No. 10-1491

IN THE
Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, *et al.*,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NEAL KUMAR KATYAL*
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA
LINDSAY D. BREEDLOVE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amicus Curiae
**Counsel of Record*

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America respectfully submits this brief as *amicus curiae*.

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket *amicus* consent letters.

three million businesses and trade and professional organizations of every size, sector, and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the Judiciary.

The Chamber has a substantial interest in this case. As the Chamber explained in its earlier brief, many of its members have been targeted by plaintiffs suing under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. These lawsuits, based on conduct occurring in more than 60 countries, have maligned routine business activities as "violations of international law" actionable in U.S. courts. By purporting to hold companies liable for workaday transactions half a world away, these ATS suits have not only had a pernicious effect on businesses—both at home and abroad—but also on U.S. foreign policy. To highlight those troubling consequences, the Chamber filed an *amicus* brief in this case last Term and has filed many more in ATS cases here and in the lower courts.[2] The Chamber continues to urge the Court to rule, regardless of its conclusion on extraterritoriality, that there is no corporate liability under the ATS.

To be clear: The Chamber unequivocally condemns violations of human rights. But as in the first round of briefing, the question here is not whether such wrongs occurred. Rather, it is whether Congress intended the ATS to reach across national borders, bestow on U.S. judges the power to adjudicate claims arising within other nations, and invite the sorts of foreign disputes that the Framers who enacted the

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[2] *See* http://www.chamberlitigation.com/cases/issue/foreign-affairs-international-commerce/alien-tort-statute-ats.

ATS were keen to avoid. The answer on all counts is no. The decision below should be affirmed.

SUMMARY OF ARGUMENT

1. The governing rule of decision is clear: "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). None means none. Because the ATS provides no clear indication of extraterritorial application, that ends the inquiry. The ATS therefore does not apply to causes of action arising within the sovereign territory of other nations, regardless of whether the alleged tortfeasor is a citizen of, or has connections to, the United States. Because the Complaint here involves alleged torts occurring in Nigeria, the suit must be dismissed.

2. Petitioners and their *amici* insist the inquiry is more complicated, but each of their arguments is ultimately answered by *Morrison* itself. Petitioners, for instance, argue that the presumption does not apply to jurisdictional statutes. But *Morrison* reaffirmed that courts must "apply the presumption in all cases." 130 S. Ct. at 2881. And applying the presumption to provisions such as the ATS makes sense. After all, the ATS is not merely jurisdictional; it also identifies the type of substantive legal claim to which that jurisdiction attaches. And Congress said nothing about the extraterritorial reach of those substantive claims. Faced with such a statute, there is no reason for the Court to stray from the usual rule: For a statute to have global reach, Congress must clearly signal *somewhere* that it so intended.

Petitioners also argue that the presumption is trumped because the ATS applies on the high seas.

Not so. It is not at all a foregone conclusion that the ATS reaches the high seas. But the Court need not reach that issue because even if the ATS *did* reach the high seas, that would not prove that Congress intended the Act to reach conduct taking place on distant sovereign lands, potentially entangling the United States in any number of foreign conflicts. As *Morrison* explains, even "when a statute provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* at 2883 (emphasis added).

3. In an about-face from the United States' earlier view that the ATS categorically lacks extraterritorial application, the Solicitor General now argues for a multi-factored case-by-case approach. Under that approach, the Solicitor General envisions district courts examining a hodgepodge of variables to determine whether a "foreign-squared" ATS case—*i.e.*, one involving foreign events and foreign plaintiffs but a U.S. defendant—may proceed in federal court.

The Solicitor General's indeterminate approach should be rejected for multiple reasons. It flies in the face of *Morrison*. It flatly contradicts the Solicitor General's previous ATS briefs, which argued—correctly—that the ATS lacks extraterritorial effect regardless of the defendant's identity. It would destabilize corporate investment as well as U.S. foreign policy. It would trigger the very conflicts with foreign governments that the ATS was designed to avoid. It would create disincentives for U.S. companies to invest in developing nations. It would create perverse incentives for U.S. companies to move jobs offshore. And it would put those American companies at a substantial disadvantage vis-à-vis

their foreign competitors. That is because the Solicitor General would have this Court declare that only "foreign-cubed" cases—where *foreign* defendants are sued by foreign plaintiffs for torts committed on foreign soil—are categorically beyond the reach of the ATS. Under the Solicitor General's unprecedented view of extraterritoriality, Plaintiffs seeking a deep pocket in ATS cases could simply target U.S. companies, thus ensuring that they would face an intensified wave of ATS litigation while their foreign competitors would sidestep those costs altogether. This penalty for being an American company finds no support in logic, the text of the statute, or the previous positions of the Solicitor General.

