No. 11-649

IN THE
Supreme Court of the United States

RIO TINTO PLC AND RIO TINTO LIMITED,
Petitioners,

v.

ALEXIS HOLYWEEK SAREI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Date: December 28, 2011

MOTION OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners has lodged a letter with the Clerk of the Court consenting to the filing of this brief. Counsel for Respondents declined to consent to the filing. Accordingly, this motion for leave to file is necessary.

WLF is a public interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has frequently opposed efforts to create broad private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, because such efforts seek (inappropriately, in WLF's view) to incorporate large swaths of allegedly customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici agree with the Court's view, expressed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that a decision to create a private right of action is one best left to legislative judgment. Congress has given no indication that it authorized the federal courts to create a private right of action for violations of customary international law alleged to have occurred in foreign countries. Absent any such indication, *amici* oppose all efforts to apply the ATS extraterritorially. *Amici* believe that this case offers an excellent vehicle for clarifying the territorial reach of the ATS, among other issues.

Amici believe that the arguments set forth in this brief will assist the Court in determining and resolving the issues presented in the Petition. *Amici* have no direct interest, financial or otherwise, in the outcome of this case. Because of their lack of a direct interest, *amici* believe that they can provide the Court with a perspective that is distinct from that of the parties.

Amici seek to address the first Question Presented only: "Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens."

For the foregoing reasons, *amici* respectfully request that they be allowed to participate in this important case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Amici address only the following issue:

Whether U.S. courts should recognize a federal common law claim under the Alien Tort Statute, 28 U.S.C. § 1350, arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens.

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are more fully set forth in the accompanying motion to file this brief.[1]

Amici agree with this Court's view, expressed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that a decision to create a private right of action is one best left to legislative judgment. Congress has given no indication that it authorized the federal courts to create a private right of action for violations of customary international law alleged to have occurred in foreign countries. Absent any such indication, *amici* oppose efforts to apply the ATS extraterritorially. *Amici* believe that this case offers an excellent vehicle for clarifying the territorial reach of the ATS, among other issues.

Amici are concerned that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests. The Court expressed similar concerns in *Sosa* in 2004.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file.

Several federal appellate courts, including the court below, appear not to have heeded that expression of concern and instead have continued apace with the recognition of an ever-expanding federal common law of actionable violations under customary international law.

STATEMENT OF THE CASE

Petitioners Rio Tinto plc and Rio Tinto Limited (collectively, Rio Tinto) are leaders in global mineral exploration and extraction. In the 1960s, Rio Tinto's Papua New Guinea-based subsidiary contracted with the government of Papua New Guinea (PNG) to build a mine on Bougainville, an island located off the main island. Pet. App. 538a-539a. The agreement provided that the government of PNG would receive a 20% stake in the mine's operation. *Id.* at 539a.

In 1988, when a separatist uprising sought to obtain Bougainville's independence from PNG, militant rebels ultimately forced the mine's closure by destroying the mine's infrastructure with dynamite stolen from Rio Tinto. *Id.* at 547a. When PNG deployed military forces to put down the rebellion, a civil war ensued for the next decade. *Id.* at 550.

In 2000, Respondents, a putative class of current and former residents of Bougainville, brought suit in U.S. District Court for the Central District of California alleging, *inter alia*, that PNG engaged in genocide and war crimes against residents of Bougainville. *Id.* at 4a. Specifically, Respondents allege that PNG (assisted by the Australian government): (1) killed thousands of residents of Bougainville by imposing a blockade in 1990

that prevented food and medicine from reaching the island; and (2) in prosecuting the civil war, committed human-rights abuses by attacking several of Bougainville's towns and villages. *Id*. Rather than name the governments of Australia or PNG as defendants, however, Respondents sued only Rio Tinto on the theory that Rio Tinto aided and abetted PNG's actions during the civil war. *Id*.

