No. 10-1491

IN THE

Supreme Court of the United States

ESTER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM 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 OF CHEVRON CORPORATION, DOLE FOOD COMPANY, DOW CHEMICAL COMPANY, FORD MOTOR COMPANY, GLAXOSMITHKLINE PLC, AND THE PROCTER & GAMBLE COMPANY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Curiae are corporations from different industrial sectors that through their affiliates do extensive business around the globe.[1] *Amici* unequivocally condemn human rights abuses, and are committed to conducting global commercial affairs in a lawful and responsible manner that is respectful of all persons where they do business. They also strongly support international human rights law, which imposes extensive obligations on nations to respect human rights. *Amici* are opposed, however, to the unjustified expansion of the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), to include causes of action against corporations for alleged human rights violations in foreign countries. To vindicate their interest in the proper interpretation of the ATS, *Amici* filed a brief in this case earlier this year. *See* Brief of Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, GlaxoSmithKline PLC, and the Procter & Gamble Company as *Amici Curiae* in Support of Respondents, No. 10-1491 (Feb. 3, 2012) (*Amici* Orig. Br.).

On March 5, 2012, the Court directed the parties to file supplemental briefs addressing the following issue: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The burden of

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[1] Written consents from both parties to the filing of *amicus curiae* briefs in support of either party are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae* or their counsel contributed money to the preparation or submission of this brief.

extraterritorial ATS causes of action falls on all businesses with substantial contacts to the U.S., especially U.S. corporations that are always amenable to suit in the United States. *Amici* thus have a direct interest in the proper answer to the Court's supplemental question.

INTRODUCTION AND SUMMARY OF ARGUMENT

The success of international human rights law has depended on its adherence to the centuries-old principle that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," and is "susceptible of no limitation not imposed by itself." *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.). In accord with this principle, nations have consented in treaties to numerous human rights obligations, to individual responsibility in specified courts for defined international crimes, and to various forms of monitoring by international and regional organizations. They have not derogated their sovereignty with respect to human rights entirely, however. In particular, they have not consented to the regulation of human rights inside their territories through private civil causes of action in the domestic courts of other nations. *See Amici* Orig. Br. at 10-17.

Lower federal courts have nonetheless construed the ATS to permit U.S. federal causes of action for alleged misconduct by foreign governments on foreign soil. These extraterritorial ATS causes of action have sparked diplomatic and legal protests from governments of allies and highly respected courts, all of whom are committed to advancing human rights. *See id.* at 4-10. ATS cases have been internationally

controversial not just because they violate foreign territorial sovereignty, but also because they are fueled by what other nations view as exorbitant U.S. rules concerning discovery, litigation costs, jury trials, punitive damages, class actions, and contingent fees. *See* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party at 27-28, *Kiobel v. Royal Dutch Petroleum Co.*, No 10-1491 (June 13, 2012) (U.K. et al. Br.).

The instant case typifies a particularly controversial trend in ATS cases: lawsuits alleging that corporations doing business abroad aided and abetted the foreign government's actions. Such corporate ATS cases, no less than ones against government officials, require courts to adjudge foreign government conduct on foreign soil. The lawsuits thus use corporations "as proxies for what are essentially attacks on government policy; because corporations do not have sovereign immunity, they are generally more vulnerable to suit." Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 107. Foreign governments have protested this uniquely American form of "plaintiff's diplomacy" in cases involving both U.S. and foreign corporate defendants. *See, e.g.,* Letter from Soemadi Djoko M. Brotodiningrat, Ambassador, Embassy of the Republic of Indonesia, to Richard L. Armitage, Deputy Sec'y of State, July 15, 2002 (protesting "extraterritorial jurisdiction" in ATS case against Exxon Corporation in connection with alleged human rights abuses by the Indonesian military); Brief of *Amicus Curiae* Republic of South Africa in Support of Affirmance, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 301 (2d Cir. 2007) (No. 05-2141-cv)

(protesting interference with South Africa's "independence and sovereignty" in ATS case against U.S. and non-U.S. firms that did business in Apartheid South Africa).

The foreign relations controversies caused by ATS cases are not attributable to a decision by the Congress that enacted the ATS in 1789, or to any subsequent congressional action. They are, rather, entirely a result of discretionary decisions by federal judges to create extraterritorial ATS causes of action pursuant to their federal common law powers. The Court's supplemental question asks whether these causes of action are valid. For three independent reasons, they are not.

First, extraterritorial ATS causes of action are contrary to *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa* counseled courts to craft ATS causes of action in ways that minimize legal and diplomatic conflicts with foreign sovereigns, and that respect Congress' primary role in the definition of causes of action that touch on international relations. Extraterritorial ATS causes of action do just the opposite. They create significant legal and diplomatic conflicts. And they fail to pay adequate respect to Congress, which has taken a cautious approach to extraterritorial causes of action that is inconsistent with the much more aggressive posture adopted by courts in ATS cases. These comity and separation of powers concerns have much greater force in this case than in *Sosa*, for here unlike *Sosa* plaintiffs allege misconduct by a foreign sovereign on foreign soil.

