "high seas" are outside the sovereign territory of any state.[9]

Early on, this Court was careful to construe federal criminal legislation dealing with piracy to limit its reach to robbery only on the high seas[10] and robbery

---

[8] *See also* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 866-871 (2006) (concluding that the ATS did not cover piracy).

[9] As then-U.S. Representative John Marshall stated in 1800: "It is not true that all nations have jurisdiction over all offenses committed at sea. On the contrary, no nation has any jurisdiction at sea, but [only] over its own citizens or vessels, or offenses against itself." 10 Annals of Congress 607 (1800).

[10] *See United States v. Furlong*, 18 U.S. 184, 198 (1820): "If by calling murder *piracy*, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent."

affecting only U.S.-flag ships or U.S. nationals—situations with a nexus to the United States. *See United States v. Palmer*, 16 U.S. 610, 632 (1818) (criminal piracy statute should not be construed "to punish a seaman on board a ship sailing under a foreign flag, under the jurisdiction of a foreign government. . . ."). Indeed, given this Court's interpretation of the federal criminal law outlawing piracy, it is doubtful in the extreme that the ATS was intended to extend to any acts of piracy that have no nexus to the United States.

2. The 1795 opinion of Attorney General William Bradford with respect to potential claims against Americans who participated in the French plunder of a British slave colony likewise provides no support for application of the ATS to a case like this one. *See* 1 Op. Atty. Gen. 57, 57-59. Even if that opinion can be regarded as reliable evidence of the original intent of the ATS rather than merely an improvised response to a diplomatic crisis—something that is by no means clear—it in no way supports the universal international law cause of action Petitioners advocate.

First, the opinion is at best ambiguous as to whether it contemplated application of the ATS to conduct in foreign sovereign territory, as opposed to application only to conduct on the high seas. As the United States notes, the opinion is at best "amenable to different interpretations" on this point. Supplemental Brief For The United States As Amicus Curiae 8 n.1.

Second, Attorney General Bradford did not make clear whether he was referring to the "law of nations" clause of the ATS or to the statute's treaty clause. His view that the ATS was applicable may well have

been based on a violation of an expressly extraterritorial *treaty*—the 1783 treaty between the United States and Great Britain, which provided for the cessation of "all hostilities, both by sea and land" "between the subjects of the one and the citizens of the other." Definitive Treaty of Peace, U.S.-Gr. Brit., art. VII, Sept. 3, 1783, 8 Stat. 80. If the United States's obligation was grounded in a treaty and any ATS cause would be based on the treaty clause, there is little basis here for arguing that that the ATS's law of nations clause was understood to reach violations of the law of nations worldwide.

Third, and perhaps most important, the alleged violation at issue, even if understood to include conduct within the territory of Sierra Leone, invoked the central purpose of the ATS: as evidenced by the formal protests of British authorities, the alleged offense at issue was one for which the United States as a nation was deemed responsible (either because of its express treaty obligation or under the British government's view of the law of nations). Far from reflecting a view of the ATS as providing a worldwide cause of action, this incident provides a classic example of the type of circumstance to which the ATS was a practical response: *an affront to a foreign power* that threatened "serious consequences in international affairs" if not "adequately redressed." *Sosa*, 542 U.S. at 715.

For all of these reasons, the Bradford opinion provides no support for recognizing a cause of action where those practical purposes are not implicated, or where, as in this case, those purposes would be disserved.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MEIR FEDER
PATRICK J. SMITH
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

SAMUEL ESTREICHER
Counsel of Record
PAUL HASTINGS LLP
75 East 55th Street
New York, NY 10022
(212) 318-6000

Counsel for Amici Curiae