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

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should apply the holding in *Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308 (1999), to the Alien Tort Statute ("ATS") so as to require federal courts to apply the methodology that existed when the Judiciary Act of 1789 was enacted to determine the parties and claims that may be recognized as part of a tort committed in violation of the law of nations.

2. Whether this Court should use the ruling below by Judge José Cabranes to clarify its holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), to make clear the methodology to be used in ATS cases for determining the parties and claims cognizable in tort under the law of nations, and thereby reduce the confusion in the lower federal courts regarding the scope of ATS jurisdiction.

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences, and files *amicus* briefs. The instant case concerns Cato because it raises vital questions about the role of judges in defining the scope of federal jurisdiction and will clarify when and how judges are to interpret international law.[1]

SUMMARY OF ARGUMENT

The ATS, a purely jurisdictional statute enacted as part of the Judiciary Act of 1789, reflected the Founders' concern that the scope of federal jurisdiction be carefully limited to the scope defined by Congress. As such, jurisdictional grants should be read narrowly *and* defined in the context of Congress's original grant. Absent that interpretive limitation, federal courts could expand the scope of their jurisdiction without an act of Congress, upsetting the balance of powers inherent in our Constitution. Such a development would undermine

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

the structural integrity and political legitimacy of the federal system by creating a gap between the jurisdictional grant by the legislative branch and the scope of jurisdiction exercised by the judicial branch. That kind of gap would be particularly serious here because the ATS inherently touches on issues of foreign affairs that the Constitution assigns to the political branches.

In interpreting other sections of the Judiciary Act of 1789, the Court has given maximum respect to Congress's actions by placing jurisdictional grants in the context of the law as it existed when the grant was made. Specifically as to the ATS, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), makes clear that lower courts may not resort to evolving notions of how international law should be determined or understood to inform the jurisdictional reach of a statute that has not changed since 1789. *Grupo Mexicano* set a temporal limit on how federal courts may interpret and understand their jurisdiction.

The methodology for determining torts committed in violation of the law of nations must be understood in the same way as equity was understood in *Grupo Mexicano*: limited by the original boundaries of the jurisdictional grant unless and until Congress alters that grant. Courts may not resort to evolving notions of federal common law or international law to alter the way they determine what is cognizable under the law of nations because that would take them beyond the jurisdictional grant that Congress made in 1789. The approaches advocated by Petitioners and the United States must be rejected because they would apply to the ATS methods used by courts to supplement or interpret causes of action otherwise created

under federal law, which methods are inapplicable to jurisdictional grants.

In 1789 there was a clear methodology for understanding what constituted the law of nations. It involved applying a narrow set of principles drawn from classical sources like Hugo Grotius and using those principles to understand the norms that States viewed as universal and obligatory. These principles defined *both* the types of claims that could be asserted *and* those against whom claims could be asserted. That the law of nations could yield a result different from domestic law on both these factors would not have seemed unusual given that the Founders understood that the law of nations is fundamentally different from the civil law applied within any given State.

Adopting an approach to the ATS that is tailored to its historical origins does not undermine the statute because this approach focuses on *methodology*, not content. The ATS need not freeze in time (i.e., 1789) what torts and defendants are cognizable under the law of nations. Rather, at a minimum, the jurisdictional grant fixes the *method* by which federal courts should evaluate these questions. To the extent some torts *or* the types of parties that may be held accountable for them have become cognizable under the standards for determining the law of nations when the ATS was enacted, then jurisdiction would be within the congressional grant.

The Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Company*, 621 F.3d 111 (2d Cir. 2010), *reh'g en banc denied*, 642 F.3d 268 (2d Cir. 2011), is consistent with this judicially-restrained approach to the ATS's jurisdictional grant. Applying classical standards used when the ATS was enacted,

the court found that, based on the consistent practice of States, corporations were not cognizable parties for alleged torts committed in violation of international law.

Recent decisions by other federal courts, however, show that the restrained approach applied below is not universally accepted, and that the lower courts require clarification of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Judge José Cabranes, the author of *Kiobel*, has articulated an appropriate approach to the ATS which cleaves to the standards applicable when the ATS was enacted. Earlier decisions in which he was involved, *Flores v. Southern Peru Copper Corporation*, 414 F.3d 233 (2d Cir. 2003), and *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), remain good law and articulate a straightforward and consistent approach to understanding the ATS jurisdictional grant. The decision in *Kiobel* accords with *Flores* and *Yousef*, and the standards there employed would be a proper guide for lower courts in ATS cases.

ARGUMENT

I. THE SCOPE OF JURISDICTION CREATED BY THE ALIEN TORT STATUTE SHOULD BE DEFINED BY THE STANDARDS FOR RECOGNIZING TORT VIOLATIONS UNDER THE LAW OF NATIONS IN 1789

The Alien Tort Statute ("ATS"), codified at 28 U.S.C. § 1350 (2011), provides for federal jurisdiction as to "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." The statute, passed as part of the Judiciary Act of 1789, has been swept up in efforts to make U.S. courts a universal forum for tort claims—

involving foreign parties and occurring anywhere in the world—that arise from alleged violations of international law as that term has come to be understood by those advocating this shift. The decision below applied a methodology for determining the parties cognizable in tort under the law of nations which is appropriate to the standards that applied in 1789 when the ATS was enacted.