Second, extraterritorial ATS causes of action cannot be squared with the presumption against extraterritoriality. The presumption against extraterritoriality requires courts to construe federal law to

apply only inside the United States unless Congress clearly expresses an intention to apply it extraterritorially. The ATS contains no indication of congressional intent to create or support extraterritorial causes of action. Such causes of action are thus disallowed in ATS cases. This reading of the ATS is consistent with the strict territorial assumptions about the nature of law that prevailed in 1789, and with the original purpose of the statute, which was to prevent diplomatic controversy by providing a judicial forum for civil lawsuits alleging torts in violation of international law that occurred inside the United States and perhaps on the high seas.

Third, the extraterritorial ATS causes of action in this case violate international law. They do so because they purport to regulate foreign government conduct on foreign soil beyond the consent of nations. Nations have consented to a foreign prosecution for certain "universal jurisdiction" crimes committed in their territories even though the foreign nation lacks any connection to the underlying behavior. They have not consented to allow a foreign court to entertain civil causes of action on the basis of universal jurisdiction, as is done in this case. Universal civil jurisdiction is a different and greater intrusion on territorial sovereignty than universal criminal jurisdiction, for it is broadly enforceable by individuals rather than by the government alone, which exercises political discretion in enforcement. The international law problems with universal ATS causes of action implicate the canon of construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

ARGUMENT

Petitioners in this case, Nigerian plaintiffs, bring causes of action against British and Dutch corporations under the ATS for allegedly aiding and abetting the Nigerian government in committing torture, extrajudicial killing, crimes against humanity, and arbitrary arrest and detention in Nigeria. The Court's supplemental question asks whether the ATS permits courts to recognize causes of action for alleged international law violations in cases, like the present one, that occur on foreign soil. The proper answer is that it does not. Extraterritorial ATS causes of cause of action are contrary to *Sosa*, and they are precluded by the presumption against extraterritoriality and the canon that acts of Congress should be construed so as not to violate international law.

I. *SOSA* PRECLUDES EXTRATERRITORIAL ATS CAUSES OF ACTION

The Court need look no further than its 2004 decision in *Sosa* to understand why extraterritorial causes of action are impermissible under the ATS.

Sosa established a two-part test for judicial recognition of any ATS cause of action. First, the cause of action must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms . . . ." 542 U.S. at 725. This element of *Sosa* ensures that plaintiffs allege a violation of a truly "binding customary international law," *id.* at 735, before courts can consider whether to create a private cause of action to enforce it, *see id.* at 738 n.30 (Court's "demanding standard of definition . . . must be met to raise even the possibility of a

private cause of action"); *see also id.* 738 n.29 (distinguishing international law's "status as binding law" from the requirements for "creation by judges of a private cause of action to enforce the aspiration behind the rule claimed").

Second, even if the international law in question is adequately accepted and defined, courts must exercise "great caution in adapting the law of nations to private rights" by ensuring that any proposed ATS cause of action accords with the general limitations on federal common law and implied rights of action. *Id.* at 725-28. *Sosa* emphasized in particular that the "potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. This second prong of the *Sosa* analysis requires courts to conform any cause of action to Congress's enactments in the area, *id.* at 726-28, and to exercise an "element of judgment about the practical consequences" of crafting the cause of action, *id.* at 732-33; *see also id.* at 736 (distinguishing "binding customary norm" from "predicate for a federal lawsuit," which turns on "implications" of recognizing cause of action).

The Court in *Sosa* disposed of the case before it on the first prong of the analysis: the plaintiff's proposed cause of action for arbitrary detention did not rest on a binding norm of customary international law. *Id.* at 735, 738. It thus had no need to apply the second prong. And in any event, the foreign relations consequences that would have been relevant to the second prong were relatively insignificant in *Sosa*. Unlike this case and most other ATS cases, *Sosa* did not involve a challenge to foreign government con-

duct on foreign soil.[2] Rather, it was a lawsuit arising out of a kidnapping in Mexico by the U.S. government. The plaintiff alleged violations of international law by the United States and its agents, including several Mexican nationals. But he did not sue any officials of the Mexican government, which had refused to participate in the kidnapping and which later protested it vigorously. *See id.* at 698.

In contrast to *Sosa,* plaintiffs in this case seek to apply ATS causes of action to alleged foreign governmental wrongdoing within foreign territory. *Sosa* expressed deep skepticism about the validity of ATS causes of action in this context. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Id.* at 727. ATS causes of action in this situation "raise risks of adverse foreign policy consequences" and "should be undertaken, *if at all*, with great caution." *Id.* at 728 (emphasis added).[3] The "risks" of adverse policy consequences

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[2] Defendant Sosa was a *former* Mexican policeman, *see Alvarez-Machain v. United States*, 266 F.3d 1045, 1048 (9th Cir. 2001), and as the *en banc* court of appeals opinion in *Sosa* noted, the kidnapping in Mexico took place "without the involvement of the Mexican judiciary or law enforcement, and under protest by Mexico." *Alvarez-Machain v. United States*, 331 F.3d 604, 608 (9th Cir. 2003) (en banc).