Rio Tinto moved to dismiss the complaint for lack of subject matter jurisdiction, failure to exhaust local remedies, and failure to state a claim. As it has done in other ATS cases concerning the conduct of foreign governments, the U.S. State Department advised the district court that "continued adjudication of the claims . . . would risk a potentially serious adverse impact on the peace process [in Bougainville], and hence on the conduct of our foreign relations." *Id*. at 33a.

The district court dismissed the action on the grounds that it presented a non-justiciable political question inasmuch as it required the court to evaluate the legitimacy of the conduct of a foreign sovereign and would undermine U.S. foreign policy. *Id*. at 710a-712a.

On appeal, the Ninth Circuit reversed. *Id*. at 426a-535a. In response to a rehearing petition, the panel revised its original opinion to limit its holdings to the following: (1) the political question doctrine did not require dismissal of any claims; (2) Respondents' claims were "nonfrivolous" and thus satisfied the jurisdictional requirement of the ATS; and (3) Respondents were not required to exhaust available local remedies in PNG before commencing their action in federal court in California. *Id*. at 312a-374a. Judge Bybee dissented

from both panel decisions on the issue of exhaustion. *Id.* at 486a-535a, 375a-425a.

Supported once again by the United States, Rio Tinto successfully petitioned for rehearing en banc. The petition was supported by briefs from both the United Kingdom and Australia as *amici curiae*. Following a protracted procedural history that included a remand to the district court on the issue of exhaustion, a divided en banc court ultimately held, by a 6-5 vote, that Respondents' claims for crimes against humanity and racial discrimination could not proceed, but that the remaining claims for war crimes and genocide survived. *Id.* at 1a-203a.

The en banc majority opinion authored by Judge Schroeder addressed a broad range of jurisdictional and nonjusticiability issues related to ATS claims and held, *inter alia*, that: (1) courts may recognize federal common law claims under the ATS for conduct occurring entirely within a foreign country; (2) courts may recognize federal common law claims under the ATS against corporations; (3) the ATS supports aiding and abetting liability; and (4) the district court was correct in deciding on remand that exhaustion was not required for Respondents' claims. *Id.* at 7a-36a.

Judges McKeown, Bea, Kleinfeld, and Ikuta each wrote dissenting opinions (Judge McKeown's was a partial dissent). Judge Kleinfeld (joined by Judges Bea and Ikuta) dissented on the grounds that the ATS does not authorize claims based on extraterritorial conduct, which he described as inconsistent with the history of

the ATS and this Court's precedents. *Id.* at 125a-170a. In particular, he argued that the ATS must be presumed not to apply to conduct occurring within foreign countries in the absence of evidence that Congress intended such application. *Id.* at 147a-155a.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. The Court in *Sosa* made clear that courts should exercise "great caution" in recognizing new federal common law rights of action under the ATS. *Sosa*, 542 U.S. at 728. Indeed, it indicated that there might not be *any* additional causes beyond the three common law rights of action – none of which focused on activities in foreign countries – generally recognized at the time Congress adopted the ATS in 1789. *Id.* at 724.

But far from heeding *Sosa*'s words of caution, the Ninth Circuit and several other federal appellate courts have viewed *Sosa* as a license to continue with business as usual and to create an ever-expanding array of federal common law causes of action for alleged violations of the law of nations. The causes of action recognized by the en banc Ninth Circuit in this case carry that trend to new heights.

In 2008, the Court was presented with an excellent vehicle for answering several basic issues regarding the scope of ATS liability, when numerous corporations sought review of a Second Circuit decision that allowed an ATS suit to go forward based on claims that the corporations had aided and abetted human rights violations by doing business in South Africa while

the apartheid government was still in power. The United States supported the petition, arguing that the ATS should not be applied extraterritorially. Unfortunately, four Justices were unable to participate in that case, and the lack of a quorum prevented the Court from granting review. *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom., American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

Several of those basic issues are once again raised by this petition, thereby rendering it an especially suitable vehicle for addressing ATS claims. In particular, the petition raises the issue of whether the Ninth Circuit erred in determining, Pet. App. 7a-13a, that the ATS can appropriately be applied to conduct that takes place in a foreign country. *Sosa* did not specifically address the extraterritorial reach of the ATS. But in explaining its adoption of "a high bar to new private causes of action" under the ATS, the Court stated 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." *Sosa*, 542 U.S. at 727.

