No. 16-499

In the
Supreme Court of the United States

JOSEPH JESNER, *et al.*,

Petitioners,

vs.

ARAB BANK, PLC,

Respondent.

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

BRIEF OF *AMICI CURIAE* JACK BLOOM and ALPHA CAPITAL HOLDINGS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other Authorities:

INTEREST OF *AMICI CURIAE*[1]

Amici are experts in the regulation of financial institutions. They have substantial background in and experience with banking oversight in the New York area. *Amici* are Jack Bloom and Alpha Capital Holdings, Inc.

Jack Bloom is an investment banker and senior management advisor at Alpha Capital Holdings, Inc., a strategic and financial advisory firm that has been providing investment-banking services for more than 30 years. He was a key adviser to the House Financial Services Committee of the U.S. Congress regarding the Dodd-Frank Wall Street Reform Act, signed into law July 21, 2010 by President Obama.[2] He graduated with honors from Harvard College in 1979 and from the MIT Sloan School of Management with an MBA in 1983.

Amici have a strong interest in the U.S. Supreme Court reversing *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015). Speaking as investment bankers, *amici* are dismayed that the Second Circuit applied such a narrow reading of the Alien Tort Statute. The equities here demand liability for the respondent and a clear ruling so that no corporation can expect to violate international law with immunity. The banking community will not be surprised if this Court overturns the Second Circuit. Further they should not be greatly concerned, as Arab

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[1] No counsel for a party authored any portion of this brief, and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* received consent from the parties to file this *amicus* brief.

[2] Pub. L. No. 111–203, 124 Stat. 1376 (2010).

Bank's behavior lies far outside the business norms and mandated controls of any bank in the United States today. Accordingly, for the reasons discussed herein, *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015) incorrectly immunizes corporations for acts that violate the law of nations, including acts of terrorism, genocide, and human trafficking.

SUMMARY OF ARGUMENT

Congress enacted the Alien Tort Statute ("ATS") in 1789 to deter violations of the law of nations. Recently, acts that violate these laws have cost the United States and its companies billions of dollars each year and have led to the tragic death of thousands of parents, children, siblings, and spouses. But those who commit these atrocities do not do it alone. They rely heavily on ready access to money, and in many cases, rely on the banking industry to sustain their illegal operations. In the words of convicted terrorist Zacarias Moussaoui, "[W]ithout the money . . . you will have nothing."[3]

Given that terrorists and other human rights violators rely so heavily on the banking industry, strong laws are needed to ensure banks do not simply serve as vehicles to transmit money around the world, but also as gatekeepers to block transactions that facilitate acts of terrorism. In banking, money is "fungible" and payments for nefarious conduct can occur anywhere in the United States or the world at any time. Should it have purpose, and substantial

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[3] Statement Under Oath of Zacarias Moussaoui, *In re Terrorist Attacks on September 11, 2001*, 03-MD-1570, October 20, 2014, at p. 26, ECF No. 2927-5; *see also United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010).

funding, the power of a bank to conduct violations against aliens (and U.S. citizens alike) is enormous.

Large banking corporations can be truly multinational, stretching their boundaries and operations far beyond those of any government or individual. They frequently utilize money, operations, and people in the United States to impact conditions in other countries. Banks facilitate monetary transactions; act as intermediaries; give financial advice; and originate, buy, hold, and sell financial assets. Every transaction is done with purpose. This purpose can be to generate profits and shareholder value, or could be for other purposes such as political contributions, free speech, or charity.

Due to their presence in virtually every country, and the innumerable activities banks perform, they are naturally subject to wide-ranging regulatory regimes. For example, in the United States, banks must comply with Know Your Customer regulations and Anti-Money Laundering laws. The notion that allowing corporate liability under a statute with very narrow application would subject banks to onerous compliance costs is therefore misplaced. Arab Bank failed to implement appropriate programs to comply with its obligations under these laws. But responsible and law-abiding banks already have procedures in place to comply with their legal responsibilities that would subsume any internal procedures necessitated by allowing corporate liability under the ATS. In other words, banks need not start from scratch or make any substantial change in operations to avoid ATS liability. The responsible ones already have appropriate procedures in place.