A. The Founders' Careful Approach to Federal Jurisdiction Provides the Necessary Context for this Court's Analysis of the ATS.

The scope of federal subject matter jurisdiction under the Judiciary Act, which included the ATS, represents the Founders' debates and carefully crafted compromises.[2] Federal jurisdiction implicates the full spectrum of federalism, separation of powers, and liberty issues that occupied the Philadelphia

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[2] See, *e.g.*, Gordon S. Wood, *Empire of Liberty* 409 (2009) (describing the Judiciary Act of 1789 as "an ingenious bundle of compromises that allayed many of the Anti-Federalist suspicions"). Skepticism stemmed from judges' "arbitrary discretionary authority . . . [that] flowed from the fact that the colonists' laws came from many different and conflicting sources." *Id.* at 402. The ability to choose a rule of decision from English common law, colonial common law, general law or parliamentary acts had earned the colonial judiciary, in Jefferson's words, a reputation as being subject to "the eccentric impulses of whimsical, capricious, designing men." *Id.* Strict limits on federal jurisdiction were one way to address those concerns. *Cf.* James Leonard and Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 6 (2001) (discussing the Constitutional Convention's rejection of a "Council of Revision" to provide *ex ante* advice on the constitutionality of proposed legislation).

Convention. Accordingly, the Founders meticulously shaped federal jurisdiction to encompass only "those causes which are manifestly proper for the cognizance of the national judicature . . . . " The Federalist No. 81, at 457-58 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

B. The Judiciary Act of 1789 was Purely Jurisdictional.

Against this backdrop, Congress enacted the ATS as part of the Judiciary Act of 1789.[3] This Court long ago recognized that the Judiciary Act, "in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). Accordingly, the ATS is best understood as "strictly jurisdictional" given that it "was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction . . . ." *Sosa*, 542 U.S. at 713.

Because the ATS is a purely jurisdictional grant requiring maximum respect to the act of the legislative branch in shaping federal jurisdiction, that jurisdictional grant (i) must be read narrowly,

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[3] Congress has re-enacted the ATS three times as part of codifications, each time placing it in the chapter addressing "District Court Jurisdiction." Rev. Stat. § 563, Sixteenth (2d ed. 1878) (see ch. 3); Judicial Code of 1911, § 24, Seventeenth, 36 Stat. 1087, 1091 (1911) (see ch. 2); 28 U.S.C. § 1350, 62 Stat. 869, 934 (1948) (see ch. 85).

and (ii) must be understood in the context of the original grant by Congress in 1789.[4]

C. The Jurisdictional Grant of the ATS Must Be Read Narrowly and Confined by the Standards That Applied When the Judiciary Act Was Enacted.

Given the concerns of the Founding Era, jurisdictional grants are read narrowly to avoid expanding federal jurisdiction without an act of Congress. See *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 217 (2002) (citing *Grupo Mexicano*, 527 U.S. at 318) (cautioning that the "rolling revisions of [a statute's] content" will "introduce a high degree of confusion" into the use of statutory terms). The methodology to be used for understanding the law of nations under the ATS is thus crucial to preserving the structural integrity and political legitimacy of the

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[4] Thus, this is not an exercise in shaping a rule of decision or understanding an element of a federal cause of action as to which federal jurisdiction already exists. In such cases, federal common law, or federal common law as supplemented by international law, may be consulted. See *The Paquete Habana*, 175 U.S. 677 (1900) (jurisdiction rested on admiralty, rule of decision supplied by federal common law and the law of nations). In ATS cases, however, the court must know what international law is (and who is cognizable under it) *before* any federal jurisdiction or rule of decision may attach. The methodology for determining that may not use federal common law to "fill in the blanks" as to a claim under the law of nations (and thereby expand the scope of cognizable torts or parties) because that places the cart before the horse. See Pet. Br. at 24-25; U.S. Br. at 15-21. In short, the inquiry under the ATS is different from the inquiry in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), and *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), which involved statutes that created federal causes of action. In the ATS, Congress set a "threshold limitation on a statute's scope," *Arbaugh*, 546 U.S. at 515.

federal system by ensuring that the function of each branch operates within the limits the Founders established.

The Constitution vests most of the foreign affairs power in the democratically accountable political branches. See, *e.g.*, U.S. Const. art. I, § 8, cl. 10 (authorizing Congress to "define and punish . . . Offences against the Law of Nations"); U.S. Const. art. II, § 2, cl. 2 (authorizing the President "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"). Indeed, Article I is the sole reference to the law of nations in the Constitution, and empowers Congress to craft U.S. law in this respect.

Madison's description of the "define and punish" clause in Federalist No. 42 illuminates the Founders' concerns with defining international law. Madison explained that the often ambiguous nature of the law of nations demanded that Congress assume the responsibility of definitively sketching how U.S. law would address crimes under the law of nations. See Federalist No. 42, at 274 (James Madison) (Isaac Kramnick ed., 1987). While a "definition of piracies" might reliably be left to the law of nations, Madison worried that even the term "felony" could not be construed predictably under the law of nations alone, absent congressional direction. *Id.* at 274-75.

