No. 10-3675

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Boimah Flomo, *et al.*,
Plaintiffs-Appellants

v.

Firestone Natural Rubber Co., *et al.*,
Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:06-cv-00627
The Honorable Jane Magnus-Stinson, Presiding Judge

Brief of *Amici Curiae* Professors of Legal History William R. Casto, Martin S. Flaherty, Robert W. Gordon, and John V. Orth in Support of Plaintiffs-Appellants and Reversal of the District Court

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are professors with expertise in legal history who have an interest in the proper understanding and interpretation of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and of the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Among the *amici* are several who filed an *amicus curiae* brief in *Sosa*,[2] the position of which the Supreme Court adopted in Part III of its opinion. *See id.* at 714. The court below looked to the reasoning of the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111(2d Cir. 2010), and rejected the proposition that corporations may be held liable for torts in violation of international law under the ATS. *Flomo v. Firestone Natural Rubber Co.*, 2010 U.S. Dist. LEXIS 108068 (S.D. Ind., Oct. 5, 2010); *Flomo v. Firestone Natural Rubber Co.*, 2010 U.S. Dist. LEXIS 112249 (S.D. Ind., Oct. 19, 2010). *Amici* respectfully submit this brief to demonstrate that the text, history, and purpose of the ATS show otherwise. *Amici* take no position on the elements of any particular international law violation or on which issues in ATS litigation are governed by international, as opposed to domestic, law.

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[1] No counsel for any party authored this brief in whole or in part, nor has counsel for this brief received fees from any party. The Harvard Law School International Human Rights Clinic paid the preparation costs for this brief.

[2] The *amici* who have joined both briefs are William R. Casto, Robert W. Gordon, and John V. Orth.

SUMMARY OF ARGUMENT

Section 9 of the First Judiciary Act provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to Establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73, 77 (1789). This provision, commonly known as the Alien Tort Statute ("ATS"), is now codified as 28 U.S.C. § 1350.[3]

The purpose of the ATS is clear from its text and history. The statute's text specifies the identity of the plaintiff ("an alien") and allows cases to proceed for violations of international norms (rights recognized by "the law of nations or a treaty of the United States"). Notably, the statute says nothing about the identity of the defendant and places no restriction on the type of international norm that can be violated, meaning the norm need not be criminal in nature ("all causes"). The history indicates that the First Congress thought it crucial to provide a federal forum to discharge the duty of the nation, to avoid potentially hostile state courts, and to promote uniform interpretation when dealing with violations of the law of

[3] As presently codified, § 1350 reads: "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." 28 U.S.C. § 1350. It has never been suggested that any change in wording upon codification was intended to alter the scope of this provision. Because this brief is concerned with the original understanding of the ATS, discussion refers to the original text.

nations. Thus, interpreting the ATS to not allow cases against corporations would run counter to these original purposes of the statute.

Contemporaneous interpretations show that the conduct did not have to be criminal for jurisdiction to lie under the ATS. Courts looked at international violations, not exclusively at international "crimes" when considering claims under the ATS. For example, the district court's opinion in *Bolchos v. Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607), upon which the Supreme Court relied in *Sosa*, *see* 542 U.S. at 720-21, involved a situation where no criminal prosecution was possible. In *Bolchos*, the violation of the law of nations was in fact not criminal at the time, but rather civil in nature.

Nor does the text of the ATS exclude corporate defendants. Attorney General William Bradford's 1795 opinion, 1 Op. Att'y Gen. 57 (1795), and *Bolchos* both suggest that Congress would not have distinguished between individuals and corporations. Legal actions for violations of the law of nations were not limited to natural persons in the late eighteenth and early nineteenth centuries, or subsequently. *See, e.g.*, 26 Op. Att'y Gen. 250 (1907) (stating that ATS suit would be appropriate against corporation after treaty body found that entity in violation of international law). Finally, even if the First Congress did not believe that corporations would be defendants under the ATS, it does not follow

that they should be immune from suit today, for the First Congress understood that the law of nations evolves.

ARGUMENT

I. The Text and History of the Alien Tort Statute Make Clear Its Purpose to Provide a Federal Remedy to Aliens Injured by Violations of the Law of Nations.