Review is warranted to determine whether, in light of that admonition from *Sosa* as well as the presumption that federal statutes do not apply extraterritorially, the Ninth Circuit erred in recognizing an ATS cause of action. That cause is based on claims that a foreign corporation aided and abetted the government of PNG in its alleged mistreatment of its own citizens entirely within the borders of PNG. Particularly given the United States's repeated

submissions to the lower courts that continued adjudication of Respondents' claims would create a risk of serious adverse impact on U.S. foreign policy interests, the extraterritoriality issue raised by the petition is of extreme importance.

Review is also warranted because the decision below is based on a basic misunderstanding of the history leading up to Congress's adoption of the ATS in 1789. That history makes plain that Congress intended the ATS to apply to events occurring within the United States or on the high seas, not to events occurring within foreign countries.

The Court has already agreed to hear a case this term that raises ATS issues, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491. *Kiobel* addresses whether corporations are proper defendants in federal common law claims asserted under the ATS, an issue also raised by this Petition. The federal appeals courts have issued conflicting decisions on the corporate liability issue, which undoubtedly is important. But while *Kiobel* addresses *who* may be sued under the ATS, it does not address the proper scope of ATS claims, and thus the Court's decision in that case is likely to have little impact on the volume of ATS litigation in the federal courts. Nor will the decision address other important ATS issues raised by Rio Tinto, including whether the federal appeals courts are ignoring *Sosa*'s cautionary words by recognizing an ever-expanding litany of ATS causes of action.

If the Court is able to act on the Petition soon enough to permit the case to be decided this Term, *amici* suggest that it be heard in conjunction with

Kiobel. In any event, review is warranted to determine whether, as Judge Kavanaugh has asserted, "something is palpably awry in the modern ATS juggernaut." *Doe v. Exxon Mobil Corp.*, 654 F. 3d 11, 78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Judge Kavanaugh was unequivocal in identifying the principal source of "the problem": "extension of the ATS to conduct occurring in foreign lands." *Id.*

Judge Kavanaugh's views illustrate the widespread disagreement that has developed among federal judges regarding whether the ATS should apply extraterritorially. Review is also warranted to resolve that conflict.

I. REVIEW IS WARRANTED BECAUSE THE PETITION RAISES ISSUES OF EXCEPTIONAL IMPORTANCE THAT HAVE DEEPLY DIVIDED THE FEDERAL JUDICIARY

In light of *Sosa*'s admonition that federal courts exercise "great caution" in recognizing *any* federal common law rights actionable under the ATS (in addition to the three common law rights of action generally recognized at the time of the ATS's adoption in 1789), it is incumbent on courts to take a careful look at the broad scope of the causes of action that plaintiffs in this and many other ATS cases are asking the courts to recognize. Plaintiffs with few or no contacts with the United States routinely ask lower federal courts to resolve human rights disputes centered in a foreign country, and an increasing number of lower federal courts have determined that the ATS authorizes the

courts to do so. This Court has never addressed the issue of whether Congress intended the ATS to apply extraterritorially. *Amici* respectfully submit that in light of the presumption *against* extraterritorial application of U.S. laws, the lower federal courts are in need of guidance from this Court regarding whether Congress, when it adopted the ATS in 1789, really intended to authorize federal courts to create federal common law rights based on actions taken within a foreign country.

The ATS provides district courts with jurisdiction over "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. *Sosa* held that although the ATS is solely jurisdictional in nature and does not create any causes of action, Congress anticipated that courts would exercise their ATS jurisdiction to hear "a narrow set of common law actions derived from the law of nations." *Sosa*, 542 U.S. at 721. *Sosa* did not identify what, if any, federal common law rights of action ought to be recognized, other than the three private rights that were deemed by Blackstone and other to be part of the law of nations as it existed in 1789: causes of action alleging offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 720.