[3] This passage in *Sosa* expressly leaves open the possibility that courts should not recognize an ATS cause of action in cases—like the present one, but unlike in *Sosa*—that involve alleged foreign governmental human rights violations. This is

in cases involving extraterritorial ATS causes of action have, in the eight years since *Sosa*, turned into reality. Under *Sosa* these causes of action must be rejected.

The judicial creation of internationally controversial ATS causes of action is especially inappropriate, *Sosa* noted, because "Congress as a body has done nothing to promote" them. *Id.* at 728. Far from promoting them, presidents and senates have for decades expressed skepticism about the judicial enforcement of international human rights law by rendering every modern human rights treaty non-self-executing. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 463-64 (2001); *Sosa,* 542 U.S. at 728, 735. Congress did create an express extraterritorial cause of action for torture and extrajudicial killing. *See* Torture Victims Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note. But that statute is "confined to specific subject matter," 542 U.S. at 728, and unlike the ATS it contains careful limitations and qualifications, including foreign state action and exhaustion requirements, *see* 28 U.S.C. § 1350 note, sec. 2(a), and a restriction to individuals, *see Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012). It is entirely contrary to *Sosa* for courts to craft extra-

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one reason why Petitioners err in claiming that *Sosa* resolved the Court's supplemental question. *See* Petitioners' Supplemental Brief at 12-17, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 6, 2011) (Pet. Supp. Br.). Another reason is that in dismissing the complaint on the ground that the cause of action failed the "definition" test, 542 U.S. at 738, *Sosa* made clear that it was ruling only on a threshold issue, *see id.* n.30, and that it did not set forth all "criteria for accepting a cause of action" under the ATS, *id*. at 732; *see also id.* at 733 n.21 (other principles "limit[] the availability of relief" in ATS cases).

territorial ATS causes of action so far beyond what Congress has approved—especially since doing so has and will continue to offend foreign nations.

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY PRECLUDES EXTRATERRITORIAL ATS CAUSES OF ACTION

Sosa alone disposes of this case. But the same separation of powers and comity concerns that inform *Sosa*'s analysis underlie the presumption against extraterritoriality, a canon of construction that also leads to the conclusion that extraterritorial ATS causes of action are impermissible.

A. The Presumption Against Extraterritoriality Applies to ATS Causes of Action

"It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)) (further internal quotations and citations omitted). The presumption applies to the extraterritorial activities of U.S. and foreign defendants alike. *See Morrison*, 130 S. Ct. at 2875-76, 2888 (applying presumption to lawsuit against U.S. and foreign firms for alleged misconduct concerning securities traded on foreign exchanges); *Aramco*, 499 U.S. at 247, 259 (applying presumption to foreign employment practices of U.S. firms).

The presumption against extraterritoriality serves comity and separation of powers aims similar to the ones that underlie *Sosa*'s cause of action test. The presumption "protect[s] against unintended clashes

between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (construing statutes "to avoid unreasonable interference with the sovereign authority of other nations" "helps the potentially conflicting laws of different nations work together in harmony"). It also reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind," *Smith v. United States*, 507 U.S. 197, 204, n.5 (1993), and ensures that the politically accountable Congress, rather than courts, calibrates any clashes between U.S. law and foreign law, *see McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19, 22 (1963) (arguments about extraterritoriality "should be directed to the Congress rather than to us"); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (Congress "alone has the facilities necessary to make fairly such an important policy decision [as extraterritoriality] where the possibilities of international discord are so evident").

Petitioners contend that the comity concerns underlying the presumption against extraterritoriality are not implicated here because courts in ATS cases enforce international law rather than U.S. substantive law. Pet. Supp. Br. at 35. The foreign government protests in this and other ATS cases belie the claim that comity is not implicated here. And *Sosa* made clear that the governing law in ATS lawsuits is not international law, but rather U.S. private causes of action created by federal courts exercising discretionary federal common law powers. *See Sosa* 542 U.S. at 725, 727, 732, 738 & n.29; *see also* Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance at 2,

Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (June 13, 2012) (U.S. Supp. Br.) (ATS cause of action "is not created or prescribed by international law," but rather is an "application of the substantive and remedial law of the United States, under federal common law, to the conduct in question . . . ."). It is the extraterritorial application of the distinctly American ATS causes of action that renders ATS cases so controversial, and it is to those judge-made causes of action that the presumption should apply. *Cf. Morrison*, 130 S. Ct. 2869 (applying presumption in case brought under judge-made private cause of action).[4]

