No. 16-499

IN THE

Supreme Court of the United States

JOSEPH JESNER et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case.

SUMMARY OF ARGUMENT

According to the complaint in this case, Arab Bank, a multinational corporation based in Jordan, knowingly used its New York branch to finance international terrorism that led to suicide bombings and other attacks that resulted in the death, capture, or injury of thousands of innocent civilians. Victims of these terrorist attacks, their family members, and representatives of their estates all sued under the Alien Tort Statute (ATS), which allows the federal district courts to hear suits for torts "committed in violation of the law of nations," 28 U.S.C. § 1350. The Second Circuit, however, held that no one could sue simply because the Bank is a corporation. The Second Circuit's reasoning is triply flawed: it cannot be

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

squared with the text of the ATS; it cannot be squared with the purpose of the ATS, which was to provide a federal forum to redress violations of international law, ensuring a remedy for the "handful of heinous actions" that "violate[] definable, universal and obligatory norms," *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); and it cannot be squared with fundamental principles of corporate personhood that allow corporations to be sued for wrongdoing.

First, the ATS confers on federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Significantly, that language "does not distinguish among classes of defendants," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), permitting suits against all defendants, including corporations and other artificial entities. To create an exception to the ATS barring all suits against corporations—entities that, like other private actors, are bound by fundamental international norms held by all civilized nations, such as prohibitions against piracy, slavery, genocide, or financing of terrorism—would require rewriting the terms of the ATS.

Second, the ATS was the Framers' considered response to the systematic failure of the dysfunctional Articles of Confederation government to enforce the law of nations, a failure which, all too often, drew the new nation into international conflicts. The ATS provided a federal remedy, reflecting that "the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be ac-

companied with the faculty of preventing it." *The Federalist No. 80*, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004), reflecting that "the law of nations . . . is a part of the law of the land," *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

Third, permitting those victimized by corporations that violate the law of nations to sue under the ATS is compelled by longstanding principles of corporate personhood dating back to the Founding-era, which recognize that "[t]he great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men," *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830), including by making a corporation accountable in the courts for torts committed by corporate actors. "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties . . . cannot be wielded to deprive others of acknowledged rights." *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327 (1854).

It has been a basic precept of American law since the Founding that corporate personhood ensures that corporations can be brought to account for violating the rights of individuals. *See* Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309, 315 (2015) (observing that an "aspect of corporate personhood is to create a mechanism in law to hold

corporations accountable"). Reading corporations out of the class of defendants suable in federal court under the ATS for violations of the law of nations does violence to these foundational rules. Under the Second Circuit's rule, "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149-50 (2d Cir. 2010) (Leval, J., concurring), *aff'd on other grounds*, 133 S. Ct. 1659 (2013).

Businesses do not have a free pass under the ATS to "trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons," or, as in this case, finance international terrorism, "all without civil liability to victims." *Id.* at 150 (Leval, J., concurring). Indeed, the paradigmatic violations of international law that led the First Congress to enact the ATS—"violation of safe conducts, infringement of the rights of ambassadors, and piracy," *Kiobel*, 133 S. Ct. at 1666 (citation omitted)—often involved companies rather than individuals. During the early Republic, this Court enforced the international prohibition of piracy in *in rem* admiralty proceedings, requiring shipping companies to forfeit ships that had engaged in piracy. It did not matter that the individual ship owner claimed innocence. "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).

To be sure, this Court has set a high bar to suit under the ATS, *see Kiobel*, 133 S. Ct. at 1669 (requiring that ATS suit "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application"); *Sosa*, 542 U.S. at 732 (holding 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 paradigms familiar when § 1350 was enacted"), but a case cannot be dismissed under the ATS solely on the ground that the defendant is a corporation. The judgment of the Second Circuit should therefore be reversed.

ARGUMENT

I. THE ALIEN TORT STATUTE BROADLY PERMITS SUIT FOR VIOLATIONS OF THE LAW OF NATIONS AND DOES NOT IMMUNIZE ANY CLASS OF DEFENDANTS.

The ATS confers on federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As its text makes clear, and as this Court has recognized, the ATS broadly permits suits for violations of the law of nations and does not immunize any class of defendants, including corporations, from suit. *Argentine Republic*, 488 U.S. at 438 (the ATS "does not distinguish among classes of defendants"). Significantly, the statute explicitly identifies the plaintiffs who may sue ("an alien") and the cause of action that may be brought ("a tort only committed in violation of the law of nations or a treaty of the United States"), but does not limit at all the class of defendants suable under the ATS.