The Court should reject the invitation to leave the door open to an uncertain universe of extraterritorial ATS suits. It should squarely resolve the question now—holding that the ATS has no extraterritorial application—so that all businesses, domestic and foreign, may proceed with investment abroad free from the cloud of litigation risk that the current ATS regime has created.

ARGUMENT

I. DISTRICT COURTS LACK JURISDICTION TO ADJUDICATE EXTRATERRITORIAL ATS SUITS.

A. The ATS Has No Extraterritorial Reach.

1. The Law Requires A Clear Indication Of Extraterritorial Reach.

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*)

(quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption against extraterritoriality is so "longstanding" that it dates back to the founding generation, when the ATS was enacted. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (describing the importance of not violating "the independence and sovereignty of foreign nations"); *Rose* v. *Himeley*, 8 U.S. (4 Cranch) 241, 259 (1808). The presumption's continued vitality underscores that today, just as at the Founding, the Judiciary must guard against "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. And it applies "in all cases," even if there is no "risk of conflict between the American statute and a foreign law" and even if Congress clearly has the raw power to legislate extraterritorially on the issue in question. *Morrison*, 128 S. Ct. at 2877-78, 2881.

Under *Morrison* and its predecessors, the question in cases seeking extraterritorial application is not whether Congress *could* regulate particular conduct abroad, as some *amici* have suggested; it is whether Congress actually did so. And if Congress in fact wants to do so, it must do so clearly: "When a statute gives no *clear* indication of an extraterritorial application, it has none." *Morrison*, 128 S. Ct. at 2878 (emphasis added). Congress, of course, need not actually say " 'this law applies abroad' " in order to give a statute extraterritorial reach—but at the same time hints and "uncertain indications" will not do. *Id.* at 2883.

2. The ATS Offers No Such Indication.

The ATS does not provide the "clear statement," *id.*, that this Court requires to overcome the pre-

sumption against extraterritoriality. The statute provides jurisdiction for federal district courts 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. This "terse provision" is "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." *Sosa*, 542 U.S. at 692. But as this Court held in *Sosa*, it also has a substantive element: With its enactment, Congress permitted the federal courts to recognize certain limited substantive violations of law. The question, then, is whether Congress provided a clear statement of extraterritorial intent *anywhere* in the Act, either as to its jurisdictional or its substantive reach. The answer is no.

Missing in the Act is any indication that Congress intended federal district courts to exercise their jurisdiction over persons engaged in activities taking place wholly within another sovereign's borders. Certainly the words "any civil action" do not suffice to defeat the presumption. *See United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (reaching same conclusion with respect to the words "any person"). Nor do the statute's references to "alien[s]" or "the law of nations" carry the day. This Court has held that the word "alien" does not suffice to overcome the presumption; without more, it merely permits a particular class of plaintiffs to bring suit. *See Aramco*, 499 U.S. at 255 (Title VII did not apply extraterritorially despite the fact that, by its terms, it protects aliens). Likewise, Congress's use of international-sounding terms, such as "the law of nations," does not dictate extraterritorial application where the terms just as easily can refer to domestic application. *See id.* at 251 ("[E]ven statutes that

contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not apply abroad").

That is the situation here. An "alien" certainly could sue an individual under the ATS for a "law of nations" violation that occurred in the United States. (Indeed, as we discuss below, that is what Congress had in mind when it enacted the statute.) The terms "alien" and "law of nations" thus are consistent with domestic application. They do not provide the "clear indication of an extraterritorial application" required to overcome the presumption. *Morrison*, 128 S. Ct. at 2878.

And they are a far cry from the sorts of statutory phrases that *do* overcome the presumption—namely, phrases that can only be understood to contemplate application to conduct abroad. *See*, *e.g.*, Torture Victim Protection Act, 28 U.S.C. § 1350 note (defining a defendant as one who acts under color of law of "*any foreign nation*" and a plaintiff as one who has exhausted his remedies "*in the place in which the conduct giving rise to the claim occurred*") (emphasis added). As Judge Kavanaugh recently explained: "[T]he mere fact that statutory language could plausibly apply to extraterritorial conduct does not suffice to overcome the presumption against extraterritoriality. Otherwise, most statutes, including most federal criminal laws, would apply extraterritorially and cover conduct occurring anywhere in the world." *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

But unlike the criminal prohibitions Judge Kavanaugh described, the petitioners cannot even point to some positive-law prohibition of ambiguous geo-

graphic reach. Instead, they rely on a provision through which Congress at most accepted that federal courts would engage in common-law recognition of certain limited substantive rules. To infer an extraterritorial intent from that delegation to the Judiciary would not only be unprecedented; it would offend the basic separation-of-powers principles that animate the presumption against extraterritoriality. After all, if the presumption requires *Congress* to speak clearly, and Congress does not do so, it makes little sense for *courts*, exercising common-law powers, to claim the extraterritorial reach that was within Congress's power to provide. *See Sosa*, 542 U.S. at 726 ("[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law.").