These concerns show why it must be left to Congress to expand the scope of jurisdiction under the law of nations, and why this Court should apply a methodology that limits federal jurisdiction under the ATS to understanding what could be part of the law of nations as that term was used when the ATS was enacted. This approach is best suited to avoiding the "democracy gap" that would ensue if unelected judges

expand ATS jurisdiction in ways Congress has not in over two hundred years. As discussed below, many federal courts have not employed a methodology in ATS cases based on how the law of nations was understood in 1789. See *infra* Section II-A.

In interpreting other sections of the Judiciary Act of 1789, this Court has given maximum respect to Congress's actions by assessing jurisdictional grants in the context of the law as it existed when the grant was made. For example, in analyzing admiralty jurisdiction under the Judiciary Act, absent a change by Congress, the jurisdictional scope remains as it was *when the statute was enacted.* See *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574 (1874) ("The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"); *The Thomas Barlum*, 293 U.S. 21, 43 (1934) ("When the Constitution was adopted, the existing maritime law became the law of the United States 'subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require.'") (citation omitted); *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 609 (3d Cir. 1974) ("When Section 9 of the Judiciary Act conferred admiralty jurisdiction upon the district courts, what was referred to was the pre-1789 admiralty jurisdiction.").

With particular regard to the ATS, *Grupo Mexicano* makes clear that the lower federal courts may not use evolving notions of how international law is defined to inform the jurisdictional reach of the statute. In

Grupo Mexicano, this Court addressed the equitable jurisdiction of the district courts under Section 11 of the Judiciary Act of 1789, which merged the courts of law and equity.[5] Relying on Federal Rule of Civil Procedure 65 and general equitable authority, a federal court had imposed a prejudgment injunction broadly restraining defendants from transferring certain assets so as to secure a potential judgment in a contract action. 527 U.S. at 312-13. The Second Circuit affirmed, holding that equity jurisprudence had evolved to the point where this type of injunction could issue. See *Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688, 695 (2d Cir. 1998).

In reversing, this Court held that "the substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318-19. Whether the injunction was a proper exercise of federal equity jurisdiction under the Judiciary Act of 1789 could *not* depend on evolving principles of equity. *Id.* at 318-21 (declining to look to the "grand aims of equity" rather than the scope of remedies available in the 1780s) (citations omitted). Instead, the injunction was beyond the equitable jurisdiction of the district court because an action of this type would not have been available in 1789 when the Judiciary Act created federal equity jurisdiction. *Id.* As the Court stated:

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[5] Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (federal courts "shall have original cognizance, concurrent wit the courts of the several States, of all suits of a civil nature at common law or in equity").

> We do not decide which side has the better of [the arguments on the merits of such a remedy]. We set them forth only to demonstrate that resolving them in this forum is incompatible with the democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence.
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> * * *
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> The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress.

Id. at 332-33. The ATS was enacted as Section 9 to the same Judiciary Act at issue in *Grupo Mexicano*, and the reasoning there applies with equal force here. Petitioners and the United States ignore *Grupo Mexicano* entirely.

D. Under *Grupo Mexicano*, the 1789 Standards for Determining the Law of Nations Must Govern.

Grupo Mexicano makes clear the precise nature of the Court's holding in *Sosa*. Under *Grupo Mexicano*, there is a temporal limit on how federal courts define and understand their jurisdiction. A tort committed in violation of the law of nations must be understood in the same way as equity (or admiralty), as limited by the original boundaries of the jurisdictional grant unless and until Congress alters that grant. See *Knudson*, 534 U.S. at 217; see *also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (assessing the Federal Arbitration Act based on Congress's understanding of arbitration in 1925, the year the

statute was enacted). By focusing on the methodology that would have been used in 1789 for determining the acts and parties cognizable within a tort in violation of the law of nations, these cases ensure that federal courts will not expand the scope of federal jurisdiction without an act of Congress.

Grupo Mexicano explodes a premise advanced by Petitioners, the United States, and supporting *amici*: that the methodology for understanding the law of nations may reference federal common law, evolving notions of international law, and/or municipal law to fill in gaps left by the actual practice of States among themselves. The opposite is true. Under *Grupo Mexicano*, federal courts may not alter the methodology for understanding international law to include evolving standards of law because to do so would allow federal courts to reset the jurisdictional boundaries without congressional mandate. Rather, the boundaries of the ATS must be set by how the law of nations was understood in 1789, when Congress enacted the Judiciary Act.

As noted above, this rule takes on heightened importance with respect to the ATS because the Constitution contemplates that foreign affairs will be the province of the political branches and not the courts. See *supra* at 8-9; see *also Sosa*, 542 U.S. at 727-28; and *id.* at 747 (Scalia, J., concurring) ("In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives."). To avoid incursions on the political branches, ATS jurisdiction must be honed to the standards used in 1789 for determining whether a

given tort and parties answerable for that tort were recognized under the law of nations.[6]

In 1789, a court would have understood that discerning the law of nations involved the use of a narrow set of principles which defined *both* the types of claims that could be asserted *and* the types of persons against whom claims could be made. That international law could yield a result as to both these factors which was different from domestic law would not have been seen as unusual given that the Founders understood that the law of nations is fundamentally different from the civil law applied within any given State.