For two centuries following its enactment in 1789, the ATS was virtually never invoked and its meaning was deemed largely indecipherable. That situation has changed over the past three decades; during that period, human rights activists have filed hundreds of ATS suits alleging violations of the law of nations. The overwhelming majority of ATS suits filed

in the past 15 years have targeted multinational corporations. Respondents' claims against Rio Tinto are typical of these suits; they very often allege that a foreign government (generally not named as a defendant) has violated the human rights of their own citizens, and that the corporate defendant aided and abetted those violations while doing business in the country. *See generally*, Julian Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L REV. 105 (2005).

The large number of such cases is a cause for serious concern because of the obvious risks to U.S. foreign relations when U.S. courts take it upon themselves to judge whether the conduct of foreign governments rose to the level of human rights violations. In explaining its requirement that federal courts exercise extreme caution when deciding whether to recognize federal common law causes of action under their ATS jurisdiction, the Court noted "the potential implications for the foreign relations of the United States of recognizing such causes." *Sosa*, 542 U.S. at 727. When, as here, the corporate defendants are citizens of a foreign country, ATS lawsuits are likely to cause friction with two sets of countries: not only the country whose government is charged with human rights violations but also the country in which the corporations are based. Recent prominent ATS cases of the sort described above and in which the defendant is a foreign corporation include *Kiobel* (British-Dutch corporation accused of aiding and abetting human rights violations in Nigeria); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010) (Canadian corporation operating in the Sudan); *Khulumani*

(numerous European corporations operating in South Africa); and *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (German corporation operating in Argentina). The risk of foreign policy complications is not simply theoretical; in each of the listed cases, both the country accused of human rights violations and the country of incorporation objected to U.S. courts exercising jurisdiction over the ATS claims, and in several of those cases the U.S. government joined in those objections. Given the significant foreign policy concerns raised by the proliferation of such cases, review is warranted to determine whether Congress really intended to permit suits of this sort.

The Ninth Circuit discounted the possibility of conflict, arguing as follows:

> [T]he primary consideration underlying the presumption against extraterritoriality – the foreign relations difficulties and intrusions into the sovereignty of other nations likely to arise if we claim the authority to require persons in other countries to obey our laws – do not come into play. . . . [T]he ATS provides a domestic forum for claims based on conduct that is illegal everywhere, including the place where that conduct took place. It is no infringement on the sovereign authority of other nations, therefore, to adjudicate claims cognizable under the ATS, so long as the requirements for personal jurisdiction

are met.

Pet. App. 11a-12a. That argument blinks reality. Even assuming that the governments of Australia, PNG, and the United Kingdom define genocide and other alleged human rights violations in precisely the same fashion as the Ninth Circuit (an unlikely assumption), they (along with virtually every country in the world) strongly object to U.S. courts determining whether their treatment of PNG citizens within PNG violates the law of nations. The Ninth Circuit may have concluded that such objections are illegitimate, but that conclusion does not make the objection (and thus the potential for friction between those countries and the United States) any less real. *Sosa* states that federal courts are required, when considering whether to recognize federal common law causes of action under the ATS, to consider how that recognition would affect foreign relations of the U.S. government. Review is warranted to resolve the conflict between the requirement imposed by *Sosa* and the Ninth Circuit's refusal to adhere to that requirement.

The Ninth Circuit also sought to downplay the importance of foreign policy concerns by asserting that *Sosa* "took such concerns fully into account when it held that ATS jurisdiction was limited to claims in violation of universally accepted norms." Pet. App. 11a (citing *Sosa*, 542 U.S. at 727-28). That statement is based on a clear misreading of *Sosa*. The Court made plain in *Sosa* that it was not sanctioning any specific federal common law causes of action for human rights violations but rather was stating a general standard that set forth necessary (but *not sufficient*) conditions for such causes of action. *Sosa,* 542 U.S. at 732

("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigm familiar when § 1350 was adopted."). Nothing in *Sosa* suggests that a cause of action meeting that standard ought to be recognized without regard to its foreign policy implications. Indeed, the Court's discussion of the *Khulumani* litigation and the potential that that lawsuit might create friction between the U.S. and South Africa, 542 U.S. at 733, suggests precisely the opposite.