As a corollary, the Court should not fear it is opening up the floodgates for new lawsuits against defendants for wide-ranging violations of the ATS. As this Court has already ruled, the scope of liability under the ATS is narrow. While narrow, the ATS is still an essential tool for holding human rights violators accountable in federal court and creating a complete remedy for those injured by violations of the law of nations.

ARGUMENT

I. The First Congress Enacted the ATS to Deter Violations of International Law.

The ATS now reads in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[4] While the ATS is a jurisdictional statute with limited legislative history, historical events leading to the statute's enactment demonstrate that Congress intended the ATS to have a deterrent effect.

Just a few years prior to the Constitution's ratification and ultimately the First Congress's decision to enact the ATS, the Continental Congress, in 1781, "implored the States to vindicate rights under the law of nations" and "called upon state legislatures" to "provide expeditious, exemplary and adequate punishment."[5] In 1784, in response to an embarrassing episode involving an assault on a French diplomat, Congress "called again for state

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[4] 28 U.S.C. § 1350 (2012).

[5] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004) (quoting 21 Journals of the Continental Congress 1136-37 (G. Hunt ed. 1912)).

legislation" due to the "inadequate vindication of the law of nations."[6]

Alexander Hamilton confirmed:

> [T]he responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice . . . is with reason classed among the just causes of war. . . . This is not less essential to the preservation of the public faith, than to the security of the public tranquillity.[7]

Ultimately, the First Congress enacted the ATS consistent with prior requests to the states and with Alexander Hamilton's vision, in order to "vindicate rights," "punish[ ]" violators, "propagate and enforce . . . international law rules," avoid "causes of war," and to preserve "public tranquillity."[8]

The rationales for the ATS are even stronger now than they were in 1789. Congress enacted the ATS when the United States was a young fledgling nation trying to prove itself to the international community. Now the United States is not only trying to prove itself, but to lead other nations by example. Similarly, international commerce has evolved radically since 1789, thus warranting a broader view of the principles underlying the ATS.

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[6] *Id.* at 717 (citing 1 Records of the Federal Convention of 1787, p. 25 (M. Farrand ed. 1911) (speech of J. Randolph)).

[7] The Federalist No. 80, at 500-01 (Alexander Hamilton) (B. Wright ed. 1961).

[8] *Id.*; *Sosa*, 542 U.S. at 716, 717.

II. Permitting Suits Against Corporations Such as Banks Will Fulfill the Goal of Preventing Terrorism and Other Violations of the Law of Nations.

Allowing a federal court to exercise jurisdiction over a corporation that violates the law of nations fulfills the stated goals of this nation's founding leaders. Every branch of government has recognized that banks can facilitate the violation of the law of nations, and the need to deter these violations. For example, Congress has sought to prevent banking corporations from facilitating acts of terrorism, both before September 11, 2001,[9] and after.[10]

In enacting the PATRIOT Act, Congress specifically recognized that "money laundering, and the defects in financial transparency on which money launderers rely, are critical to the financing of global terrorism

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[9] Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 301(a), 324, 110 Stat. 1214, 1247, 1254 (1996) ("[I]nternational terrorism is among the most serious transnational threats faced by the United States and its allies . . . . [F]oreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations.").

[10] As recently as last year, Congress enacted the Justice Against Sponsors of Terrorism Act ("JASTA") to:

> [P]rovide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

Pub. L. No. 114-222, § 2, 130 Stat. 852, 852 (2016).

and the provision of funds for terrorist attacks," and amended the banking laws "to increase the strength of United States measures to prevent, detect, and prosecute international money laundering and the financing of terrorism."[11] In hearings, Congress has confirmed the need to "dismantle the financial infrastructure of terrorism" and "starve terrorists of funding."[12]

Federal courts around the country have made similar findings, both in the context of deciding ATS issues and otherwise.[13]

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[11] PATRIOT Act, Pub. L. No. 107-56, §§ 302(a)-(b), 115 Stat. 272, 296-97 (2001) ("Patriot Act").

[12] *See Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H.R. Comm. on Fin. Servs.* (H. Hrg. 107-64), 107th Cong., at 1 (Oct. 3, 2001) (internal quotation marks omitted).