The ATS's history and context confirm that Congress never intended such a result. As this Court explained in *Sosa*, the ATS was borne of a problem dating to the Articles of Confederation. The United States at that time lacked the authority to remedy violations of the law of nations on its own soil. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716-717 (2004); J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed. 1893) (Continental Congress could not "cause infractions of treaties, or of the law of nations to be punished."). That posed colossal diplomatic problems: At least twice in the 1780s, foreign diplomats suffered invasions of their customary rights on U.S. soil and Congress could not ensure redress. *See Sosa*, 542 U.S. at 717. The First Congress responded by enacting the ATS. *Id.*; *see also id.* at 720 ("Uppermost in the legislative mind appears to have been offenses against ambassadors."). Congress, in short, "was concerned about aliens who

were injured in the United States in violation of customary international law"—not those injured abroad by foreign actors. *Doe*, 654 F.3d at 77 (Kavanaugh, J., dissenting).

Finally, the ATS's purpose confirms that the statute was not meant to apply extraterritorially. As the Solicitor General has observed in the past, the ATS was designed " 'to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations.' " Br. of U.S. as Respondent, *Sosa* v. *Alvarez-Machain*, No. 03-339, 2004 WL 182581, at *49 (Jan. 23, 2004) (U.S. Sosa Br.) (quoting *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring)); *accord Sosa*, 542 U.S. at 715-718. Applying the ATS to cases premised on foreign conduct threatens the very foreign-relations difficulties the statute was designed to avoid. Indeed, foreign nations—including the U.K., Switzerland, and Germany—have frequently objected that the ATS violates their rights to regulate conduct in their own territory. *See Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1283 (2011); *see also* Br. of the Governments of the United Kingdom of Great Britain & Northern Ireland & the Kingdom of the Netherlands 32-34, *Kiobel*, No. 10-1491 (June 13, 2012) (UK-Netherlands Br.). The statute's modest purpose explains why Congress provided no "clear statement of extraterritorial effect" when enacting the ATS. *Morrison*, 128 S. Ct. at 2883.

B. Petitioners Seek An Unwarranted Extraterritorial Application Of The ATS.

For the reasons above, the ATS does not apply extraterritorially. That conclusion dooms petitioners'

case because the claims they advance require extraterritorial application.

Morrison explained that allegations of some domestic activity—even a substantial amount of domestic activity—do not necessarily render a case domestic for purposes of the extraterritoriality canon. 130 S. Ct. at 2884-87. After all, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* at 2884. Instead, the Court held, Congress's statutory goals must drive the analysis. Where a complaint alleges activity transcending national borders, the question whether the case involves extraterritorial application of a statute turns on two factors: the statute's "focus" and whether the event on which the statute focuses occurred abroad. *Id.* at 2884-85. If it did, then the application is extraterritorial.

Applying that test, *Morrison* determined that the plaintiffs were seeking to apply Section 10(b) of the Securities Exchange Act extraterritorially. The Court explained that Section 10(b) "focuse[s]" on actual "purchases and sales of securities," not on underlying conduct such as "the place where the deception originated." *Id.* at 2884. A case in which the purchase of securities was consummated abroad thus sought extraterritorial application, despite the fact that the defendants allegedly "engaged in * * * deceptive conduct" and "made misleading public statements" in the United States. *Id.* at 2883-84. Because Section 10(b) did not apply extraterritorially, the case had to be dismissed. *Id.* at 2888.