The importance of the extraterritoriality issue is underscored by the significant divisions it has created among federal appeals courts. Although both the Ninth and D.C. Circuits have concluded that the ATS applies extraterritorially, both decisions elicited strong dissents. Pet. App. 125a-170a (Kleinfeld, J., dissenting, joined by Bea and Ikuta, JJ.); *Doe v. Exxon Mobil Corp.*, 654 F. 3d at 71-91 (Kavanaugh, J., dissenting). Moreover, the Second Circuit, while acknowledging that whether the ATS applies extraterritorially is an "open" question within that circuit, cited a 1795 opinion of U.S. Attorney General William Bradford as evidence that Congress did not intend such application. *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 142 (2d Cir. 2010), *cert. granted*, 181 L. Ed. 2d 292 (2011).[2]

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[2] Dictum in a recent Seventh Circuit decision stated that the ATS applies extraterritorially. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011). That statement was clearly dictum; it was included at the very end of the opinion,

Finally, the Court's grant of review in *Kiobel* should not deter the Court from granting this Petition as well. *Kiobel* does not address the proper scope of ATS claims and thus does not address the important ATS issues raised by Rio Tinto. Moreover, even if the Court affirms the Second Circuit and rules that corporations are not proper defendants in ATS suits, the concerns raised here – in particular, the proliferation of ATS suits against multinational corporations accused of aiding and abetting the human rights violations of a foreign government – will not be resolved. Human rights groups have already made clear that if they lose *Kiobel*, they will simply re-file their ATS suits and name as defendants the responsible corporate officers of the corporations that had previously been named as ATS defendants. Such re-filed suits will raise the same serious foreign policy concerns as existing ATS suits.

In sum, review is warranted because the Petition raises issues of exceptional importance – issues that caused significant consternation within both the U.S. government and foreign governments.

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after the court had concluded that the plaintiffs' claim failed to state a cause of action under the ATS.

II. THE NINTH CIRCUIT'S DETERMINATION THAT THE ATS APPLIES TO EVENTS OCCURRING WITHIN A FOREIGN COUNTRY CONFLICTS WITH THE DECISIONS OF THIS COURT

Review is also warranted because the decision below directly conflicts with decisions of this Court – both *Sosa* and decisions setting forth the rule that federal statutes are presumed not to apply extraterritorially in the absence of a clear indication of a contrary congressional intent. At the very least, the lower federal courts are in need of guidance from this Court regarding whether Congress, when it adopted the ATS in 1789, really intended to authorize federal courts to create federal common law rights based on actions taken within a foreign country.

There is serious reason to doubt that Congress harbored such an intent. Since the early years of the Republic, there has been a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991). As the Court recently explained, "Foreign conduct is generally the domain of foreign law," and "courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American law." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007). In the absence of any evidence that Congress intended that federal common law causes of action recognized pursuant to ATS jurisdiction should extend to activities within foreign nations, the presumption

against extraterritorial application of the ATS should hold sway.

The Ninth Circuit declined to apply the presumption on the grounds that there is no indication that such a presumption "existed and could have been invoked by Congress in 1789." Pet. App. 9a. This Court has never suggested, however, that application of the presumption against extraterritoriality is dependent on a showing that Congress actually harbored such a presumption during the year in which the legislation at issue was adopted. Rather, the Court could not have been clearer that the presumption brooks no exceptions: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010).[3] The Court explained as follows the wisdom of adopting an inviolate presumption regarding congressional intent:

> The results of judicial-speculation-made-law – divining what Congress would have wanted had it thought of the situation before the court – demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in

[3] In any event, the presumption against extraterritoriality was well-established at the time the ATS was adopted. *See The Apollon*, 22 U.S. (9 Wheat) 362, 370 (1824). The 1795 opinion of Attorney General Bradford, to which the Court referred in *Sosa,* stated that insofar as "the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. 57, 58 (1795).

all cases.