[13] *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 46, 55 (D.C. Cir. 2011) (noting the "deterrence rationale" in applying the ATS to corporations); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1018 (7th Cir. 2011) (Posner, J.) (corporate liability under the ATS deters violations of international law); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 115 (2d Cir. 2013) (noting "the important U.S. and international interests in preventing the financial support of terrorist organizations" in resolving a discovery dispute with Arab Bank); *Linde v. Arab Bank, PLC*, 269 F.R.D. 186, 208 (E.D.N.Y. 2010) ("giv[ing] greater weight to the United States' interest in preventing the financing of terrorism than to other jurisdictions' enforcement of their bank secrecy laws" in resolving discovery dispute); *Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 79 (D.D.C. 2009) (noting "the federal interest in deterring terrorist attacks and compensating victims"); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 53 (E.D.N.Y. 2007) ("the United States[ ] has a strong national interest in enforcing domestic and international anti-terrorism laws"); *Estates of Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15, 25 (D.R.I. 2004) (judgments under the Anti-Terrorism Act

The Executive Branch has made even more robust findings, promulgating various regulations designed to prevent the financing of terrorism and other human rights violations.[14]

The Financial Crimes Enforcement Network ("FinCEN") has even penalized this respondent, Arab Bank, for failing to provide adequate internal controls to prevent funds from going to terrorists,[15] as has the

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("ATA"), 18 U.S.C. § 2333 (2012), "interrupt or at least imperil the flow of terrorism's lifeblood, money") (citing *Antiterrorism Act of 1990: Hearing on S2465 Before the Subcomm. on Cts. and Admin. Practice of the Comm. on the Judiciary U.S. S.*, 101st Cong., at 85 (1990) (statement of Joseph Morris)).

[14] *E.g.*, 136 Cong. Rec. S26717 (Oct. 1, 1990) (statement of Senator Grassley quoting State Department official) (the ATA will "add to the arsenal of legal tools that can be used against those who commit acts of terrorism against U.S. citizens abroad."); Executive Order No. 12947, Prohibiting Transactions with Terrorists who Threaten to Disrupt the Middle East Peace Process, 60 Fed. Reg. 5,079 (Jan. 23, 1995); Executive Order No. 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism, 66 Fed. Reg. 49,079 (Sept. 23, 2001); Financial Crimes Enforcement Network; Anti-Money Laundering Requirements—Correspondent Accounts for Foreign Shell Banks; Recordkeeping and Termination of Correspondent Accounts for Foreign Banks, 67 Fed. Reg. 60,562-60,573 (Sept. 26, 2002) (codified at 31 C.F.R. Part 103); Financial Crimes Enforcement Network, Money Laundering Prevention: A Money Services Business Guide, *available at* https://www.fincen.gov/sites/default/files/shared/prevention_guide.pdf; Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering Examination Manual (2014) ("FFIEC Manual"), *available at* https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf.

[15] *In re Federal Branch of Arab Bank PLC, New York, New York*, No. 2005-2, Assessment of Civil Money Penalty (Aug. 2005) ("Assessment of Civil Money Penalty"), *available at*

Office of the Comptroller of the Currency ("OCC"),[16] and a jury already found Arab Bank liable under the ATA for "knowingly provid[ing] financial services to Hamas," a designated terrorist organization, and for "ma[king] payments to beneficiaries identified by Hamas-controlled organizations, including the families of Hamas suicide bombers and prisoners."[17] The "verdict was based on *volumes* of damning circumstantial evidence that defendant knew its customers were terrorists."[18]

Maintaining the ATS as an additional tool to thwart acts of international terrorism and other violations of international law, such as those committed by Arab Bank, would not only preserve the original stated purpose of the ATS, but further the stated purposes of numerous other laws promulgated by Congress and the Executive Branch, and recognized by the courts. Corporate liability is an essential piece of the puzzle in deterring violations of the law of nations.[19] Indeed,

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https://www.fincen.gov/sites/default/files/enforcement_action/arab081705.pdf.

[16] *In re Federal Branch of Arab Bank PLC, New York, New York*, No. AA-EC-05-37, Consent Order for Civil Money Penalty (Aug. 2005) ("Consent Order for Civil Money Penalty"), *available at* https://www.occ.gov/news-issuances/news-releases/2005/nr-ia-2005-80a.pdf.

[17] *Linde v. Arab Bank, PLC*, 97 F. Supp. 3d 287, 299 (E.D.N.Y. 2015).