Because nothing in the text of the ATS expressly limits its scope to individuals, artificial entities, including corporations, can be sued for tortious acts that violate "'specific, universal, and obligatory'" international norms. *See Kiobel*, 133 S. Ct. at 1665 (quoting *Sosa*, 542 U.S. at 732); *cf. Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012) (holding that the Torture Victim Protection Act, which authorizes suit against an "individual," "encompasses only natural persons" and "does not impose liability against organizations"). To exclude corporations from the scope of the ATS would require rewriting its terms.

The statutory scheme set out in the ATS reflects the concerns that led the First Congress to enact it in the first place. The Constitution's Framers, many of whom served in the First Congress, wrote the ATS because they were gravely "[c]oncern[ed] that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin," and they wanted "to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis." *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring); Pet'r Br. at 22-23.

Indeed, under the dysfunctional government of the Articles of Confederation, the law of nations was a dead letter in the United States, potentially imperiling the new nation in conflicts with foreign nations. "The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa*, 542 U.S. at 716 (quoting J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed., 1893)). James Madison lamented that the Articles "contain no provision for the case of offenses against the law of nations; and conse-

quently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist No. 42*, at 233.

In 1781, the Continental Congress "implored the States to vindicate rights under the law of nations." *Sosa*, 542 U.S. at 716. Congress urged state legislatures to "provide expeditious, exemplary and adequate punishment" for (1) "the violation of safe conducts or passports," (2) "the commission of acts of hostility against such as are in amity, league or truce with the United States," (3) "the infractions of the immunities of ambassadors and other public ministers"; and (4) "infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress* 1774-1789, at 1136-37 (Gaillard Hunt ed., 1912). This list was not designed to be comprehensive, but included "only those offences against the law of nations which are most obvious." *Id.* at 1137. The resolution also recommended that states authorize "suits to be instituted for damages by the party injured." *Id.* The states refused, and "concern over the inadequate vindication of the law of nations persisted through the time of Constitutional Convention." *Sosa*, 542 U.S. at 717.

Throughout this period, the failure to enforce international law led to a number of "notorious episodes involving violations of the law of nations." *Kiobel*, 133 S. Ct. at 1666. Incidents, such as the Marbois affair of 1784, in which a Frenchman in the United States assaulted Francis Barbe Marbois, the Secretary of the French Foreign Legion, leading the government of France to demand redress, *see id.*, convinced the Framers of the need for a federal judiciary empowered to enforce federal treaties as well as the law of nations.

During the debates about whether Pennsylvania should ratify the Constitution, James Wilson insisted that we "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 490 (Jonathan Elliot ed., 1836). Likewise, Alexander Hamilton argued that "[a]s the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *The Federalist No. 80*, at 444. "So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Id.* at 445.

In 1789, the First Congress made good on the Framers' promises to ensure proper enforcement of the law of nations in federal court. To redress past abuses, and prevent new violations of the law of nations from arising, the First Congress enacted the ATS, expecting it to "have practical effect the moment it became law." *Sosa*, 542 U.S. at 724. "The First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations," *id.*, including "'three principal offenses against the law of nations' [that] had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Kiobel*, 133 S. Ct. at 1666 (quoting *Sosa*,

542 U.S. at 723, 724); *id.* at 1674 (Breyer, J., concurring) ("[T]he statute's language, history, and purposes suggest that the statute was to be a weapon in the 'war' against those modern pirates who, by their conduct, have 'declar[ed] war against all mankind." (quoting 4 William Blackstone, *Commentaries on the Laws of England* *71)).

Significantly, because "the Union [would] undoubtedly be answerable to foreign powers for the conduct of its members," *Federalist No. 80*, at 444, the First Congress made sure the ATS was all-encompassing. *See United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826) ("[t]he mischief intended to be reached by the statute is the same, whether it respects *private* or *corporate* persons" (emphasis in original)). After all, a stringent limitation on this federal remedy—denying suit against an entire class of defendants and thus allowing corporations to violate the law of nations with impunity, no matter the particular violation of international law alleged—would have undercut the ATS's raison d'etre and resulted in the very evils the ATS sought to prevent.

Indeed, liability for corporations under the ATS finds strong support in this Court's early case law, which enforced the international prohibition of piracy—one of the paradigmatic violations that the ATS aimed to redress—against ships in *in rem* admiralty proceedings, condemning ships run by companies that had engaged in piracy. Reasoning that pirates are "common enemies of all mankind," this Court held that a "piratical aggression by an armed vessel sailing . . . may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." *The Mariana Flora,* 24 U.S. (11 Wheat.) 1, 40-41 (1825). Liability attached to the ship itself, and thus the shipping company that operated it, regard-

less of the owner's claim of innocence. As Justice Story explained, "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *The Malek Adhel*, 43 U.S. (2 How.) at 233; *see Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships. Of course the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders." (citations omitted)); Pet'r Br. at 25-26.