If anything, the international comity and separation of powers justifications for the presumption are stronger when the question is whether a judge-made cause of action (as opposed to a statute) applies extraterritorially. In the ordinary case, courts assume—in acknowledgment that they lack relevant authority and policy expertise, and out of deference to Congress and foreign nations—that the substantive

[4] Petitioners also claim that the presumption cannot apply to jurisdictional statutes like the ATS. *See* Pet. Supp. Br. at 34. *But cf. Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-41 (1989) (applying presumption against extraterritoriality to the Foreign Sovereign Immunities Act). This claim is beside the point because the issue here is not the extraterritoriality of the ATS *per se*. Rather, as just noted, and as the Court's supplemental question makes clear, the issue is whether judge-made ATS causes of actions can be applied to conduct on foreign soil. *See also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 23 (D.C. Cir. 2011) ("[T]he question . . . is not whether the ATS applies extraterritorially but is instead whether the common law causes of action that federal courts recognize in ATS lawsuits may extend to harm to aliens occurring in foreign countries.").

law Congress creates does not apply abroad absent a clear indication. In the ATS context, courts rather than Congress make the discretionary decision to create the governing law. That initial judicial law-making decision, as *Sosa* made clear, is fraught with comity and separation of powers concerns. Those concerns—and thus the justification for applying the presumption against extraterritoriality—are heightened when judges both create the governing law and decide to apply it to conduct on foreign soil, especially when they do so in ways that cause foreign relations controversy.

B. The Presumption Against Extraterritoriality Precludes Extraterritorial ATS Causes of Action

The Court imposes a high bar before applying federal laws extraterritorially. Unless there is "the affirmative intention of the Congress clearly expressed, we must presume [federal law] is primarily concerned with domestic conditions." *Aramco*, 499 U.S. at 248 (citations and internal quotations omitted); *see also Morrison*, 130 S. Ct. at 2883 (requiring "clear indication of extraterritoriality"). Nothing in the ATS comes close to meeting this burden with respect to ATS causes of action.

The ATS provides that "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. It says nothing about the law that governs in ATS cases, much less about the extraterritorial scope of that law. The Court has ruled that "broad jurisdictional language" of the type found in the ATS, including jurisdictional language that extends to "any

person" or "any foreign country," or "any activity," does not overcome the presumption against extraterritoriality. *See Morrison*, 130 S. Ct. at 2881-82; *Aramco*, 499 U.S. at 248-51. Similarly, the ATS's jurisdictional limitation to alien plaintiffs says nothing about the extraterritorial scope (if any) of the law applied in ATS cases. *Cf. Aramco*, 499 U.S. at 255 (rejecting extraterritorial application of Title VII even though the statute protected aliens working in United States). Finally, a "tort . . . committed in violation of the law of nations or a treaty of the United States" might be governed by local or foreign law. This portion of the ATS thus says nothing about governing law or geographical locus.

The ATS's silence about governing law and any possible extraterritorial scope to such law is fatal under the presumption against extraterritoriality. In the Court's recent extraterritoriality decisions, the statutes under consideration contained "plausible" interpretive evidence, *Aramco*, 499 at 250, or "uncertain indications," *Morrison*, 130 S. Ct. at 2883, of extraterritorial application that the Court nonetheless found lacking. The ATS, by contrast, contains no indication at all of congressional intent to support the application of extraterritorial federal law. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878.

C. The Historical Context of the ATS Demonstrates that the Statute Cannot Support Extraterritorial Causes of Action

The Court need look no further than the text of the ATS to conclude under the presumption against extraterritoriality that ATS causes of action cannot

be applied to conduct on foreign soil. But the historical context in which the ATS was enacted supports the same conclusion.

Evidence from the period in which the first Congress enacted the ATS indicates a focus on conduct on U.S. soil and perhaps on the high seas, but not on foreign soil. "Uppermost in the legislative mind" of the first Congress was the need for a judicial forum to redress actions against ambassadors inside the United States. *See Sosa*, 542 U.S. at 716-17, 720. The ATS framers probably (but less certainly) intended for violations of safe conduct and piracy to be actionable as well. *Id*. Consistent with this focus, the two actions under the ATS soon after 1789 concerned conduct inside the United States. *See Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607) (ATS provides jurisdiction for wrongful seizure in United States); *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9,895) (dismissing suit under the ATS for wrongful seizure in U.S. territorial waters because it was not "for a tort only").