[18] *Id.* at 313 (emphasis added).

[19] To the extent the Court is concerned that potential ATS liability would unnecessarily overlap with liability under other statutes or common law principles, this Court already addressed this in *Sosa*. There, Mr. Sosa argued that it would have been "absurd" for the Continental Congress to suggest to state legislatures to pass laws authorizing suits for violations of

why should a federal court refuse to decide a case simply because an individual decided to form a corporation before violating international law?

III. Banks Will Not Need to Adopt New or Expensive Protocols to Comply with Their Obligations Under the ATS.

Banks will not need to expend significant funds, beyond what they already pay to comply with existing banking laws, to ensure that their practices do not facilitate any violation of the law of nations.

Banking corporations are already subject to many special rules and regulations. Particularly relevant here are the Anti-Money Laundering laws ("AML") under the Bank Secrecy Act ("BSA")[20] and the Know

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international law if such causes of action already existed in the common and criminal laws of that time. The Court rejected this argument, noting that statutes designed to reinforce universal laws are necessary because without them, the country would "cease to be a part of the civilized world." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 67 (1769)). This Court explained that the Continental Congress encouraged state legislatures to pass criminal statutes for violations of the law of nations even though criminal and common law remedies already existed, and that the First Congress did enact these laws. *See id.* Indeed, when Congress really wants to deter certain activity, it has set up redundancies within legislation to ensure a full range of criminal and civil remedies. *See, e.g.*, ATA, 18 U.S.C. §§ 2333, 2339A-C (authorizing criminal and civil remedies against those involved in committing acts of terror).

[20] The BSA is codified in subchapter II of chapter 53 of title 31 of the United States Code.

Your Customer or Customer Identification Program ("CIP") regulations under the BSA.[21, 22]

For example, in opening even a small business bank account in the United States, the branch banker will ask the customer about the nature of his or its business.[23] That inquiry is mandated by the CIP and AML regulations promulgated under the BSA, as amended by the Patriot Act.[24] Section 352 of the Patriot Act amended the BSA to require financial

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[21] *See generally* 31 C.F.R. Part 1020 (2017).

[22] The Office of Foreign Assets Control ("OFAC") also maintains a series of regulations that banks must comply with to prevent funds from going to terrorists. *See generally* 31 C.F.R. Parts 594, 595, 596 (2017); U.S. Treasury Dep't, *OFAC Regulations for the Financial Community*, at p. 14 (January 2012), *available at* https://www.treasury.gov/resource-center/sanctions/Documents/facbk.pdf; FFIEC Manual at pp. 142-54 (recommending internal controls, policies, and procedures for complying with OFAC regulations).

[23] *See* 31 C.F.R. § 1020.220 (2017) (requiring bank to "implement a written Customer Identification Program" which includes a procedure for obtaining customer information including a customer's name, address, date of birth (for an individual), and identification number; verifying this information; and maintaining records of this information); *see also* Lorraine Hyde, 1-5 Bank Procedures: A Guide to Regulatory Compliance § 5.03 Bank Secrecy Act (2017) ("To effectively comply with BSA requirements, each financial institution must have in place a detailed customer identification program. The customer identification program (CIP) requirements are an integral requirement to achieve compliance with the BSA, related OFAC requirements, as well as other anti-money laundering (AML) elements.").

[24] *See* 31 C.F.R. §§ 1020.210, 1020.220 (2017).

institutions to establish robust AML programs.[25] Section 326 of the Patriot Act amended the BSA to require financial institutions to establish written customer identification programs.[26] Identification information is recorded in the bank's records.[27] Agreeing to open the account and handle funds is then subject to review by compliance officers.[28] If the account does not meet CIP and AML standards, the bank's compliance officers will instruct the banker to close the account.[29]

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[25] Patriot Act § 352; 31 C.F.R. § 1020.210; Financial Industry Regulatory Authority ("FINRA") Manual, Rule 3310 (requiring member financial institutions to "develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member's compliance with the requirements of the Bank Secrecy Act"), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=8656.

[26] Patriot Act § 326; 31 C.F.R. Parts 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030 (2017) (detailing program requirements for different types of financial institutions).

[27] 31 C.F.R. § 1020.220(a)(3).