The test set forth in *Morrison* shows why petitioners' extraterritorial application of the ATS is imper-

missible. The ATS's "focus," *Morrison*, 130 S. Ct. at 2884, is on "a tort only[.]" 28 U.S.C. § 1350. The question, then, is whether the "tort[s]" alleged here occurred abroad. The answer is yes. Plaintiffs alleged torts such as extrajudicial killing and property destruction (though the property destruction claim was dismissed by the District Court). They alleged, in other words, torts involving bodily harm and harm to property. Yet this Court has already explained in *Sosa* that the "place of wrong for torts involving bodily harm" and "torts involving harm to property" is "*the place where the harmful force takes effect upon the body*." 542 U.S. at 706 (quoting Restatement (First) of Conflict of Laws § 377 note 1 (1934)) (emphasis in Restatement); *accord id.* at 705 n.3 (" 'Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred.' ") (quoting Restatement (Second) of Conflict of Laws § 412 (1969)); *American Safety Cas. Ins. Co.* v. *City of Waukegan*, 678 F.3d 475, 479-480 (7th Cir. 2012) (Easterbrook, J.) (under state and federal law "the tort occurs when its last element comes into being").

Here there is no allegation that any "harmful force t[ook] effect" on any individuals or property within the United States. *Sosa*, 542 U.S. at 706. To the contrary, the "last event" of every alleged tort, *id.* at 705 n.3, occurred in Nigeria. Petitioners thus seek an extraterritorial application of the ATS. That application is impermissible given the statute's lack of extraterritorial reach.

C. Petitioners' Contrary Arguments Should Be Rejected.

Petitioners advance several arguments aimed at steering the Court away from straightforward application of its extraterritoriality jurisprudence. These arguments are foreclosed by *Morrison* and should be rejected.

1. The Usual Presumption Against Extraterritoriality Applies To A Jurisdictional Statute Like The ATS.

Petitioners argue that the presumption against extraterritoriality "does not apply to jurisdictional statutes." Pet. Supp. Br. 34-35. That argument—for which petitioners offer no support, save an inapposite reference to *Morrison*—has no merit.[3] This Court has made clear that the presumption applies "*in all cases*," *Morrison*, 130 S. Ct. at 2881 (emphasis added)—not "in all cases minus certain jurisdictional statutes."

Applying the presumption to a jurisdictional statute like the ATS makes particularly good sense. That is because the Act does not merely confer

[3] Petitioners cite *Morrison* for their position on the theory that the Court "did not apply the presumption to the jurisdictional provisions of the Securities Act." Pet. Supp. Br. 34. That argument is misguided. *Morrison* had no need to—and did not—address the extraterritorial effect *vel non* of the Act's jurisdictional provisions, because Section 10(b)'s lack of extraterritorial effect sufficed to resolve the case. *See* 130 S. Ct. at 2877. And while the Court said the Act's jurisdictional provisions gave courts "jurisdiction * * * to adjudicate *the question whether § 10(b) applies*" extraterritorially, *id.* (emphasis added), it nowhere suggested that those jurisdictional provisions themselves give the courts the power to reach events occurring overseas. The cited passage sheds no light on whether the presumption applies to jurisdictional statutes.

jurisdiction; instead—unlike the purely jurisdictional statutes to which Petitioners point, Pet. 34—it both grants jurisdiction and sets the parameters of the substantive offense that courts can recognize under common law: a violation of the law of nations. The question therefore remains whether Congress intended *that substantive offense* to encompass acts that took place half a world away—whether, in the words of the United States, Congress meant to give courts power "to project U.S. law into foreign countries through the fashioning of federal common law." Br. for U.S. as Amicus Curiae in Support of Petitioners, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008), No. 07-919 (Feb. 11, 2008), 2008 WL 408389, at *12 (U.S. Ntsebeza Brief). Under *Morrison*, the answer to that question hinges on whether Congress provided a clear statement of extraterritorial intent somewhere—anywhere—in the Act. Because the ATS lacks such a clear textual commitment to extraterritorial effect, this Court must presume Congress intended it to have none.

It is therefore irrelevant that the ATS is denominated a "jurisdictional" statute. What matters is whether the substantive norm over which Congress vested the district courts with jurisdiction is a norm that Congress intended to apply beyond U.S. borders.

Applying the usual presumption against extraterritoriality to this "jurisdictional" statute not only faithfully hews to *Morrison*, but it also avoids meaningless formalism. After all, from the perspective of a foreign sovereign, it is immaterial whether Congress creates U.S. authority over matters within the sovereign's territory through a separate "substantive" statutory provision or whether it incorporates the substantive proscription into a "jurisdictional"

provision like the ATS. Either way, it is an intrusion into the foreign sovereign's prerogatives. *See* Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation (Apr. 15, 2003) ("We consider it completely unacceptable that matters that are central to the future of our country *should be adjudicated in foreign courts* which bear no responsibility for the well-being of our country[.]") (emphasis added). As the *amicus* brief filed by the Netherlands and the United Kingdom observed: "[T]here is no reason why the risks to international comity are somehow less when a statute is labeled 'jurisdictional' rather than 'substantive.'" UK-Netherlands Br. 31.

