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

BRIEF OF *AMICI CURIAE* PROFESSORS OF LEGAL HISTORY BARBARA ARONSTEIN BLACK, WILLIAM R. CASTO, MARTIN S. FLAHERTY, ROBERT W. GORDON, NASSER HUSSAIN, STANLEY N. KATZ, MICHAEL LOBBAN, JOHN V. ORTH, AND ANNE-MARIE SLAUGHTER IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of 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 this 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 this Court adopted in Part III of its opinion. *See id.* at 713-14. The Second Circuit's majority opinion in *Kiobel v. Royal Dutch Petroleum Co.* rejected the proposition that corporations may be held liable under the ATS for torts in violation of international law. 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *and* 642 F.3d 379 (2d Cir. 2011). *Amici* respectfully urge that this Court recognize corporate liability under the ATS because a corporate exemption would be inconsistent with the text, history, and purpose of the statute.

[1] The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

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

SUMMARY OF ARGUMENT

In *Sosa v. Alvarez-Machain*, this Court recognized that the First Congress intended the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to provide jurisdiction over "private causes of action for certain torts in violation of the law of nations." 542 U.S. 692, 724 (2004).[3] The First Congress understood that this jurisdictional grant would be given "practical effect" through the common law of the time. *Id.* at 719-20.

To read a corporate exemption into the ATS would be inconsistent with the statute's plain text and contrary to congressional intent. The text creates a broad civil remedy ("all causes") for aliens and excludes no class of defendant from suit. The Founders established this federal forum to discharge the nation's duty and avoid potentially hostile state courts. The First Congress intended federal courts to give effect to the ATS by, first, drawing the norms governing prohibited conduct from the law of nations and, second, looking to common law to resolve questions left unanswered by the law of nations. *See Tel-Oren v.*

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[3] 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, ch. 20, § 9, 1 Stat. 73, 77 (1789). With small changes, it is now codified in 28 U.S.C. § 1350, but it has never been suggested that any change has altered the scope of the original provision. This brief is concerned with the original understanding of the ATS and thus refers to the original text.

Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). Specifically, the First Congress would have understood that issues such as corporate liability – a form of loss allocation based on agency principles[4] – were resolved domestically.

At the time of the Founders, courts did not exempt juridical entities from liability for violations of the law of nations. Cases against entities that resembled the modern corporation – including the British East India Company – show as much. Jurists were familiar with allocating losses to principals for their agents' violations of the law of nations; even corporate entities presumed themselves subject to suit in such circumstances.

The Founders likewise would not have understood incorporation to insulate corporate actors from liability for their agent's wrongful acts. As modern business corporations proliferated during the nineteenth century, courts applied established agency concepts to allocate loss and damages to the corporation (the principal) for the actions of its employees (the agents). Shortly after the adoption of the ATS, corporate liability for corporate agents' torts was

[4] Loss allocation is "a deliberate allocation of a risk. The losses caused by the torts of employees . . . are placed upon the employer because, having engaged in an enterprise . . . and sought to profit by it, it is just that he, rather than the innocent injured plaintiff should bear them; and because he is better able to absorb them, and to distribute them . . . ." W. Page Keeton et al., *Prosser & Keeton on Torts* § 69, at 500 (5th ed. 1984).

commonplace. Accordingly, this Court should reject the Second Circuit's ahistorical conclusion that the ATS does not recognize corporate liability.

ARGUMENT

I. THE FIRST CONGRESS PASSED THE ALIEN TORT STATUTE TO ENSURE A FEDERAL TORT REMEDY FOR VIOLATIONS OF THE LAW OF NATIONS

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, vests federal courts with jurisdiction to provide a tort remedy for violations of the law of nations. The First Congress intended the statute to accomplish several goals, including to forestall the appearance of American complicity in such violations. The First Congress did not pass the statute for mere "jurisdictional convenience" and understood that the common law would resolve questions regarding the tort remedy left unanswered by the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 (2004). This Court should not read a corporate exemption into the ATS. To do so would be inconsistent with the statute's plain text and contrary to congressional intent.

A. The Text of the Alien Tort Statute Does Not Exempt Any Class of Defendant

The best evidence of the congressional purpose is the statute's text. *See Sosa*, 542 U.S. at 718. The ATS identifies the plaintiff ("an alien") who may

invoke the federal courts' jurisdiction but is silent with regard to who may be sued. An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) (hereinafter Judiciary Act). Nothing in the statute's words can be read to limit jurisdiction to suits against natural persons. Significantly, the ATS deliberately extended jurisdiction to "all causes" in tort for violations of the law of nations. *Id.* This language evinces congressional intent to provide plaintiffs with broad remedies.[5] To exclude a class of

[5] "The broad wording of the statute clearly encompasses torts without regard to the place of their commission." William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 503 (1986) (hereinafter Casto, *Law of Nations*). All non-property torts were presumed actionable by the common law at the time, wherever the defendant could be found. Accordingly, the First Congress would have found it unnecessary to specify the extraterritorial application of the ATS. In 1789, Attorney General Bradford expressed "no doubt" that British citizens injured by a French raid on the British colony in Sierra Leone could find justice in U.S. Courts. 1 Op. Att'y Gen. 57, 57 (1795) (Any "company . . . injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort."). Bradford differentiated criminal offenses, which were confined to the jurisdiction of the injury, from civil liability, which followed the defendant. *See also* Brief for Vikram Amar et al. as *Amici Curiae*, *Sosa v. Alvarez-Machain*, 2004 WL 419425, 20 n.14 (2004); Casto, *Law of Nations*, at 503-04.