Id. at 2881.

Moreover, the history leading up to adoption of the ATS in 1789 strongly suggests that Congress did not intend the ATS to apply extraterritorially. As *Sosa* recognized, the ATS was adopted in response to a decade-long concern that America's standing within the international community would suffer if it failed to uphold international law by failing to permit aliens a means of seeking redress in American courts for injuries inflicted on them by virtue of violations of the law of nations. *Sosa*, 542 U.S. at 715-19. Those concerns focused on injuries suffered by aliens while living in the United States. *Id.* Nothing in the pre-1789 history provides any support for the proposition that the ATS was intended to apply extraterritorially.

As *Sosa* explained, late 18th-century legal scholars recognized only three offenses by individuals that violated the law of nations: piracy, offenses against ambassadors, and violations of safe conducts. *Sosa*, 542 U.S. at 715 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 68 (1769)). It was those offenses that Congress apparently had in mind when it adopted the ATS. *Id.* at 719. Most importantly, Congress apparently was mindful of the need to create an adequate judicial forum when those offenses were committed *within the United States*. *Id.*[4]

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[4] The same Congress that enacted the ATS enacted a statute criminalizing the three offenses – piracy, assaults on ambassadors, and violations of safe conducts – that gave rise to the ATS. 1 Stat. 112, §§ 8, 25 (April 30, 1790). Like the ATS, the

Concern about creating an adequate forum for addressing violations of the law of nations arose during the American Revolution, "owing to the distribution of political power from independence through the period of confederation." *Id.* at 716. As the Court explained:

> The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary, and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties to which the United States are a party." 21 *Journals of the Continental Congress* 1136-37 (G. Hunt ed. 1912). The resolution recommended that the States "authorize suits . . . for damages by the party injured, and for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137.

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criminal statute was silent regarding whether it was to have extraterritorial application. However, although invoked by prosecutors many times, the statute was never invoked in cases involving actions taken within the territory of another nation.

Sosa, 542 U.S. at 716. Quite plainly, the concern focused on misconduct committed by American citizens and others living within this country. The United States could only be said to have "sustained" damages by virtue of "an injury to a foreign power" if the injury occurred domestically; only then could the Nation's international esteem be thought to have suffered by virtue of having failed to prevent the injury to the alien/foreign power from occurring.

A. Offenses Against Ambassadors

Two events in the 1780s – involving assaults on foreign government officials within the United States – heightened the "appreciation of the Continental Congress's incapacity to deal with" violations of the law of nations. *Id.* The first event, the Marbois Affair of May 1784, was widely recognized as a sign of the weakness of the national government. A "French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion," Mr. Marbois, in Philadelphia. *Id.* "The international community was outraged and demanded that the Congress take action, but the Congress was powerless to deal with the matter. It could do nothing but offer a reward for the apprehension of de Longchamps so that he could be delivered to the state authorities." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-92 (1986). The Marbois Affair "was a national sensation that attracted the concern of virtually every public figure in America. The Continental Congress's impotence when confronted with violations of the law of nations had been clearly established." *Id.* at 492-93. It was discussed on

numerous occasions at the Constitutional Convention in 1787 and led to inclusion of Art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . Offences against the Law of Nations") and Art. III, § 2 (granting federal courts jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls").

A similarly notorious incident occurred in 1787 during the ratification process following the convention. A local New York City constable entered the house of the Dutch ambassador and arrested one of his servants. This "affront" to diplomatic immunity "outraged" the ambassador, who protested to national government officials; but "[a]s in the Marbois Affair, the national government was powerless to act." Casto, at 494. The only sanction came at the hands of state courts in New York, which deemed the constable's conduct a violation of the law of nations, actionable under New York's common law. *Id.* at 494 n.153. Thus, when Congress adopted the ATS in 1789 in order to create federal court jurisdiction over the three torts thought actionable as violations of the law of nations, the two best-known examples of torts made actionable thereby (Marbois and the Dutch ambassador) both involved conduct that had taken place within the United States.