For these reasons, the presumption against extraterritoriality applies to jurisdictional statutes like the ATS. The presumption requires Congress to speak clearly if it wants to provide U.S. courts with authority to rule on—and thus, effectively, to exercise control over—events overseas. *See Aramco*, 499 U.S. at 248. If a jurisdictional statute is triggered by specific prohibited conduct, and Congress does not specify where that conduct may occur, the courts should assume—as they do in every other context—that Congress does not intend to project U.S. authority into other sovereign nations. That approach best serves a fundamental purpose of the presumption: to avoid reading congressional ambiguity to produce "interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004).

Congress itself appears to share this understanding of the presumption. In the wake of *Morrison*, Congress amended jurisdictional provisions of the Securities Exchange Act and related statutes to provide

that "district courts of the United States * * * shall have jurisdiction" over certain types of actions involving "*conduct occurring outside the United States that has a foreseeable effect within the United States*" or "within the United States that constitutes significant steps in furtherance of the violation, *even if the securities transaction occurs outside the United States and involves only foreign investors*." Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010) (emphases added). Congress would have had no reason to enact this language if it believed the presumption inapplicable to jurisdictional statutes. More to the point, the amendments demonstrate that Congress got the message this Court sent in *Morrison*—"be clear about extraterritorial application or there won't be any"—and that Congress knows how to give a jurisdictional provision extraterritorial effect when it wants to. To back away from *Morrison*'s simple, clear rule is to undermine the "stable background" the Court intended *Morrison* to create. 130 S. Ct. at 2881.

2. The Presumption Is Not Trumped By Statutory Provisions Regulating Piracy.

Petitioners separately argue that even if the presumption applies, it is overcome because—in their view—the ATS reaches piracy, an extraterritorial offense. Pet. Supp. Br. 35-36. Echoing the D.C. Circuit majority's opinion in *Doe*, petitioners argue that respondents' extraterritoriality argument seeks "to apply a new canon of statutory construction," Pet. Supp. Br. 36, because there is supposedly "no authority supporting the existence of a presumption that a statute applies to the high seas (e.g., piracy) but not to foreign territory." 654 F.3d at 22.

Petitioners are wrong. Even if their premise is indulged—that the ATS actually reaches piracy[4]—that would say nothing about the extraterritorial reach of the ATS to violations beyond piracy. The reason: This Court in *Morrison* clarified that even "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." 130 S. Ct. at 2883; *accord id.* at 2883 n.8 (Congress "knows * * * how to limit [extraterritorial] effect to

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[4] The ATS by its terms does not say, or even suggest, that it applies to piracy; nor is there any legislative history suggesting that it does. *See Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) ("The debates over the Judiciary Act * * * nowhere mention the provision, not even, so far as we are aware, indirectly."). Moreover, Section 9 of the First Judiciary Act—the multi-faceted provision of which the ATS is just one clause—indicates that the ATS in fact does *not* apply to piracy. That is because two separate clauses of Section 9 *explicitly* give district courts "cognizance of [certain] crimes and offences * * * upon the high seas" and of "civil causes of admiralty and maritime jurisdiction * * * within their districts as well as upon the high seas." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Therefore, the First Judiciary Act vested the district courts with jurisdiction over claims for piracy occurring beyond the immediate borders of the United States. But that express grant of extraterritorial power did not reside in the clause that has since become known as the ATS. Nor, unlike those earlier clauses in Section 9, does the ATS clause say anything about the "high seas" or foreign lands. That is significant, because "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). *See also* T. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 847 (2006) ("[T]he evidence indicates that the ATS was addressed only to the safe-conduct violation * * *. Ambassadorial infringements were addressed by section 13, which set forth the Supreme Court's original jurisdiction; piracy was addressed by the admiralty statute, a clause preceding the ATS in section 9 of the Act.").

particular applications."). The Court explained, in other words, that a statute can have *limited* extraterritorial reach, and that that congressional intent for limited extraterritorial reach does not knock the presumption out altogether.