To understand the law of nations, the Founders would have looked to leading jurists, such as Hugo Grotius, whose works were available in English as of the 1700s and who was regularly cited by this Court, as an authority on the law of nations.[7] See, *e.g.*,

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[6] Applying these principles to the Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1991) ("TVPA") would support affirmance of the lower court's holding that Congress did not include corporations in the statute by use of the term "individual" (as opposed to "person"). See *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011). This narrow approach to the reach of the TVPA recognizes (i) the serious nature of a jurisdictional grant especially with regard to areas touching on foreign affairs, and (ii) that international law does not usually provide for corporate liability, such that Congress could have made clear its intent to break from this norm.

[7] See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095, 2105, (1999) (noting that Grotius and others exerted "substantial influence on the American Founders"); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. Rev. 421, 428 (1990) (noting that James Otis

United States v. Smith, 18 U.S. (5 Wheat.) 153, 163 n.8 (1820) (Story, J.) (quoting Grotius at length in concluding that the law of nations defined piracy with sufficient clarity to permit prosecution in U.S. courts); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796) (Chase, J.) (citing Grotius in determining the viability of British creditors' claims on pre-Revolutionary war debts); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 160 (1795) (Iredell, J.) (citing Grotius's *The Rights of War and Peace* regarding penalties for piracy).

In *The Rights of War and Peace*, Grotius examined the basis of the law of nations and its sources. Grotius first noted that law arose from nature and law in civil society exists for the benefit of those choosing to live in those societies because it helps men order their affairs for mutual advantage. Hugo Grotius, *The Rights of War and Peace*, *Preliminary Discourse*, at xix-xx (Eng. trans.) (London 1738). But the law of nations was different:

> But as the Laws of each State respect the Benefit of that State; so amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the Advantage not of one Body in particular, but of all in general. And this is what is called the Law of Nations, when used in Distinction to the Law of Nature.

Id. at para. XVIII, p. xx. The concept that the common consent of States was the most important source of the law of nations was distinguished by

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and Samuel Adams cited Grotius in revolutionary pamphlets); Irving Brant, *The Madison Heritage*, 35 N.Y.U. L. Rev. 882, 885 (1960)(noting Madison's study of Grotius at Princeton).

Grotius from the nature of civil rights that might exist *within* a State, with the latter deriving from the will of persons within a State, but the former deriving from the consent of States themselves:

> We will begin with the Human [right], as more generally known; and this is either a *Civil, a less extensive*, or a *more extensive Right than the Civil*. The *Civil* Right is that which results from the Civil Power. The Civil Power is that which governs the *State*. The State is a compleat [sic] Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit. The *less extensive* Right, and which is not derived from the Civil Power, though subject to it, is various, including in it the Commands of a Father to his Child, of a Master to his Servant, and the like. But the *more extensive* Right, is the *Right of Nations*, which derives its Authority from the Will of all, or at least of many, Nations.

Id. Book I, Chapter 1, *What War is, and What Right is*, at para. XIV, p. 15.

Because the law of nations as understood in 1789 derived from the practice and consent of States, it was understood that States could delineate *both* the rights recognized *and* the persons who could be answerable under the law of nations. Early cases, like *Ware v. Hylton*, addressing the rights of British creditors seeking to collect on pre-Revolutionary War debt, illustrate this principle.

In *Ware*, a British creditor had issued a bond to Virginia citizens in 1774. 3 U.S. at 245-46. In 1777, the Virginia assembly passed a law permitting Virginians indebted to British creditors to pay their debts to a state "Loan Office," which would hold the

funds for "safe keeping . . . subject to the future directions of the legislature," the goal being to prevent the funds repaid from enriching the enemy during the Revolution. *Id.* at 220-21, 226. The Virginia law provided that the debt balance would be reduced by any amounts paid to the Loan Office. *Id.* at 220.

Justice Chase observed that Virginia enjoyed sovereign authority to confiscate British property in 1777. 3 U.S. at 222, 232-34. But, to the extent Virginia's law violated the law of nations with respect to creditors' rights, the proper defendant in a creditors' action would not be individual Virginia debtors, but Virginia herself. *Id.* at 223-24, 229. The Court then concluded that the Treaty of Paris (ending the Revolutionary War) preempted the Virginia law under the Supremacy Clause. See *id.* at 245 (Chase, J.); *id.* at 281 (Wilson, J.); *id.* at 283 (Cushing, J.). Thus, the law of nations implicated not only the plaintiffs' rights to collect on their debts, *but also* who was a cognizable defendant on those claims.

As discussed below, the Second Circuit employed an analysis based on the principles enunciated by Grotius and determined (including based on modern State practice) that under the law of nations corporations are not answerable in tort.

E. Applying the Standards Applicable to the Judiciary Act of 1789 Does Not Undermine the ATS.

Although ignored by Petitioners and the United States, perhaps the most significant juridical statement on torts in violation of the law of nations, the 1946 Nuremberg Tribunal ruling in the trial of the so-called Major German War Criminals, made clear

that *modern* international law continued to draw careful lines *both* as to what rights could be recognized *and* what defendants could be answerable for violations of those rights.