The inability of the national government to provide a remedy for violations of the law of nations was a major concern of American leaders in the years before passage of the ATS. *See Sosa v. Alvarez-Macahin*, 542 U.S. 692, 715-18 (2004). The historical record shows that by 1789, they were sufficiently concerned that they opened the federal courts for a remedy, giving the federal courts jurisdiction to enforce the law of nations in a civil action. The text of the ATS does not require criminal conduct and places no limit on the defendant that can be pursued.

A. One Purpose of the Alien Tort Statute Was to Provide a Federal Forum and Avoid Embroiling the Nation in Foreign Affairs Controversies.

In 1781, the Continental Congress passed a resolution recommending to the States that they provide punishment for violations of the law of nations and treaties to which the United States was a party. 21 Journals of the Continental Congress 1136-37 (1784) (G. Hunt ed. 1912). Congress did not consider criminal punishment adequate and recommended that the States "authorise suits to be instituted for damages . . . ." *Id.* at 1137; *see also id.* at 1136 (explaining that

"instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries recommitted by individuals"); *see also* *Sosa*, 542 U.S. at 716 (discussing 1781 resolution).[4]

The reliance on state enforcement proved problematic. James Madison complained that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." The Federalist No. 42, 264, 265 (J. Madison) (C. Rossiter ed. 1961); *see also* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (J. Elliot ed. 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts . . . ."); *Sosa*, 542 U.S. at 716-17 (discussing 1784 Marbois Affair and inability of national government to vindicate violations of the law of nations); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-93 (1986).

Thus, for the First Congress, the availability of a remedy in a federal court for "all causes" was crucial.[5] There is no indication that Congress would have

[4] These provisions from the 1781 resolution are the direct precursors of the ATS. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-91 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 226-28 (1996).

considered non-natural defendants, such as corporations, beyond the reach of the statute. Indeed, this would have defeated the statute's purpose to safeguard foreign policy.

B. The Text Provides that Alien Tort Statute Jurisdiction Is for "All Causes" of Action by Aliens in Violation of the Law of Nations.

To remedy the problems identified in the preceding years, *see* Part I.A, *supra,* the ATS provided federal courts with jurisdiction over "all causes" in violation of the law of nations.[6] The text demonstrates that the ATS was not limited to criminal conduct and did not exclude corporate defendants. Congress was focused not on whether the acts were criminal or the defendant's identity but rather on the right that had been violated (a right under "the law of nations or a

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[5] In *Chisholm v. Georgia*, Chief Justice John Jay also observed that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed . . . ." 2 U.S. (2 Dall.) 419, 474 (1793). Providing a federal forum would also promote uniform interpretation. *See* The Federalist No. 3 at 41, 43 (J. Jay) (C. Rossiter ed. 1961).

The ATS did not take power from states to adjudicate violations of the laws of nations, but ensured that federal courts would be open to foreigners. *See Sosa*, 542 U.S. at 714, 721-22; *see also* Judiciary Act, ch. 20, § 9, 1 Stat. at 77.

[6] In addition to the civil remedy provided under the ATS, the First Congress also criminalized certain violations of the law of nations. *See* An Act for the Punishment of Certain Crimes against the United States, ch. 9, §§ 8-12 & 28, 1 Stat. 112, 113-15, 118 (1790). Congress additionally gave the federal courts jurisdiction over common law crimes against the law of nations. Judiciary Act, ch. 20, §§ 9 & 11, 1 Stat. at 76-77, 78-79. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 73, 77 (1923); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003, 1016 (1985).

treaty of the United States") and the plaintiff's identity ("an alien"). *See* Judiciary Act, ch. 20, § 9, 1 Stat. at 77. Together, these two factors defined a class of cases sufficiently important for Congress to grant jurisdiction over "*all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77 (emphasis added).

Congress knew how to limit the jurisdiction of the federal courts with regards to conduct and the identity of defendants. *See, e.g.*, Judiciary Act, ch. 20, § 11, 1 Stat. at 78-79 (limiting conduct); *id.* ch. 20, § 9, 1 Stat. at 76-77 (same); *id.* ch. 20, § 9, 1 Stat. at 76-77 (limiting defendants to "consuls or vice-consuls"). If Congress had wished to limit the ATS to criminal conduct or particular defendants, it could have done so either by employing general language to that effect or by enumerating qualifying criminal violations or defendants. It did neither. Instead, it expressly provided that jurisdiction should extend to "all causes." *Id.* ch. 20, § 9, 1 Stat. at 77. As the Supreme Court noted in *Sosa*, the text of the ATS is a mixture of expansive and restrictive terms. *See* 542 U.S. at 718. Courts construing the act must give effect to both.