That principle fatally undermines petitioners' argument. If the ATS was intended to have "some extraterritorial application," *id.* at 2883—namely, to piracy—that would not suggest an intent to apply the ATS within the territory of foreign sovereigns across the globe. Far from it: Piracy by definition occurs on the high seas, "out of the jurisdiction of any particular state." Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113 (1790); *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (Story, J.). As Judge Kavanaugh pointed out, the high seas "are 'the common highway of all nations,' governed by no single sovereign," and often fall within the jurisdiction of the federal courts. *Doe*, 654 F.3d at 78-79 (Kavanaugh, J., dissenting) (quoting *The Apollon*, 22 U.S. at 371). Moreover, because no single sovereign can claim exclusive authority over the high seas, "[a]pplying the ATS to conduct on the high seas does not pose the risk of conflicts with foreign nations that the presumption against extraterritoriality and the ATS itself were primarily designed to avoid." *Id.* at 78. It therefore makes perfect sense that Congress could have understood ATS jurisdiction to extend to the high seas but not to foreign territory. And under *Morrison*, that limited, specific extraterritorial application would not eliminate the presumption altogether. The presumption would still "operate[ ] to limit" the extraterritorial application "to its terms." 130 S. Ct. at 2883.

Thus to say that respondents seek a "new canon" is quite wrong; they seek to apply the same canon this Court has long hewed to, including most recently in *Morrison*. It is petitioners who seek to blow past the canon's animating logic by proposing the following formulation: Congressional intent to apply a statute to a limited area of international concern—the high seas—should be read as congressional intent to apply the statute everywhere on Earth. That approach makes little sense in the context of a canon whose purpose is to "construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

II. THE SOLICITOR GENERAL'S APPROACH CONTRADICTS *MORRISON*, CONFLICTS WITH THE U.S. GOVERNMENT'S PRIOR POSITIONS, AND WOULD HARM U.S. BUSINESS AND FOREIGN POLICY.

The Solicitor General's supplemental brief skips by the extraterritoriality canon altogether and argues that federal courts, employing a collection of indeterminate factors, should decide on a case-by-case basis whether to adjudicate extraterritorial ATS claims. U.S. Supp. Br. 3. Applying its amorphous test, the Solicitor General suggests that courts in certain cases may be able to adjudicate extraterritorial ATS claims involving U.S. corporate defendants. That approach should be rejected. It cannot be reconciled with this Court's cases or with the Solicitor General's past positions. It is unworkable. And it risks serious harm to U.S. businesses and U.S. foreign policy interests, as the United States itself has recognized in previous briefs.

A. The Solicitor General's Common-Law Formulation Is Unprecedented And Fatally Indeterminate.

The Solicitor General declines to apply the presumption against extraterritoriality. U.S. Supp. Br. 3. Instead, he forges ahead with a common-law test of his own invention: He argues that courts should decide on a case-by-case basis whether to hear extraterritorial ATS claims, picking and choosing from among the following factors in making their decision: "the modern conception of the common law"; the "evolution in the understanding of the proper role of federal courts in making that law"; the "general assumption that the creation of private rights of action is better left to legislative judgment"; "the potential implications for the foreign relations of the United States"; the possibility of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; "the absence of a congressional mandate"; "the practical consequences of making a cause [of action] available to litigants in the federal courts"; the citizenship of the defendants; the location of the alleged conduct; and the role of foreign sovereigns in that conduct. *Id.* at 3-4, 13-21 (citations omitted).

The Solicitor General admits that this formulation "calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion." *Id.* at 6. Applying his test, he argues that courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct." *Id.* at 21. But the Solicitor General would leave the door ajar for other

extraterritorial ATS claims, including in cases "where the defendant is a U.S. national or corporation." *Id.*

The Solicitor General's position is problematic on many levels. First and foremost, it cannot be reconciled with *Morrison*. That decision held that the canon applies "in all cases." 130 S. Ct. at 2881. And yet the Solicitor General simply declines to apply the presumption to the ATS. U.S. Supp. Br. 3. That will not do. For the reasons already given, the presumption should apply here as it does in any other case. And importantly, the presumption leaves no room for the distinctions the Solicitor General draws between "foreign squared" cases involving U.S. defendants and "foreign cubed" cases involving foreign defendants. That is so because under *Morrison*, the key question is whether the event on which the statute "focuses"—here, a tort—occurs abroad. *See supra* at __. That question does not turn on the defendant's nationality. *Morrison* itself made that clear: It held that plaintiffs were seeking to apply the Securities Exchange Act extraterritorially, despite the fact that the case involved "American defendants" and alleged conduct in the United States. 130 S. Ct. at 2875, 2883-84. Just so in ATS cases. If the tort at the heart of a plaintiff's suit occurred abroad, the plaintiff seeks an extraterritorial application—and the suit cannot be maintained—regardless of whether the defendant is a U.S. or foreign corporation.