First, while recognizing that it had received ample evidence of crimes against humanity and/or genocide in pre-war Nazi Germany, the Tribunal was concerned about the lack of consensus regarding these torts as compared to the area of war crimes, as to which the Tribunal cited clear international consensus prior to World War II. See *The Nurnberg Trial (United States v. Goering)*, *reprinted at*, 6 F.R.D. 69, 105-11 (Int'l Military Trib. 1946). Accordingly, the Tribunal adjudged the defendants with respect to crimes committed *after* September 1, 1939, when the war officially began. *Id.* at 130-31.

Second, consistent with principles used in 1789, the Tribunal did not start out by assuming that any "person" could be held responsible for a given tort under the law of nations, but wrestled with the nature of individual responsibility for war crimes. *Id.* at 107-11. Only after looking to pre-war treaties and State practice did the Tribunal determine that it was consistent with the law of nations for individuals (as opposed to States) to be held accountable under the law of nations. *Id.* Given the importance of State action in assessing the content of international law, it is thus noteworthy that no corporation ever was indicted or tried for violations under international law under the Nuremberg Charter.

The Nuremberg rulings show that the standards of 1789 used to determine the wrongs and parties cognizable under the law of nations are neither arcane nor irrelevant. Instead, they remain relevant and demand caution in recognizing *both* torts com-

mitted in violation of the law of nations *and* the parties, as broadly accepted by States in their mutual dealings, subject to liability for those torts.

This classical approach to the law of nations will not render the ATS irrelevant or leave it "to sit on the shelf," see *Sosa*, 524 U.S. at 723-24, until Congress acts further to define causes of action because this approach focuses on *methodology* not content. The ATS need not freeze in time (i.e., 1789) what torts and defendants are cognizable under the law of nations. Rather, at a minimum, the jurisdictional grant fixes the *method* by which federal courts should evaluate these questions. To the extent some torts *or* the parties that may be held accountable for them have become cognizable under the standards for determining the law of nations when the ATS was enacted (or via a duly ratified treaty), then jurisdiction would be within the congressional grant.[8] Because the method for determining the scope of international law allows for change, the ATS is not rendered nugatory by adhering to the standards in place when it was enacted to determine its scope.

Both Petitioners and the United States would have this Court ignore the limits built into the law of nations in 1789 as to who may be a party liable for torts under international law. Petitioners assert that

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[8] Examples would include genocide and torture, which are universally recognized as actionable as to individuals (including as codified by Congress). See 18 U.S.C. § 1091 (genocide); 18 U.S.C. §§ 2340-2340A (torture); Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* Dec. 10, 1984, *for the United States* June 26, 1987.

corporate liability is recognized under international law because "all modern legal systems impose civil liability on corporations for torts committed by their agents." Pet. Br. at 44. This, however, ignores the fundamental difference between national law, formed for the benefit of individuals within a State, and the law of nations, which depends on the consent of all States to a given principle. That nations may allow companies to be sued under national law does not mean that they would approve of their companies being haled into U.S. courts to answer for alleged violations of the law of nations. Petitioners also invoke federal statutes that are not jurisdictional in arguing that Congress need not include or exclude classes of defendants in shaping a cause of action. See Pet. Br. at 15-16. Again, Petitioners miss the point. By requiring that a "tort" committed be in violation of the law of nations, the ATS uses the law of nations to shape both the cognizable torts *and* parties because that is what international law does. The fact that international law, especially as it was understood in 1789, was particular as to whom could be sued and for what, highlights the narrow and special nature of the law of nations and its difference from national law.

The United States would sever the statute from its jurisdictional foundation by allowing the "torts" and cognizable persons to be defined by reference to federal common law. See Br. for the United States ("U.S. Br.") at 15-21. This approach ignores the crucial distinction between the law of nations—as referenced in the ATS jurisdictional grant—and U.S. law as contained in general *or* federal common law. The fact that U.S. law allows corporations to be sued for torts, and entertains a broad class of torts involving primary and secondary liability, has nothing to do

with whether States allow such claims in their dealings with each other. If Congress wants federal courts to consider claims against corporations based on principles of international law, then Congress may so decide. Under the standards applicable to the ATS, however, Congress has not made that decision. As this Court recognized in *Morrison*, "[i]t is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." 130 S. Ct. at 2886.[9]

II. THE LOWER FEDERAL COURTS NEED A CLEAR METHODOLOGY, LIKE THAT APPLIED BY JUDGE JOSÉ CABRANES, TO DETERMINE ATS JURISDICTION

Although this Court in *Sosa* attempted to guide the lower courts in applying classical principles to the jurisdictional grant of the ATS, the current circuit split and the *amici* supporting Petitioners, demonstrate confusion regarding how the law of nations should be discerned.

Sosa was limited to rejecting the unlawful detention claim advanced by the plaintiff as a basis for ATS jurisdiction. 542 U.S. at 724-25, 731-33. Although *Sosa* admonished the lower federal courts to exercise restraint in considering causes of action

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[9] Where Congress intends to extend federal subject matter jurisdiction to specific defendants it knows how to do so. See 28 U.S.C. § 1330 (jurisdiction as to foreign states); 28 U.S.C. § 1346 (jurisdiction as to the United States); 28 U.S.C. § 1348 (jurisdiction as to national banking associations); 28 U.S.C. § 1349 (denying jurisdiction as to companies incorporated by congressional act); 28 U.S.C. § 1351 (jurisdiction as to consular officials); 28 U.S.C. § 1364 (jurisdiction as to diplomatic officials or their families).

beyond those available in 1789, *id.* at 724-25, the only guidance it provided was that any claim recognized under modern international law should "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 [the Court has] recognized." *Id.* at 725. In explaining how that "specificity" might be discovered, the Court said:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is.