C. Causes of Action Under the Alien Tort Statute Are Not Limited to Criminal Conduct.

International violations, not solely international "crimes," were the focus of the ATS when it was first enacted. The "offences against the law of nations," 21 Journals of the Continental Congress 1137, with which the Continental Congress

was concerned in 1781, were not limited to criminal conduct. Blackstone used the phrase "offences against the law of nations" to connote any violation of that law without regard to whether it was criminal. Indeed, he stated that "offences against the law of nations can rarely be the object of the criminal law of any particular state." 4 W. Blackstone, Commentaries on the Laws of England 68 (1769); *see also Sosa*, 542 U.S. at 723 & 723 n.16 (discussing Blackstone and noting that the founding generation would have been familiar with using a mixture of remedies to address international offenses). Thus, when Congress recommended to the States in 1781 that they "authorise suits to be instituted for damages by the party injured" for offenses against the law of nations, 21 Journals of the Continental Congress 1137, its use of the word "offenses" did not limit that recommendation to criminal conduct. The ATS as passed in 1789 contained no requirement that "violations of the law of nations" must involve criminal conduct.

Bolchos v. Darrel, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607), an early case sustaining ATS jurisdiction, shows definitively that jurisdiction was not limited to conduct that could be criminally prosecuted. *See Sosa*, 542 U.S. at 720 (discussing *Bolchos*). A French privateer captured as prize a Spanish vessel carrying slaves mortgaged to a British citizen. In port, the mortgagee's agent, Darrel, seized and sold the slaves, and the privateer, Bolchos, sued for the proceeds.

The privateer's claim was based on Article 14 of the 1778 Treaty of Amity and Commerce with France, which provided:

> whatever shall be found to be laden by the Subjects and Inhabitants of either Party on any Ship belonging to the Enemys [sic] of the other or to their Subjects, . . . may be confiscated in the same manner, as if it belonged to the Enemy . . . .

Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-FR., art. XIV, Feb. 6, 1778, 8 Stat. 12, 21. Article 14 was a purely civil provision dealing with rights in captured property. The acts of the mortgagee's agent in seizing and selling the slaves were not criminal under the treaty or the law of nations. *See Bolchos*, 3 F. Cas. at 811. Yet the district court had no difficulty finding jurisdiction over the civil claim on the basis that it was "for a tort, in violation of . . . a treaty of the United States." *Id.* at 810; *see also* 1 Op. Att'y Gen. 57, 59 (1795) (stating federal remedy for tort action was permissible for "acts of hostility" arising out of episode in Sierra Leone even when criminal jurisdiction was in doubt); *Sosa*, 542 U.S. at 721 (citing Bradford's opinion for principle that "federal court was open" in such situations); 26 Op. Att'y Gen. 250, 254 (1907) (stating that ATS suit would be appropriate against a corporation after a treaty body found that entity in violation of international law).

II. The Alien Tort Statute Does Not Exclude Corporate Defendants.

The ATS limits who can be a plaintiff by confining jurisdiction to suits by "an alien." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. By contrast, the text places no limits on who can be a defendant.

Congress did not indicate that corporations could not be sued under the ATS. It was quite clear to Attorney General Bradford in 1795 that foreign corporations could bring ATS suits.[7] "[T]here can be no doubt," he wrote, "that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States . . . ." 1 Op. Att'y Gen. at 60. *Bolchos* further suggests that no distinction would have been drawn between individual and corporate defendants. Darrel, acting as agent for a British mortgagee, had seized and sold slaves who properly belonged to Bolchos. *See Bolchos*, 3 F. Cas. at 810-11. Although Darrel was an individual, it beggars belief that the district court would have decided differently and dismissed the case if the mortgagee had chosen a corporation as his agent.

Legal actions for violations of the law of nations were not limited to natural persons in the late-eighteenth and early-nineteenth centuries. In 1819, Congress provided for the forfeiture of ships engaged in "piratical aggression." Act of

[7] Although there is language in Blackstone suggesting that a corporation could not be a party to certain tort actions, such as for personal injury, Blackstone's limitations applied to corporations both as plaintiffs and as defendants. 1 Blackstone, at 476.