These indications of the geographical focus of the statute are consistent with the broader jurisprudential assumptions that prevailed in 1789. In the late eighteenth and early nineteenth centuries, sovereignty was a rigid concept and law was conceived in strict territorial terms. *See, e.g., Green v. Sarmiento,* 10 F. Cas. 1117, 1117 (C.C.D. Pa. 1810) (No. 5,760) ("The laws of one country, can have in themselves no extraterritorial force, except so far as the comity of other nations may extend to give them effect . . . .") (jury charge). American jurists during this period were deeply influenced by a well-known 1689 essay by Ulrich Huber that maintained that the "laws of each state have force within the limits of that

government and bind all subjects to it, but not beyond." See Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* (1689), *reproduced and translated in* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 375, 403 (1918-19); *see also Holmes v. Remsen*, 4 Johns. Ch. 460, 469 (N.Y. Ch. 1820) (Chancellor Kent) (Huber's essay "every where received as containing a doctrine of universal law"); *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) (Washington, J.) ("principles laid down by Huberus [are] universally acknowledged").[5]

Of most direct significance, prevailing eighteenth and nineteenth century conceptions of sovereign equality and territorial sovereignty would have precluded U.S. courts from adjudicating the legality of foreign governmental acts on foreign soil, in cases involving private and public defendants alike. *See, e.g., Schooner Exchange*, 11 U.S. (7 Cranch) at 136; *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."); *The Antelope*, 23 U.S. 66, 122 (1825) (Marshall, J.) ("It results from [the perfect equality of nations] that no one [nation] can rightfully impose a

[5] In *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 369 n.2 (1797), reporter Alexander J. Dallas included translated extracts from Huber's famous essay, including its provisions on strict territorial sovereignty, and noted that he was "persuaded . . . that its insertion here will be approved by the profession."

rule on another. Each legislates for itself, but its legislation can operate on itself alone."); *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) ("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."); *cf.* U.S. Supp. Br. at 14 ("The historical context of the ATS lends no support to recognizing a private right of action challenging the acts of a foreign sovereign in its own territory.").

Petitioners invoke the doctrine of "transitory torts" in an attempt to show that the ATS contemplated application of extraterritorial causes of action. Pet. Supp. Br. 18-19, 23, 27-31. This doctrine was a common law pleading innovation that permitted venue when some foreign torts (as opposed to local actions, usually involving real property) were in issue. *See* William H. Wicker, *The Development of the Distinction Between Local and Transitory Actions*, 4 Tenn. L. Rev. 55 (1926). There is no affirmative evidence that the transitory tort venue rule applied in ATS cases. But even if venue were proper over some transitory torts in ATS cases, the important consideration for present purposes is the law that would have governed in such cases—a consideration that cuts against the extraterritorial ATS causes of action in this case.

The governing law for foreign torts during the relevant period was the law of the place of the tort. *See Smith v. Condry*, 42 U.S. 28, 33 (1843); *Wilson v. Rich*, 5 N.H. 455, 456 (N.H. 1831); *Stout v. Wood*, 1

Blackf. 71, 71-72 (Ind. 1820); *Shaver v. White*, 20 Va. (6 Munf.) 110, 112 (Va. 1818); *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021, 1029 (1774); *Blad*'s *Case*, 36 Eng. Rep. 991, 991-92 (1673); *see generally* Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* § 307d, at 403 (6th ed. 1865) (Redfield Rev.) (for transitory tort actions "the right of action and the nature and extent of the damages must be estimated according to the law of the place where the wrong was committed"). Judges applied foreign law in these cases out of comity and respect for foreign sovereignty. *See* Story, *supra,* § 38, at 34 ("comity" is the basis for applying foreign law); Huber, *supra*, 13 Ill. L. Rev. at 403 (nations enforce rights acquired under foreign law out of "comity"). This is precisely the opposite of what happens in ATS cases, where federal judges create U.S. causes of action and apply them extraterritorially. The comity-promoting transitory tort rule thus cannot be a basis for the quite different comity-defying modern practice of projecting controversial U.S. causes of action onto foreign soil.[6]

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[6] The governing law in transitory tort cases explains why Attorney General Bradford's 1795 opinion, 1 Op. Att'y Gen. 57 (1795), cannot support modern extraterritorial ATS causes of action. The opinion maintained that persons injured in connection with a raid by American citizens in or near Sierra Leone "have a remedy by a civil suit in the courts of the United States" under the ATS. *Id.* at 59. This statement is ambiguous. It might have concerned conduct on the high seas, and it might have concerned only the treaty prong of the ATS. *See* U.S. Supp. Br. at 7-8 & n.1. But even assuming that Bradford was referring to a remedy in an ATS case for conduct in Sierra Leone, he would have assumed that the tort law prevailing in Sierra Leone (most likely, British law) controlled. Yet another reason why the Bradford opinion cannot be the basis for extraterritorial ATS causes of action in cases like the present one is that the Sierra Leone matter, if brought under the ATS,

D. The Court Should Not Recognize Any Exception to the Presumption Against Extraterritoriality

The United States agrees that the Court "must take account of the principles underlying the presumption against extraterritorial application of federal statutes" in ATS cases. U.S. Supp. Br. at 15-16. It suggests, however, that the Court should only apply the presumption on the facts of this case, and should leave open whether to apply extraterritorial ATS causes of action "in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas." *Id.* at 21. Other *Amici* go further and urge the Court to carve out a firm exception to the presumption against extraterritoriality in ATS cases involving defendants who reside in the United States. *See, e.g.,* Brief for *Amici Curiae* Abukar Hassan Ahmed, et al. in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 13, 2012) (Br. of Ahmed et al.).