[28] 31 C.F.R. § 1020.210 (requiring that "[i]ndependent testing for compliance to be conducted by bank personnel or by an outside party").

[29] FFIEC Manual, at p. 50 (bank must develop procedures to close an account when unable to verify information); Jeffrey Torp, 1-B6 Compliance Monitoring Program for National Banks § B6.02 Anti-Money Laundering Compliance (2017) (same); Lorraine Hyde, 1-5 Bank Procedures: A Guide to Regulatory Compliance § 5.25 Customer Identification Program (2017) (bank account should be closed if unable to verify information or obtain necessary documents as required by AML and CIP laws); Donald Resseguie, 11-217 Banking Law § 217.04 Customer Due Diligence and Monitoring (2017) ("it is at least implicit under the CIP Rule that a bank would have to close an account without an

These regulations go beyond opening an account and require banks to investigate the business and background of all customers and maintain knowledge of their transactions on a continuing basis.[30] If banks cannot verify the identity and nature of their customers' transactions, they must investigate further or close the account.[31]

The customer may attempt to hide the nature of his activities through shell corporations, charities, illegal schemes (i.e. Ponzi schemes), check kiting and other illicit activities. However, the bank has a continuing requirement to review the legality and compliance of customer transactions and close the accounts as soon as it is aware of any issues.[32]

In addition, the choice of whether to engage in international transactions is a completely voluntary one. Many local banks do not participate directly in international transactions and instead rely on correspondent banks that make an investigation of

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identification number in order to maintain compliance related to the requirement to have the customer's identification number").

[30] 31 C.F.R. § 1020.210 (requiring that banks implement "[a]ppropriate risk-based procedures for conducting ongoing customer due diligence" including "[c]onducting ongoing monitoring to identify and report suspicious transactions").

[31] FFIEC Manual, at pp. 67-69 (develop procedures for closing account due to suspicious transactions); *Id.* at p. 113 (regulations "contain[ ] specific provisions as to when banks must obtain the required information or close correspondent accounts . . . within a commercially reasonable time"); *see also* 31 C.F.R. § 1010.610(d).

[32] 31 C.F.R. 1020.210 (requiring ongoing monitoring); FFIEC Manual, at pp. 12, 23, 50, 67, 69, 113, 117, 122, 128-29, 177-79.

the local bank as a business relationship.[33] Thus, if a bank desires to avoid the added risk associated with international transactions, they have that option, but once they choose to engage in more risky (and potentially more lucrative) foreign transactions, they should be, and are, subject to more regulations.[34] Other banks enter the international funds transfer system themselves. To do this, and ensure settlement of funds, they must become part of the U.S. Clearing House Interbank Payments System (CHIPS) for international transactions and agree to be subject to U.S. law.[35] Again, in this instance, potential ATS liability would not impose increased compliance costs since these banks would already be subject to U.S. law.

Indeed, in this case, both FinCEN and the OCC assessed a civil monetary penalty against Arab Bank for "fail[ing] to apply an adequate system of internal controls to the clearing of funds transfers," "fail[ing] to conduct adequate independent testing," "fail[ing] to

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[33] *See* S. Permanent Subcomm. on Investigations, *Correspondent Banking: A Gateway for Money Laundering*, S. Rep. No. 107-1, at 11 (2001).

[34] *Id.*; 31 C.F.R. § 1010.610 (requiring enhanced due diligence for correspondent accounts maintained for foreign banks); Financial Crimes Enforcement Network, Fact Sheet Section 312 of the USA PATRIOT Act Final Regulation and Notice of Proposed Rulemaking (2005), *available at* https://www.fincen.gov/sites/default/files/shared/312factsheet.pdf; FFIEC Manual, at pp. 111-17.

[35] Clearing House Interbank Payments System, *Self-Assessment of Compliance with Standards for Systemically Important Payment Systems*, at pp. 11-17 (2016), *available at* https://www.theclearinghouse.org/-/media/files/payco%20files/standards%20self%20assessment%202016.pdf?la=en.

monitor[ ] for potentially suspicious activity," "fail[ing] to implement procedures for obtaining" information used to mitigate risk of illicit activity, "fail[ing] to file a number of suspicious activity reports in a timely manner," and "fail[ing] to identify a number of potentially suspicious funds."[36] FinCEN found that these violations "were significant."[37] Had Arab Bank complied with its obligations under the BSA, we likely would not be before this Court today as a bank's involvement in transactions that are illegal or otherwise contrary to the law of nations can already be prevented using existing banking protocols.