B. Violations of Safe Conducts

There is also no evidence that Congress contemplated extraterritorial application of the second tort covered by the ATS, violations of safe conducts. As explained by the Sixth Circuit, a "safe conduct" is defined as "[a] privilege granted by a belligerent allowing an enemy, a neutral, or some other person to

travel within or through a designated area for a specific purpose. . . . Blackstone makes it clear that a violation of safe conducts occurs when an alien's privilege to pass safely through the host nation is infringed and the alien consequently suffers injury to their 'person or property.' 4 Blackstone, *Commentaries on the Law of England*, at 68-69." *Taveras v. Taveraz*, 477 F.3d 767, 773 (6th Cir. 2007). No 18th century legal commentator suggested that nations should be concerned about protecting the rights of aliens who were traveling through *other* nations. Rather, it was understood that a nation should be concerned with protecting the rights of aliens who had been granted a safe conduct while traveling through *that nation*.[5]

Blackstone explained that violations of safe conducts "are breaches of the public faith, without the preservation of which there can be no intercourse between one nation and another." Blackstone, at 68-69. If a nation was to avoid war with the nation whose citizen's travel was interrupted, it was required to punish the individual responsible for the interruption. *Id.* Accordingly, new nations like the United States, in order to preserve peace, had a particular interest in ensuring that redress was provided to those foreigners whose safe conducts were violated while traveling in the United States. Conversely, such nations would have had little interest in providing a judicial forum to, for example, a Spaniard who claimed that his safe conduct (akin to a modern-day visa or passport) had been

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[5] Also understood to be protected were aliens passing through overseas territories, in those areas in which the nation "had a military presence." *Taveras*, 477 F.3d at 773.

violated while he traveled through England. Interpreting the ATS to provide jurisdiction in federal court over such a cause of action would likely lead to conflict with England, the precise opposite from the intended purpose of providing redress for violations of safe conducts.

C. Piracy

The third tort covered by the ATS in 1789, piracy, quite clearly encompassed conduct that occurred outside the territorial jurisdiction of the United States. But while the federal courts exercised jurisdiction over piracy on the high seas, that jurisdiction did *not* include acts of piracy occurring within the jurisdiction of foreign nations.

Indeed, piracy was viewed in the 18th century as a unique offense precisely because it so often occurred outside the sovereign territory of *any* nation. Unless nations were willing to exercise jurisdiction over acts of piracy occurring outside their territory, then many such acts would go unpunished. Thus, by general agreement of legal commentators, *all* nations were both entitled and obligated to punish piracy on the high seas. *See, e.g. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 163 n.8 (1820) ("'[A]s pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is everywhere punished with death. . . . [E]very nation has a right to pursue, and exterminate them, without a declaration of war.'") (quoting Azuni, part 2, c. 5, art. 3, Mr. Johnson's translation); *United States v. Klintock,* 18 U.S. (5 Wheat.) 144, 152 (1820) (those engaging in robbery/plunder on the high seas "are proper objects for

the penal codes of all nations," unless they are acting "under the acknowledged authority of a foreign State.").

Importantly, not only was the 1790 piracy statute never invoked to cover alleged acts of piracy within the territory of a foreign nation, the Supreme Court interpreted that statute as not even applying to robberies committed by ships on the high seas sailing under the authority of a foreign nation. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-34 (1818). It is difficult to believe that the same Congress that adopted an anti-piracy statute of such limited scope nonetheless adopted an ATS statute for the purpose of extending the federal common law so as to regulate conduct within foreign nations.

In sum, neither the text nor legislative history of the ATS suggests that Congress intended the ATS to apply to conduct occurring within foreign nations. Under those circumstances, the presumption against the extraterritorial application of U.S. law suggests that the ATS does not apply to the events at issue here, which occurred in Papua New Guinea. Review is warranted to determine whether "the high bar to new private action" under the ATS, *Sosa*, 542 U.S. at 727, precludes extraterritorial application of the ATS.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

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