The Court should not recognize any exception or potential exception to the presumption against extraterritoriality. The whole point of the presumption is to avoid fact-intensive, case-by-case judicial analyses about the extraterritorial scope of particular laws. *See Morrison*, 130 U.S. at 2879-81 (criticizing "unpredictable and inconsistent" fact-intensive approach to extraterritoriality in securities law context); *see also Empagran*, 542 U.S. at 168 (rejecting "case by case"

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would not have involved the adjudication of foreign sovereign conduct on its own soil.

approach to "comity considerations" as "too complex to prove workable"). The presumption is designed to ensure that Congress, and not the federal judiciary, makes the hard policy and international relations tradeoffs needed to calibrate the precise extra-territorial scope of federal law, including any exceptions. "Rather than guess anew in each case," therefore, the Court should "apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." *Morrison*, 130 U.S. at 2881.

Aramco is instructive. There the Court applied the presumption against extraterritoriality to Title VII of the Civil Rights Act of 1964, which evinced contrary indications about its extraterritorial scope. After noting that Congress had amended many statutes to clarify their extraterritorial scope, the Court added that "should [Congress] wish to do so, [it] may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." 499 U.S. at 259. Congress accepted this invitation and specified Title VII's extraterritorial scope in a fine-grained way that *Aramco* had not considered as a possible interpretation of Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1077 (1991) (extending Title VII to cover U.S. citizen employees of U.S. firms in foreign countries unless foreign law requires otherwise, and including an exception for "foreign operations of an employer that is a foreign person not controlled by an American employer"). The presumption thus "provoked Congress into providing just the sort of nuanced specificity and limitations that the Court would have had difficulty divining." Einer Elhauge, *Statutory*

Default Rules: How to Interpret Unclear Legislation 205-06 (2008).[7]

Crafting exceptions to the presumption against extraterritoriality is not only an inappropriate task for the Court; it is also an unnecessary one. Petitioners' *Amici* are wrong to suggest that the United States would violate its international obligations, or could be faulted for harboring human rights violators, if it declined to provide a private cause against a person found in the United States who allegedly committed human rights violations abroad. *See, e.g.,* Br. of Ahmed et al.; U.S. Supp. Br. at 20.

The United States is a party to several universal jurisdiction criminal treaties that oblige it to prosecute or extradite human rights violators found within the United States, regardless of where the crime was committed. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide, Arts. 1, 5-6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Congress has enacted domestic laws that implement these obligations. *See, e.g.,* 18 U.S.C. § 2340A

[7] Congress did something similar after *Morrison* when it amended Section 10b of the Securities Exchange Act of 1934 to make clear that the U.S. government may apply Section 10b extraterritorially, but private litigants of the type that sued in *Morrison* may not. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 929P(b) & 929Y, 124 Stat. 1376 (2010). The Court lacked the authority or the policy tools to craft the law in this way, but the presumption against extraterritoriality sparked Congress to do so.

(torture); Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (to be codified at 18 U.S.C. § 1 note) (genocide); *see also United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (prosecuting former leader of Liberia for torture committed in Liberia). In addition, Congress has authorized the government to deport from the United States, and to refuse to admit to the United States, any alien involved in torture, genocide, certain war crimes, and many other human rights violations. *See* 8 U.S.C. § 1227 (Supp. III 2010) (grounds for deportation); 8 U.S.C. § 1182 (Supp. IV 2011) (grounds for non-admission).

In these and similar laws, Congress has enacted a comprehensive scheme to ensure that human rights violators cannot take refuge in the United States. These laws have several features that distinguish them from the ATS. First, they contain clear guidance about which human rights violators and violations warrant particular forms of redress, and about the applicability of the relevant provisions to extraterritorial conduct. The ATS, by contrast, provides no indication about covered norms or the extraterritorial scope of the causes of action to redress violations of those norms. Second, the anti-harboring laws are grounded in and consistent with treaty obligations. By contrast, the universal civil jurisdiction causes of action at issue in this case have no basis in any treaty, and are widely viewed to violate international law. U.K. et al. Br. at 11-18; *Amici* Orig. Br. at 4-8. Third, Congress' anti-harboring laws place delicate decisions about redress for extraterritorial human rights violations under the control of the expert and politically accountable executive branch. By contrast, the ATS leaves these decisions to alien plaintiffs and federal courts.

Fourth, Congress' anti-harboring regime has not attracted the disapproval of nations and foreign and international courts. Extraterritorial ATS causes of action, of course, have.