Thus, corporate liability under the ATS is consistent with both the text and history of the Act. It is also compelled by longstanding principles of corporate personhood, which permits corporations to be sued for tortious conduct, such as is alleged in this case. The next Section discusses these principles.

II. THE ALIEN TORT STATUTE ALLOWS FOR CORPORATE LIABIULITY CONSISTENT WITH LONGSTANDING PRINCIPLES OF CORPORATE PERSONHOOD.

Reading the ATS as written is also consistent with basic principles of corporate personhood that ensure corporate accountability. When Congress enacted the ATS, it was understood that corporations could sue to vindicate their legal rights, and that they could be sued to hold them accountable for violating the rights of others. "[F]rom the earliest times to the present, corporations have been held liable for torts." *Chestnut Hill & Spring House Tpk. Co. v. Rutter,* 4 Serg. & Rawle 6, 17 (Pa. 1818). This was not an

American invention, but a reflection of English common law principles that the Founders brought with them to the United States. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* *463 (1765) (explaining that corporations may "sue or be sued . . . and do all other acts as natural persons may"); *see Phila., Wilimington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858) ("At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety."); Pet'r Br. at 18-19. Relying on these principles, courts refused to permit corporations to "do wrong without being amenable to justice," relying on the corporate form "to hold them responsible." *Chestnut Hill*, 4 Serg. & Rawle at 16. Courts considered it "unjust to society, as well as unreasonable in itself, to suffer [corporations] to escape the consequences of direct injuries inflicted upon citizens by their agents in the prosecution of their business." *Whiteman v. Wilmington & Susquehanna R.R. Co.,* 2 Del. 514, 521 (1839).

At the Founding, as Chief Justice John Marshall recognized, a corporation was considered "an artificial being, invisible, intangible, and existing only in the contemplation of the law" endowed with "immortality and . . . individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). The capacity to sue and be sued was viewed as a critical part of corporate personhood, as treatise writers and courts recognized. *Id.* at 667 (opinion of Story, J.) ("[I]t possesses the capacity of

perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties."); *Riddle v. Proprietors of Merrimack River Locks and Canals*, 7 Mass. 169, 187 (1810) ("It is one of these maxims, that a man specially injured by the breach of duty in another, shall have his remedy by action. . . .[W]hy should a corporation, receiving its corporate powers and obliged by its corporate duties with its own consent, be an exception, when it has, or must be supposed to have, an equivalent for its consent?"); 1 Stewart Kyd, *Treatise on the Law of Corporations* 13 (1793) (discussing capacity of corporations to "su[e] and be[] sued").

As these cases reflect, from the Founding on, the "common understanding" was that "corporations were 'persons' in the general enjoyment of the capacity to sue and be sued." *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003). Accordingly, "for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances." *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 109 (1893). "As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives." *Phila., Wilmington, & Balt. R.R. Co.*, 62 U.S. (21 How.) at 210. Under these principles, "[c]orporations are liable for every wrong they commit." *Nat'l Bank v. Graham*, 100 U.S. 699, 702 (1879).

In a trio of important cases, the Supreme Court considered whether corporations were citizens entitled to sue or be sued under the diversity jurisdiction

conferred on federal courts by the Judiciary Act of 1789. *See Hertz Corp. v. Friend*, 559 U.S. 77, 84-85 (2010) (surveying the line of cases). The upshot of these cases was that "for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation" and hence could sue or be sued in federal court consistent with basic principles of corporate personhood. *Id.* at 85.

Initially, in *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809), this Court held that a corporation, being an "invisible, intangible, and artificial being," is "certainly not a citizen." *Id.* at 86. But it held that corporations could sue or be sued in diversity cases based on "the character of the individuals who compose the corporation," *id.* at 92, reasoning that "the term citizen ought to be understood . . . to describe the real persons who come into court . . . under the corporate name." *Id.* at 91. *Deveaux*'s rule, which recognized that corporations could sue or be sued in diversity, but required courts to engage in time-consuming inquiries into the citizenship of the shareholders of the corporation, was widely criticized and proved short-lived.

In *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), this Court overruled *Deveaux*, holding that "a corporation created by and doing business in a particular state" is "a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." *Id.* at 558. *Letson* made clear that a corporation was a "citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued," drawing heavily on *Dartmouth College*'s discussion of corporate personhood. *Id.*

In *Marshall v. Balt. & Ohio R.R. Co.*, this Court reaffirmed *Letson*'s rule that corporations should be treated as citizens of the state of their incorporation, permitting them to sue or be sued in diversity cases consistent with basic principles of corporate personhood. "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name." *Marshall*, 57 (16 How.) at 327. This rule, this Court explained, was necessary to ensure that individuals could go to federal court to hold out-of-state corporations accountable for legal wrongs they commit. "If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable." *Id.* at 328.