Second, the Solicitor General's proposed approach is unworkable. Indeed, it suffers from the precise flaws this Court identified with the test at issue in *Morrison*: It is "complex in formulation and unpredictable in application," it is "not easy to administer," and it would result in "judicial-speculation-made-

law" that forces courts to "guess anew in each case." 130 S. Ct. at 2878-79, 2881. As this Court wrote in *Morrison*: "There is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases * * * is not necessarily dispositive in future cases.' " *Id.* at 2879 (citation omitted). That describes the Solicitor General's "test" perfectly, by his own admission: He writes that "the question whether a court should fashion a federal common-law cause of action" under the ATS for extraterritorial violations "calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion." U.S. Supp. Br. 6. The test's malleability is as "damning" here as it was in *Morrison*.

The extraterritoriality canon's power lies in its simplicity and predictability. *See Morrison*, 130 S. Ct. at 2881 (the canon "preserv[es] a stable background against which Congress can legislate with predictable effects."). The Solicitor General's common-law mélange of factors, by contrast, would invite needless confusion in an area of law that demands certainty—particularly for U.S. businesses planning international investment.

Third, the Solicitor General's proposed approach—ignoring the presumption against extraterritoriality in favor of a case-by-case approach—is in flat conflict with its approach in previous ATS briefs to this Court. In *Sosa*, for example, the United States wrote that "Section 1350 does not apply extraterritorially to claims based on alleged violations of international law occurring in a foreign country" and that "[n]othing in Section 1350, or in its contemporary

history, suggests that Congress contemplated that suits would be brought based on conduct against aliens in foreign lands." U.S. Sosa Br., 2004 WL 182581, at *10, *48. That is, nearly verbatim, respondents' position here. Likewise, in *Ntsebeza*, the United States wrote that the presumption applies "*a fortiori*" to a case, like this one, where the question is whether Congress has given courts power "to project U.S. law into foreign countries through the fashioning of federal common law." U.S. Ntsebeza Brief, 2008 WL 408389, at *12. Just so. The Solicitor General's sudden epiphany that the presumption does *not* apply to ATS cases does not just contradict *Morrison*; it contradicts the simple, linear extraterritoriality analysis the United States previously and powerfully advanced before this Court.

B. The Solicitor General's Test Would Impose Undue Hardships On American Businesses And The U.S. Economy.

The results of the Solicitor General's test are as troublesome as the test itself. The Solicitor General suggests that the door be left ajar for ATS cases involving foreign conduct "where the defendant is a U.S. national or corporation." U.S. Supp. Br. 21. But that approach would do nothing to ameliorate the serious harms that the current ATS regime imposes on U.S. businesses, U.S. foreign policy, and developing countries—harms the Solicitor General himself has warned about in past briefs. In fact, it would exacerbate them.

The Chamber's prior brief pointed out that many recent ATS suits amount to "bids to block corporations from investing in, or doing business in, countries with poor human-rights records" and are the

equivalent of attempts " 'to impose embargos or international sanctions through civil actions in United States courts.' " Chamber Br. 8 (quoting *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009)). Such quasi-sanctions are particularly harmful, as the Solicitor General himself has observed in the past, because they "interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." U.S. Ntsebeza Brief, 2008 WL 408389, at *21. For example, "in the 1980s, the United States * * * urged companies to use their influence to press for change away from apartheid, while at the same time using limited sanctions to encourage the South African government to end apartheid"; such policies "would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence." *Id.*

The Solicitor General, in short, has recognized that permitting ATS actions in these circumstances unfairly punishes U.S. companies and undermines American foreign policy. And yet the Solicitor General's newly-minted approach to extraterritoriality, like the approach proposed by Petitioners, would allow precisely those same actions to continue unabated.

The Chamber's prior brief likewise demonstrated that overseas application of the ATS can deter investment in developing nations, harming both U.S. companies and the developing nations themselves. Chamber Br. 23-27. That is so because the risk of ATS suits can dissuade corporations from "investing in countries with a poor human rights record," D.