Id. at 734 (citation omitted). The Court then considered various sources of international law cited by Alvarez, *id.* at 734-37, and held that "in the present, imperfect world, [these principles express] an aspiration that exceeds any binding customary rule having the specificity we require." *Id.* at 738. This analysis, however, has not fostered a consistent methodology in the lower courts.

A. Lower Court Decisions and Petitioners' *Amici* Demonstrate the Need for Guidance.

Recent lower court decisions and the arguments advanced by *amici* in support of Petitioners highlight

the need for a concrete methodology to guide judges in analyzing ATS jurisdiction. In particular, courts must know where to look for and how to weigh sources of international law.

1. In *Flomo v. Firestone Natural Rubber Company*, 643 F.3d 1013 (7th Cir. 2011), the Seventh Circuit likened international law to "common law in its original sense as law arising from custom rather than law that is formally promulgated." *Id.* at 1016. Describing the analysis used in *Sosa* as "suggestive rather than precise," the court characterized *Sosa* as "best understood as the statement of a mood—and the mood is one of caution." *Id.* Applying general principles of common law, the court then held that corporations could be sued for violations of international law even though none of the sources of international law examined expressly provided for this. *Id.* at 1021. The Seventh Circuit also applied this same common law approach to determine whether a violation of international law had occurred. *Id.* at 1021-23. Relying on three international conventions, the court concluded that "it was impossible to discern a crisp rule from the three conventions." *Id.* at 1023. This conclusion, or lack thereof, bespeaks a flawed methodology. By invoking a general common law approach without reference to the established practice or consent of States, the court ignored the essential characteristics of international law and failed to appreciate its limited scope. Indeed, Judge Posner turned to general common law principles precisely because he could not discern established State practice.

2. By contrast, the Eleventh Circuit has assumed without analysis or explanation that the ATS allows corporations to be sued for any violation of interna-

tional law. See *Baloco v. Drummond*, 640 F.3d 1338, 1345 (11th Cir. 2011); *Romero v. Drummond*, 552 F.3d 1303, 1316 (11th Cir. 2008). It does not appear that any particular methodology has been applied.

3. According to the D.C. Circuit, *Sosa* did not address the question "of corporate immunity, nor provide[] precise guidance on which body of law a court must draw to answer questions ancillary to the cause of action itself, such as corporate liability." *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 50 (D.C. Cir. 2011). In allowing claims that a corporation aided and abetted violations of international law, the court rejected the Second Circuit's analysis below as "unduly circumscribed." *Id.* at 41. Applying its understanding of international law as it has evolved, the court concluded that it could consider "principles of private law administered in national courts where these are applicable to international relations . . . ." *Id.* at 31-32 (citations omitted). The court never considered the fundamental differences between law as administered at the national level and law as between States, nor whether its approach was consistent with how the law of nations would have been understood in 1789.[10]

4. Most recently, a splintered Ninth Circuit attempted to discern international law in concluding that the ATS allowed claims against a corporation for genocide and war crimes, but not for crimes against

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[10] With respect to torts, Grotius noted that "Civil Law" could create rights not recognized under the law of nations, and the law of nations could render lawful (as with certain acts of war) that which would otherwise be a tort under national law. See Hugo Grotius, *The Rights of War and Peace*, Book II, Chapter 17, *"Of the Damage done by an Injury and of the Obligation thence arising,"* at para. XIX, p. 374.

humanity or racial discrimination. *Sarei v. Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at *2 (9th Cir. Oct. 25, 2011). Ignoring international law, a plurality of the court inferred that congressional intent in 1789 supported corporate liability for genocide, because "Congress then could hardly have fathomed the array of international institutions that impose liability on states and non-state actors alike in modern times." *Id.* at *20. The court did not indicate what weight it gave particular sources of international law or the basis of its methodology in selecting and evaluating those sources. Nevertheless, the plurality gave no weight to the historical *lack* of international criminal tribunal jurisdiction over corporations. *Id.* at *6. The lack of corporate liability at Nuremberg was similarly discounted because this fact did not mean that a future tribunal "could not or would not" apply liability eventually. *Id.* at *20. The court also ignored the fact that the nations of the world chose to delete from the Rome Statute of the International Criminal Court a provision that would have allowed for corporate liability, *but* then used the absence of any reference to blockades or deprivation of food and medicine *from the same treaty* to support its holding that defendants could not be sued for crimes relating to blockades or deprivation of food or medicine. *Id.* at *34 (Pregerson, J., concurring in part and dissenting in part). The results in *Rio Tinto* highlight the inconsistencies that can occur, even within a single opinion, when a principled methodology is not used.

5. Generally, *amici* rely on evolving principles of international law which represent their aspirations for how nations should act under law, as opposed to the norms by which nations actually consider themselves bound.

The United States would leave the lower federal courts to use federal common law to resolve the scope of the ATS on a "norm-by-norm" basis. U.S. Br. at 18. While conceding that international law "informs" this exercise, *id.* at 19, the United States views corporate liability as settled under federal common law, thereby ignoring the scope of international law as it existed when the ATS was enacted.