In short, it has been the law for centuries that corporations are liable for the torts committed by corporate actors. Under these long-established principles, corporations are liable under the ATS for torts committed in violation of the law of nations to the same extent individuals are. Corporate liability ensures that entities that flout the law can be called to account; such liability, as in this Court's piracy cases, is the "only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *The Malek Adhel,* 43 U.S. (2 How.) at 233. It has never been the law that an injured plaintiff may only proceed against an individual corporate actor, as that would be "mischievous in its consequences" for a "company may do great injury," by

means of those "who have no property to answer the damages recovered against them." *Chestnut Hill*, 4 Serg. & Rawle at 17. When corporate actors commit "arbitrary exercises of power in the nature of torts, . . . the corporation may be held to a pecuniary responsibility for them to the party injured." *Salt Lake City v. Hollister*, 118 U.S. 256, 261 (1886). Rewriting the ATS to afford corporations an absolute immunity from suit for violating the law of nations—even where, as alleged here, a corporation flouts long established, obligatory, and definite international norms held by all civilized nations—would imperil this fundamental principle.

III. THERE IS NO CORPORATE EXCEPTION TO FUNDAMENTAL INTERNATIONAL NORMS.

Rather than follow the text and history of the ATS and fundamental principles of corporate liability, the Second Circuit manufactured a corporation exception to the federal remedy provided by the ATS. Relying on its earlier decision in *Kiobel*, the Second Circuit held that "federal courts lack jurisdiction over ATS suits against corporations," Cert. Pet. App. 19a, because, it claimed, "'no corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights.'" *Id.* at 15a (quoting *Kiobel*, 621 F.3d at 148). This is wrong.

To start, the Second Circuit asked the wrong question. International law, including treaties forbidding the sort of financing of terrorism at issue here, establishes legal rules, but it leaves implementation of those rules to each nation. "International law . . . consists primarily of a sparse body of norms, adopting widely agreed principles prohibiting conduct universally agreed to be heinous and inhumane.

Having established these norms of prohibited conduct, international law says little or nothing about how those norms should be enforced." *Kiobel*, 621 F.3d at 152 (Leval, J., concurring). As Judge Pooler observed below, "[c]ustomary international law does not contain general norms of liability or non-liability applicable to actors." Cert. Pet. App. 51a (Pooler, J., dissenting from the denial of rehearing en banc); *Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law."); Pet'r Br. at 32.

Some nations do not provide for civil liability to redress violations of international law. But ours does. By adopting the ATS, our law provides a federal forum to hold civilly liable those, including corporations, whose tortious acts violate specific, universal, and obligatory prohibitions of the law of nations. As this Court's decision in *Kiobel* made clear, the question in ATS cases "is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law." *Kiobel*, 133 S. Ct. at 1666; *see id.* at 1633 (observing that federal courts, under the ATS, "may 'recognize private claims . . . under federal common law'" (quoting *Sosa*, 542 U.S. at 732)); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 265 (2d Cir. 2007) (Katzmann, J., concurring) ("[A]ll [ATS] litigation is in fact based on federal common law . . . ."). Consistent with longstanding principles

of corporate liability, corporations may be held liable to the same extent as individuals under the ATS's federal common law cause of action.

Moreover, even if the Second Circuit had asked the correct question, its answer would still be wrong, because it failed to recognize that international norms do constrain the acts of corporations. As far back as 1907, the Attorney General of the United States opined that citizens of Mexico had been injured by a corporation's violation of a treaty between the United States and Mexico. *Mexican Boundary-Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250 (1907). Pointing to the ATS, the Attorney General wrote that "existing statutes provide a right of action and a forum." *Id.* at 252; Pet'r Br. at 24.

Human rights violations by German corporations that aided the Nazi war effort provide yet another example. In the aftermath of World War II, "the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law." *Flomo*, 643 F.3d at 1017; *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 52 (D.C. Cir. 2011) ("[T]he Allies determined that I.G. Farben had committed violations of the law of nations and therefore destroyed it."), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

While some international norms apply only to state actors or those who act in an official capacity (which can include corporations as the case of I.G. Farben illustrates), there is no rule of international law that exempts corporations from the fundamental commands of the law of nations that apply to all persons. No corporation may enslave individuals, commit genocide, engage in piracy, or, as in this case, finance international terrorism, without becoming an

"enemy of all mankind." *Sosa*, 542 U.S. at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). The Second Circuit erred in holding that corporations may never be sued under the ATS.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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