There is thus no need for federal courts to craft an exception to the presumption against extraterritoriality in order to supplement Congress's comprehensive anti-harboring scheme with judge-made extraterritorial private causes of action. This is especially so since Congress knows how to enact extraterritorial causes of action related to international human rights law. *See* TVPA, 28 U.S.C. § 1350 note; 28 U.S.C. § 1605A(a)(1), (c). The TVPA is particularly significant, for Congress there amended federal law to create a limited and precisely defined extraterritorial cause of action that covers the factual situation at issue in the case that initiated modern human rights litigation. *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filartiga*-type lawsuits for torture and extrajudicial killing abroad against foreign officials found in the United States thus would be unaffected by the application of the presumption against extraterritoriality to the ATS.

III. THE ATS CANNOT SUPPORT EXTRATERRITORIAL ATS CAUSES OF ACTION BECAUSE THEY VIOLATE INTERNATIONAL LAW

A second canon of construction potentially relevant in this case requires that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118; *see also Empagran*, 542 U.S. at 164. The Court should apply this canon only "*if* the presumption against extraterritoriality

has been overcome or is otherwise inapplicable." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting) (emphasis added); *see also Aramco*, 499 U.S. at 255 (applying presumption against extraterritoriality in part to avoid "difficult issues of international law").

The canon to construe statutes when possible not to violate international law serves comity and separation of powers aims similar to *Sosa*'s cause of action requirement and to the presumption against extraterritoriality. It serves comity by "help[ing] the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *Empagran*, 542 U.S. at 164-65. And it serves separation of powers by vindicating the assumption that Congress "seeks to follow" international law and "take account of the legitimate sovereign interests of other nations when they write American laws," *id.* at 164.

In our previous brief *Amici* explained why the extraterritorial causes of action in this case violate international law, and documented numerous instances of respected foreign governments, foreign courts, and international jurists agreeing with this conclusion. *See Amici* Orig. Br. at 4-21. *Amici* further explained why the potential international law difficulties with extraterritorial ATS causes of action require this Court to interpret the ATS not to permit them. *Id.* at 17 n.9, 29-30. *Amici* incorporate those arguments by reference and will not repeat them

here.[8] Rather, we here respond to the main contentions by Petitioners and their *amici* that the causes of action in this case are consistent with international law. These contentions are all unavailing.

Petitioners and their *amici* are wrong to claim that ATS causes of action do not violate foreign territorial sovereignty because they involve adjudicative jurisdiction rather than prescriptive jurisdiction. *See, e.g.,* Pet. Supp. Br. at 37-41; Supplemental Brief of Yale Law School Center for Global Legal Challenges as *Amicus Curiae* in Support of Petitioners at 5-9, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (June 13, 2012) (Yale Supp. Br.). Adjudicative jurisdiction is the power "to subject persons or things to the process of its courts." 1 Restatement (Third) of Foreign Relations Law of the United States § 401(b) (1987) (Restatement (Third)). In domestic law it is known as "judicial" (or personal) jurisdiction. *See id.*, pt. IV, ch. 2, intro. note; *id.*, § 421, Reporters' Note 2. Adjudicative jurisdiction in this case is governed by

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[8] The original question presented in this case was whether the ATS, as understood after *Sosa*, permitted corporate liability. In our opening brief, *Amici* discussed pertinent international law issues, as well as the applicability of the *Charming Betsy* canon, in order to "assist the Court in understanding why Petitioners' claims [about corporate ATS liability] do not come close to meeting" the requirements of *Sosa*. *Amici* Orig. Br. at 4. The Court had not at that time asked for briefing on the question of the extraterritorial application of ATS causes of action, and *Amici* thus did not provide a complete answer to that question. The answer to the supplemental question presented requires a full analysis of how *Sosa* applies to extraterritorial ATS causes of action, as well as analysis of the presumption against extraterritoriality. The Court need only reach the canon to construe statutes consistent with international law if it concludes that extraterritorial ATS causes of action survive the arguments set forth in Parts I and II.

the New York long-arm statute, N.Y. C.P.L.R. § 301, which applies by virtue of Fed. R. Civ. P. 4(k)(1)(a), *see Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 94 (2d Cir. 2000).

The issue posed by the Court's supplemental question is not whether there is adjudicative jurisdiction in this case. It is, rather, whether the judge-made federal causes of action recognized in *Sosa* can apply to conduct in other countries.[9] This is an issue of prescriptive jurisdiction, which is "the authority of a state to make its law applicable to persons or activities." Restatement (Third), pt. IV, intro. note at 231; *see also Morrison*, 130 S. Ct. at 2877, 2887 (extraterritoriality question concerns substantive law and prescriptive jurisdiction). The existence of adjudicative or personal jurisdiction over a defendant "does not mean that the forum state has jurisdiction to prescribe in respect to the subject matter of the action." Restatement (Third) § 421 cmt. a. The governments of the United Kingdom and the Netherlands are not protesting the assertion of personal jurisdiction over their corporate defendants in this case, but rather the application of unique American causes of action to extraterritorial conduct to which the United States has no connection. *See* U.K. et al. Br.[10]

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[9] *Sosa* held that the ATS is a subject matter jurisdictional statute that creates no new causes of action, 542 U.S. at 724, but it further held that judges could sometimes craft federal common law causes of action for ATS cases, *id.* at 725, 732. The validity of judge-made extraterritorial causes of action is the question now before the Court.