The AFL-CIO urges the Court to apply domestic common law to define corporate tort liability for the purposes of the ATS. AFL-CIO Br. at 5-6, 8. Other *amici* assert that allowing corporate liability under the ATS is part of an evolved legal obligation on the part of the United States "to promote human rights." Br. of Amicus Curiae Navi Pillay, The United Nations High Commissioner for Human Rights in Supp. of Pet. ("Pillay Br.") at 3.

In their selection and interpretation of international law *amici* present a cacophonous collage of treaties, foreign law, and selectively-edited legal history. Some look exclusively to international sources, including regional treaties to which the United States is not a party. Br. of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Supp. of Pet. ("Yale Br.") at 32. Others echo Petitioners in relying on individual State action at the national level to justify what international law should be. Pillay Br. at 33; Br. of Amici Curiae Int'l Human Rights Organizations and Int'l L. Experts in Supp. of Pet. at 2-3, 16. Still others, ignoring the fundamental rule that the law of nations is premised on the consent of States, argue that the *absence* of domestic remedies permits a court to infer the existence of international norms. Br. of Amici Curiae Int'l L. Scholars in Supp. of Pet. at 5.

Petitioners and eleven supporting *amicus* briefs reference the Nuremberg proceedings. All do so somewhat differently, but all extract a norm of international law from those proceedings that would allow corporations to be sued. But in doing so, those parties ignore that the Nuremberg Charter did not provide for jurisdiction to hear claims against corporations. These myriad attempts to find a rule where none exists led one party to file an amicus brief in support of neither party which works "to correct misimpressions in other briefs filed in this case purporting to show that Nuremberg supports corporate ATS liability." See Br. Of Nuremberg Historians and Int'l Lawyers in Supp. of Neither Party ("Nuremberg Historians' Br.") at 3-5. This brief confirms that there was no universally accepted norm among States that corporations are cognizable parties for alleged torts in violation of international law. Indeed, not only were "no corporations . . . tried directly or indirectly" at Nuremberg," *id.* at 6, but "not one document has emerged suggesting that anyone in any department [among Allied prosecutors] . . . suggested charging corporate entities, even in a program that was intended to focus on business offenders." *Id.*at 9.

The rulings of lower courts and the arguments of *amici* show a need for a set of principles, informed by standards existing when the ATS was enacted, which federal courts may apply to determine cognizable wrongs and parties under the law of nations. The analysis employed by Judge Cabranes below set forth that kind of methodology and would properly protect the narrow congressional mandate represented by the ATS.

B. Judge Cabranes Offers an Appropriate Methodology for Understanding the Law of Nations Under the ATS Jurisdictional Grant.

As a leading jurist on international law, Judge Cabranes had been involved in two cases before the decision below that show a proper understanding of how to determine international law. *Flores v. Southern Peru Copper Corporation*, 414 F.3d 233 (2d Cir. 2003) (Cabranes, J.), and *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (Walker, C.J., Cabranes and Winter, JJ.), echoed Grotius (and *Sosa*) in describing customary international law as "composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores*, 414 F.3d at 248; *Yousef*, 327 F.3d at 104 n.38. For a given rule to become a norm of customary international law: (1) "States must universally abide by it"; (2) "States [must] accede to it out of a sense of legal obligation"; and (3) it must address "wrong[s] that are of *mutual* and not merely *several*, concern to States." *Flores*, 414 F.3d at 248-49 (internal quotations omitted).

Regarding universality, Judge Cabranes stated that "States need not be universally successful in implementing the principles . . . but it must be more than merely professed or aspirational." *Id.* at 248. Similarly, "[p]ractices adopted for moral or political reasons, but not out of a sense of legal obligation, do not give rise to rules of customary international law." *Id.* at 248. Finally, Judge Cabranes rejected the idea that a principle comprises customary international law whenever it is found within States' domestic laws, noting "that fact is not necessarily significant or

relevant for purposes of customary international law." *Id.* at 249.

To determine whether a norm has reached the status of customary international law, "courts must look to concrete evidence of the customs and practices of States." *Id.* at 250. Having recognized that "the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers," *id.* at 247-48, Judge Cabranes enunciated standards for weighing evidence of international law which again echo Grotius and other leading jurists from the pre-1789 period.[11]

First and foremost, courts should consider the "formal lawmaking and official actions of States and only secondarily . . . the works of scholars as evidence of the established practices of States." *Id.* The following are thus the proper sources of international law in their order of preference:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists [i.e., scholars or

[11] Judge Cabranes also relied on *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), in which Justice Story cites Grotius extensively. See *also Yousef*, 327 F.3d at 103 n.38 (regarding the classical understanding of the law of nations).

> "jurists"] of the various nations, *as subsidiary means for the determination of rules of law*.

Flores, 414 F.3d at 251; see *also Yousef*, 327 F.3d at 100-02.