March 3, 1819, ch. 77, §2, 3 Stat. 510, 513-14, continued by Act of May 15, 1820, ch. 113, § 1, 3 Stat. 600, 600.[8] As Justice Story noted in *The Marianna Flora*, "piratical aggression by an armed vessel sailing under the regular flag of any nation, may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." 24 U.S. (11 Wheat.) 1, 40-41 (1825).

Such forfeiture proceedings were brought against the ship itself, and in *The Palmyra*, Justice Story rejected the argument that criminal proceedings against the captain or crew were a necessary precondition to the proceedings against the ship. "Many cases exist," Justice Story explained, "where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam." 25 U.S. (12 Wheat.) 1, 14 (1827).

Not only could legal actions for violations of the law of nations be brought against non-natural persons like ships, they could be brought irrespective of the innocence of those entities' owners. "It is not an uncommon course in the admiralty, acting under the law of nations," Justice Story explained, "to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *The Malek Adhel*, 43 U.S. (2

[8] Even earlier, Congress had provided for the prosecution, seizure, and forfeiture of ships engaged in the slave trade. *See* Act of March 22, 1794, ch. 11, § 1, 1 Stat. 347, 347-49; Act of March 2, 1807, ch. 22, § 2, 2 Stat. 426, 426.

How.) 210, 233 (1844); *see also The Little Charles*, 26 F. Cas. 979, 982 (C.C. Va. 1818) (No. 15612) (Marshall, C.J.) ("But this is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner.").

The weight of the textual and historical evidence suggests that the First Congress would have considered corporations to be proper defendants under the ATS, just as they considered ships to be proper subjects during their time. Even if this was not so, however, it would not mean that corporations are immune under the ATS today. Statesmen of the founding era understood that the law of nations had evolved and would continue to do so. *See generally* William S. Dodge, The Paquete Habana*: Customary International Law as Part of Our Law*, *in* International Law Stories 175, 194-95 (J. Noyes, L. Dickinson & M. Janis eds. 2007). Justice Wilson famously pronounced in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281; *see also Sosa*, 542 U.S. at 714 (quoting Wilson). As Justice Story observed, "[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at some time, it is to be concluded, that at no

subsequent period the principle can be considered as incorporated into the public code of nations." *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15551), *overruled on other grounds*, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). Indeed, at least as early as 1907—long before the advent of modern human rights litigation—Attorney General Charles Bonaparte concluded that an American corporation could be sued under the ATS for a tort in violation of a treaty of the United States. *See* 26 Op. Att'y Gen. 250.

CONCLUSION

The text of the ATS limits the jurisdiction of the federal courts in a number of ways. The plaintiff must be "an alien," and the suit must be for a "tort only in violation of the law of nations or a treaty of the United States." But neither the text, nor the history, nor the purpose of the ATS supports implying additional limitations. They do not support limiting the ATS to criminal conduct or excluding corporate defendants. Rather, the history and purpose of the ATS support what the text says: that jurisdiction extends to "*all causes* where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77 (emphasis added).

Dated: February 3, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Tyler R. Giannini, hereby certify, pursuant to F.R.A.P. 32(a)(7), that Plaintiffs-Appellants' brief complies with the type-volume limitation of Rule 32(a)(7)(B), that it was prepared using Microsoft Word in Times New Roman 14-point font with footnotes in Times New Roman 14-point font, and that there are 3,506 words in the brief and its footnotes, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: February 3, 2011

_/s/ Tyler R. Giannini____
Tyler R. Giannini

CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Tyler R. Giannini, hereby certify, pursuant to Fed. R. App. P. 31(e)(1), that a digital version this brief was furnished to the Court at the time the paper brief was filed.

Dated: February 3, 2011

_/s/ Tyler R. Giannini___
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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2011, I sent one original and two copies of the foregoing Brief of *Amici Curiae* Professors of Legal History in Support of Plaintiffs-Appellants and Reversal of the District Court to the Clerk of Court via Federal Express Next Day Air. I also hereby certify that I served via Federal Express Next Day Air two copies of the foregoing upon:

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