[10] Although the issue is not before the Court, yet another example of why ATS lawsuits are so controversial internationally is that the basis for adjudicative jurisdiction in this case—

Petitioners' *Amici* also maintain that the United States can apply ATS causes of action to conduct in other countries because international law permits extraterritorial jurisdiction unless an affirmative international law prohibits it. *See, e.g.,* Yale Supp. Br. at 4-5, 13, 25. The precedent cited for this reversal of the standard assumptions of territorial sovereignty is *S.S. "Lotus" (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7). *Lotus* is a casebook chestnut, but the presumption ascribed to it does not reflect international law. *See* Malcolm N. Shaw, *International Law* 656 (6th ed. 2008); Hugh Handyside, Note, *The* Lotus *Principle in ICJ Jurisprudence: Was The Ship Ever Afloat?*, 29 Mich. J. Int'l L. 71 (2007). Numerous judges on the ICJ have rejected its validity. *See Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Separate Op. of President Guillaume, 2002 I.C.J. 35, 43 (Feb. 14); *id.,* Joint Separate Op. of Judges Higgins, Kooijmans, and Buergenthal, 2002 I.C.J. 63, 78 ¶¶ 50-51 (Feb. 14); *see also Nottebohm Case* (second phase), 1955 I.C.J. Reports 4 (Apr. 6); *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. Reports 116 (Dec. 18). And the numerous protests by foreign governments in ATS cases show that the *Lotus* presumption does not reflect international law as actually practiced.

Petitioners also contend that the practice of nations shows that universal civil jurisdiction civil causes of action are consistent with international law.

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unrelated business contacts with the United States, *see Wiwa,* 226 F.3d at 94-99—is viewed as exorbitant by other nations. *See* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime,* 26 Hous. J. Int'l L. 327, 337-39 (2004).

See Pet. Supp. Br. at 44-48. They claim that the possibility in civil law systems of monetary compensation in universal jurisdiction criminal prosecutions amounts to universal civil jurisdiction. But as we explained in our prior brief, such recoveries, where theoretically available, are limited by various substantive, procedural, and practical considerations, and are often not available in any event against corporations. *Amici* Orig. Br. at 13 n.5. U.S.-style universal jurisdiction ATS causes of action, by contrast, are plaintiff-controlled and much more broadly available.

More significantly, while Petitioners cite to theoretical analogues to ATS-style universal civil jurisdiction in other countries, Pet. Supp. Br. at 44-48, they cite no valid decision in which a national court applies civil causes of action under that court's national law to human rights conduct that has no connection to the regulating state. *See* Supplemental Brief for Respondents at 44-46, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Aug. 1, 2012).[11] It remains true that U.S. courts are unique in the world in exercising an open-ended universal civil jurisdiction over alleged extraterritorial human rights abuses. That is why, as the former Legal Advisor to the State

[11] As noted in our initial brief, the one decision that appeared to apply universal civil jurisdiction, *Ferrini v. Fed. Republic of Ger.* (It. Ct. Cass.) (Mar. 11, 2004), ¶ 9, *reprinted in* 128 I.L.R. 659 (It. Ct. Cass. 2004), was recently declared unlawful on international law state immunity grounds, *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment (3 February 2012), at http://www.icj-cij.org/docket/files/143/16883.pdf. *See Amici* Orig. Br. at 12-13. And in any event, as the House of Lords said of *Ferrini*, "one swallow does not make a rule of international law." *Jones v. Ministry of Interior of Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. (H.L.) 270, ¶ 22.

Department put it, "foreign governments do not see the ATS as an instance of the United States constructively engaging with international law. Quite the opposite: we are regarded as something of a rogue actor." John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 2008 Jonathan I. Charney Lecture in International Law, 42 Vand. J. Transnat'l L. 1, 8 (2009).

CONCLUSION

The Court has cautioned against the "discovery of new, revolutionary meaning in reading an old judiciary enactment." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 370-71 (1959). Yet that is precisely what the lower courts have done in transforming the ATS that was little-used for nearly two centuries into a fount of novel and controversial extraterritorial human rights causes of action. The Court in *Sosa* tried to cabin ATS causes of action, and warned in particular against creating ATS causes of action in cases, like this one, that involve the adjudication of foreign sovereign conduct on foreign soil. *Sosa*'s cause of action test, the presumption against extraterritoriality, and the *Charming Betsy* canon are all designed to minimize legal and diplomatic conflicts with foreign sovereigns and to ensure that Congress, not courts, makes the decision whether and how to apply U.S. law in foreign territories in controversial ways. All three doctrines require a negative answer to the Court's supplemental question, and dismissal of this case.

Respectfully submitted,

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