As ultimately recognized in *Sosa*, *Flores* noted that international conventions that "set forth broad principles without setting forth specific rules" make it "impossible for courts to discern or apply in any rigorous, systematic, or legal manner international pronouncements that promote amorphous, general principles." 414 F.3d at 252. Further, "customs or practices based on social and moral norms, rather than international legal obligation, [also] are not appropriate because they do not evidence any intention on the part of States, much less the community of States, to be legally bound." *Id.*

While treaties evidence an intent to be bound by States that have ratified them, "a treaty will only constitute sufficient proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles." *Id.* at 256. Thus, the evidentiary weight of a treaty depends on "(i) how many, and which, States have ratified the treaty, and (ii) the degree to which those States actually implement and abide by the principles set forth in the treaty." *Id.* at 256-57.

By contrast, "non-binding [U.N. General Assembly resolutions] are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." *Id.* at 259. Multinational declarations of principles also "are not proper evidence of customary international law"

because they "are almost invariably political statements—expressing the sensibilities and the asserted aspirations and demands of some countries or organizations—rather than statements of universally-recognized legal obligations." *Id.* at 262. Finally, multinational tribunal decisions generally are not primary sources of law because these tribunals have no authority to create principles of international law beyond their charters. *Id.* at 263-64.

Finally, Judge Cabranes considered the weight to be given expert affidavits by scholars—like the myriad *amici* that now bombard the courts in ATS cases. Rejecting the premise that today's scholars may pronounce rules of law by the volume of their opinions, Judge Cabranes held that "courts may not entertain as evidence of customary international law 'speculations' by 'jurists and commentators' about 'what the law ought to be.'" *Id.* at 265; *Yousef*, 327 F.3d at 102 ("scholars do not *make* law").[12] Thus,

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[12] Once again this accords with Grotius, who limited the weight given to scholarly testimony to shedding light on State practice:

> I have likewise, towards the Proof of this Law, made Use of the Testimonies of Philosophers, Historians, Poets, and in the last Place, Orators; not as if they were to be implicitly believed; for it is usual with them to accommodate themselves to the Prejudices of their Sect, the Nature of their Subject, and the Interest of their Cause: But that when many Men of different Times and Place unanimously affirm the same Thing for Truth, this ought to be ascribed to a general Cause; which in the Questions treated of by us, can be no other than either a just Inference drawn from the Principles of Nature, or an universal Consent. The former shews [sic] the Law of Nature, the other the Law of Nations.

Hugo Grotius, *The Rights of War and Peace*, *"Preliminary Discourse,"* at para. XLI, pp. xxvii-xxviii.

while "scholars may provide accurate descriptions of the actual customs and practices and legal obligations of the States, only the courts may determine whether these customs and practices give rise to a rule of customary international law." *Flores*, 414 F.3d at 265.

Although preceding *Sosa*, *Flores* and *Yousef* provided a framework that would yield the same result as reached in *Sosa* while also providing a methodology that tracks the principles that would have been used in 1789 for understanding the shape of international law under the ATS. *Flores* and *Yousef* remain good law today.

C. Kiobel is Consistent with *Flores*'s Narrow Approach.

The *Kiobel* decision here assailed by Petitioners and their *amici* is entirely consistent with the approach taken in *Flores* and the principles applied in *Yousef*. Instead of looking to sources beyond the law of nations (which was all that was referenced by Congress in the ATS jurisdictional grant), Judge Cabranes focused on the practice of States in finding that corporations were not parties answerable in tort under international law. See *Kiobel*, 621 F.3d at 131-45.[13]

As discussed above, in challenging this holding, the United States would use common law to determine who could be liable for a tort while using interna-

[13] Far from grounding its holding on footnote 20 of *Sosa*, 542 U.S. at 732 n.20, Pet. Br. at 38, Judge Cabranes correctly relied on international law "to determine *both* whether certain conduct leads to ATS liability *and* whether the scope of liability under the ATS extends to the defendant being sued." *Kiobel*, 621 F.3d at 128.

tional law to determine types of torts within the ATS. See U.S. Br. at 15-16. The fundamental flaw in this methodology is that it ignores the fact that international law (whose violation is at the heart of ATS jurisdiction) is not a creature of common law *and* does distinguish among parties that may be answerable for violations of law and those who cannot be. See *Kiobel*, 621 F.3d at 145-48.

Recognizing that the ATS's jurisdictional grant hearkens back to a classical definition of international law, Judge Cabranes made clear that Congress was free to update the scope of ATS jurisdiction, but that until that time, the vision of international law applied since 1789 must narrowly circumscribe the reach of the statute:

> [N]othing in this opinion limits or forecloses corporate liability under any body of law *other than the ATS*-including domestic statutes of other States-and nothing in this opinion limits or forecloses Congress from amending the ATS to bring corporate defendants within our jurisdiction. Corporate liability, however, is simply not "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized as providing a basis for suit under the law prescribed by the ATS-that is, customary international law.

Id. at 149 (quoting *Sosa*, 542 U.S. at 725).

Judge Cabranes's methodological approach would provide a clear framework for the lower federal courts that would closely track the Founders' understanding of the law of nations and this Court's jurisprudence in *Grupo Mexicano* and *Sosa*. This approach would make it less likely that unelected

federal judges would look to evolving and aspirational standards of international law to expand federal jurisdiction without action by the political branches of our Government.

CONCLUSION

For the foregoing reasons, the Cato Institute respectfully requests that this Court affirm the judgment below and give proper guidance to lower courts regarding the scope of ATS jurisdiction.

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