Diskin, Note, *The Historical & Modern Foundations for Aiding & Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809 (2005), and it is often those very nations that most desperately need foreign investment. *See* Sec. of State Hillary Clinton, Remarks at the UN Conference on Sustainable Development Plenary, June 22, 2012 (noting that official development assistance accounts for only 13 percent of the capital flow to developing nations and that "private sector investments * * * have catalyzed more balanced, inclusive, sustainable growth");[5] Sec. of State Hillary Clinton, Remarks at the Business Forum Promoting Commercial Opportunities in Iraq, July 3, 2011 (to ensure prosperity and stability for Iraq, "we need to work to make sure that the investments are there that will help Iraq chart that kind of future.").[6] Again, the Solicitor General has agreed in the past, pointing out that "the prospect of costly litigation under Section 1350 * * * may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most impact on economic and political conditions," U.S. Sosa Br., 2004 WL 182581, at *44, and that deterring foreign investment in this way "could have significant, if not disastrous, effects on international commerce." U.S. Ntsebeza Brief, 2008 WL 408389, at *3 (citation omitted). That was indeed part of the reason the Solicitor General argued in past cases that the ATS has no extraterritorial effect. *See id.* at *12. The Solicitor General reverses course here without ex-

[5] *Available at* http://www.state.gov/secretary/rm/2012/06/193910.htm.

[6] *Available at* http://www.state.gov/secretary/rm/2011/06/164954.htm.

plaining why the harmful consequences it identified in past cases would not now materialize.

The Chamber's prior brief demonstrated that the current ATS regime creates unique and disproportionate risks for *all* corporations: The filing of an ATS case—no matter how tenuous its allegations—can topple corporate stock values and debt ratings, damage a company's reputation, produce massive litigation expenses, and coerce the company into settling even dubious claims at substantial cost to shareholders. Chamber Br. 14-21. The Solicitor General's approach would leave all of these risks in place for U.S. companies—and in fact, it likely would make them worse. Under the Solicitor General's theory, *American* companies may be proper defendants in cases involving torts abroad, but *foreign* companies would not. American companies thus would bear the risks and costs alone. That, in turn, likely would mean *more* total ATS litigation for U.S. companies; plaintiffs would have no one else to target. It also would "plac[e] U.S.-based firms at a competitive disadvantage in world markets." E. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 155 (2003). After all, costly regulation applicable only to one nation's corporations operating abroad, and not to those corporations' competitors, "puts th[ose] corporations at a competitive disadvantage with other countries' corporations." S. Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises*, in *Liability of Multinational Corporations under Int'l Law* 75, 82 (M. Kamminga & S. Zia-Zarifi eds., Kluwer Law Int'l 2000). Congress has been sensitive to that concern. *See*, *e.g.*, *Carpet Group Int'l* v. *Oriental Rug Imps. Ass'n*, 227

F.3d 62, 71 (3d Cir. 2000) ("Congress enacted [a foreign trade statute] for the purpose of * * * relieving exporters from a competitive disadvantage in foreign trade."). The Solicitor General's approach ignores it altogether.

Finally, the Solicitor General's approach needlessly creates a new risk: that U.S. corporations will create foreign subsidiaries to run their overseas investments, thus costing the U.S. economy jobs. Faithfully interpreting the ATS to lack extraterritorial effect avoids this risk.

It is inherent in the concept of private business that they will seek to minimize avoidable costs—whether imposed by taxation, litigation, or otherwise—where lawful to do so. And one way to do so is to relocate operations to avoid expensive regulatory regimes. That sort of relocation has been a feature of the interplay between regulation and business for decades. *See*, *e.g.*, T. Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 Bus. Law. 161, 192 (2007) ("The costs of complying with the Act are arguably very high. That is why * * * some corporations 'go private' or relocate abroad, and some foreign corporations avoid the United States."). And studies suggest that such capital flight is triggered by potential ATS liability. *See* A. Sykes, *Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis* 11 (draft Apr. 13, 2012; forthcoming, Geo. L.J.) (ATS liability "gives multinationals still further reasons to try and structure themselves so that any agents who commit wrongs will be deemed the responsibility of an impecunious foreign subsidiary or a subsidiary not subject to jurisdiction in the United States").

And yet that is the precise incentive the Solicitor General's approach offers to U.S. companies. Faced with the knowledge that *American* companies operating abroad would face the risk of costly ATS litigation while *foreign* companies would not, *see* U.S. Supp. Br. 21, an American company might well choose to create a foreign subsidiary to run its overseas operations. That would cost the U.S. economy jobs. For this reason, too, the Solicitor General's proposed approach is not just legally flawed but practically unwise.

* * *

The Court, in sum, should reject the invitation to leave the ATS picture muddled, with questions about extraterritorial application left to plague companies and courts down the road. Instead, the Court should hold that the ATS has no extraterritorial application, full stop. That simple, clear approach would well serve businesses and the judiciary by removing the uncertainty that, for too many years, has hampered investment and driven endless legal battles.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NEAL KUMAR KATYAL*
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA
LINDSAY D. BREEDLOVE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Counsel for Amicus Curiae
**Counsel of Record*

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