IV. Allowing Corporate Liability Will Not Result in a Huge Influx of Cases Against Banks.

Between 1789 and 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*, only two federal courts used the ATS as a basis for jurisdiction.[38] Further, according to at least one study, between 1960 and 2010, only 156 cases were brought under the ATS against corporations, and of those, only two were reduced to judgments and only twenty resolved in settlement.[39] In most years, no more than ten suits

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[36] Assessment of Civil Money Penalty, *supra* note 15, at pp. 2-7; *see also* Consent Order for Civil Money Penalty, *supra* note 16, at pp. 1-2.

[37] Assessment of Civil Money Penalty, *supra* note 15, at p. 3.

[38] *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.21 (2d Cir. 1980) (collecting cases).

[39] *See* Darin Christensen & David K. Hausman, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J.L. Econ. & Org. 794, 797 (2016).

were initiated.[40] In *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010) ("*Kiobel I*"), the Second Circuit even acknowledged that "[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights."[41] Since these data were released, the Supreme Court decided *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), which further narrowed the scope of ATS liability to cases that touch and concern the United States. So it is reasonable to conclude that corporations are even less likely now to be subject to liability under the ATS.[42]

Looking historically at other cases seeking to impose ATS liability for aiding and abetting violations of the law of nations, a plaintiff (at least in the Second Circuit) must demonstrate that a defendant "(1) provide[d] practical assistance to the principal which ha[d] a substantial effect on the perpetration of the crime, and (2) d[id] so with the purpose of facilitating the commission of that crime."[43] From the point of view of running a bank, these elements are entirely

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[40] *Id.*

[41] Further, there have not been serious or regular adverse effects in the other circuits that have recognized corporate liability in ATS suits.

[42] These statistics may be further exaggerated in that they do not account for the possibility that a defendant may be haled to court for violating international law as well as other statutes, regulations, or common law causes of action at the same time.

[43] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

controllable. FinCEN recognized this, when it assessed a penalty on Arab Bank for "significant" violations of U.S. banking law.[44] This Court should not be concerned that ruling for liability will open a floodgate of litigation because these illicit activities are far outside the normal operation of a bank or corporation. Indeed, few ATS cases have been brought and most have been dismissed on other grounds other than the absence of corporate liability.

V. The Time Is Right for this Court to Explicitly Recognize Corporate Liability Under the ATS.

Multinational companies already operate in the four circuits that have unequivocally recognized corporate liability under the ATS.[45] These companies should have already adapted their conduct to conform to the requirements of the ATS (to the extent they even needed to adapt their conduct at all). So as a practical matter, the Second Circuit's outlier decision should not have altered the established practices of these companies, as four circuits have rejected the Second Circuit's reasoning.

Accordingly, if this Court adopts the corporate liability rule that is already the law in four circuits in this country, well-managed and law-abiding multinational companies will continue operating as usual without interruption. However, if the Court

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[44] Assessment of Civil Money Penalty, *supra* note 15, at p. 3.

[45] *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1021-22 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54-57 (D.C. Cir. 2011); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.).

adopts the Second Circuit's corporate liability rule, it raises the potential that corporate actors will dismantle the checks and procedures they have already implemented to avoid liability under the ATS. Given the widespread acceptance of corporate liability under the ATS, a ruling by this Court changing the law to adopt the Second Circuit's rule would be much more disruptive than adopting the law as it exists in four other circuits in the country.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision below, which wrongly immunized Arab Bank from liability under the ATS for aiding and abetting terrorists because it did so using the corporate form. If Arab Bank is not held accountable, it would establish an unacceptable precedent that corporations could engage in horrific acts such as murder for hire, kidnapping, and torture with civil immunity. As the Court ruled in *Sosa*, statutes designed to reinforce universal laws are necessary because without them, the country would "cease to be a part of the civilized world."[46] Corporations are extensions of our laws and culture. We should not allow them to operate outside the law of nations, which are fundamental to our country's values.

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[46] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 722 (2004).

Respectfully submitted,

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