By the eighteenth century, these transitory tort principles were well established under English law. *See Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021, 1031 (K.B.); 1 Cowp. 161, 179 (Lord Mansfield). The Founders would have been familiar with these principles: Personal actions for all non-property torts

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defendant would run counter to this text; a suit against a corporation is undeniably a cause. *See Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 295 (Case No. 17,206) (C.C.D. Conn. 1800).

Had Congress intended to exempt particular defendants from ATS suits, it would have done so explicitly. Elsewhere in the Judiciary Act, Congress exercised its authority to restrict the type of defendant. *See* Judiciary Act, ch. 20, § 9, 1 Stat. at 77 (limiting defendants to "consuls or vice-consuls"). Excluding a class of defendant requires reading words into the text that Congress simply did not enact. No early interpreter did so, and neither should this Court. *See*, *e.g.*, 1 Op. Att'y Gen. 57 (1795) (not

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followed the defendant. *See Livingston v. Jefferson*, 15 F. Cas. 660, 664 (Case No. 8,411) (C.C.D. Va. 1811) (citing *Mostyn* for transitory nature of personal wrongs); *Pease v. Burt*, 3 Day 485, 488 (Conn. 1806) ("[A]ll rights of a personal nature are transitory. A right to personal property; a right to a personal action, whether founded on a contract, or on tort . . . extend to, and may be exercised, and enforced in, any other civilized country, where the parties happen to be . . . . Trover and trespass will lie here for injuries done to things personal in any part of the world." (counsel relying on *Mostyn*, 98 Eng. Rep. 1021, and *Rafael v. Verelst*, (1776) 96 Eng. Rep. 621 (K.B.); 2 Black. W. 1055)); *see also* The Federalist No. 82, at 491, 493 (Alexander Hamilton) (C. Rossiter ed., 1961). The drafter of the ATS, Oliver Ellsworth, applied transitory tort principles as a Connecticut judge. *See Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) ("Right of action [for a tort] against an administrator is transitory, and the action may be brought wherever he is found.").

distinguishing among defendants and noting that ATS plaintiffs could include a "company").[6]

B. In Enacting the Alien Tort Statute, Congress Vested Federal Courts with Jurisdiction to Provide a Meaningful Tort Remedy for Violations of the Law of Nations

Congress enacted the ATS as part of a broader effort to join the international community by embracing the law of nations. *See Sosa*, 542 U.S. at 714; *see also* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 483-84 (1989). The Founders had been frustrated by the Articles of Confederation's limited powers to address law of nations violations; similarly, they viewed previous efforts in state courts as ad hoc.[7] *Sosa*, 542 U.S. at

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[6] In another matter, Darrel, acting as agent for a British mortgagee, seized and sold slaves who legally belonged to plaintiff Bolchos. *See Bolchos v. Darrel*, 3 F. Cas. 810, 810-11 (Case No. 1,607) (D. S.C. 1795). It beggars belief that the court would have decided differently if the mortgagee had chosen a corporation as his agent.

[7] Early anti-piracy statutes exemplify the state enforcement problem. In the years between independence and constitutional ratification, at least four states passed resolutions implementing prohibitions against piracy in conformity with the law of nations. *See* Joel H. Samuels, *How Piracy Has Shaped the Relationship Between American Law and International Law*, 59 Am. U. L. Rev. 1231, 1235-37 (2010). Proposed amendments to the Articles of Confederation would have granted the Continental

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716-17; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violations of the Law of Nations*, 18 Conn. L. Rev. 467, 515 (1986). The Marbois affair showcased the Confederation's impotence in this respect.[8] In 1784, the Chevalier de Longchamps assaulted Mr. Marbois, the French legation Secretary in Philadelphia. "Eventually de Longchamps was brought to trial in state court, with the virtually powerless Congress limited to passing a resolution 'highly approv[ing]' the action." *Id.* at 492 (quoting 27 Journals of the Continental Congress 1774-1789, at 502-04 (G. Hunt ed., 1912)). At the 1787 constitutional convention, international relations concerns continued to resonate with the Founders. *Id.* at 493-94.[9]

Congress "sole and exclusive power" over piracy offenses as well as power "to annex suitable punishments . . . and . . . institute a federal Judicial Court." 31 Journals of the Continental Congress 1774-1789, at 497 (J.C. Fitzpatrick ed., 1934). However, the Continental Congress was unable to enact the amendment.

[8] In 1781, the Continental Congress "recommended [that states] . . . authorize suits to be instituted for damages by the party injured." 21 Journals of the Continental Congress 1774-1789, at 1137 (G. Hunt ed., 1912). This proved largely ineffective as only Connecticut heeded the call. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 228 (1996). These provisions from the 1781 resolution are the precursors of the ATS. *See* Casto, *Law of Nations*, at 490-91; Dodge, at 226-28.

[9] During the constitutional ratification process, another incident reaffirmed the necessity of a federal remedy. A New York police constable arrested a domestic servant in the Dutch Ambassador's household. The Dutch government sought relief

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To remedy such problems, the Constitution federalized control over foreign affairs, including through the courts. *See* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 583 (James Madison) (J. Elliot ed., 1836) ("We well know, sir, that foreigners cannot get justice done them in these [state] courts . . . ."). The Founders intended the federal government to handle matters involving aliens and the law of nations. *See*, *e.g.*, The Federalist No. 42, at 264 (James Madison) (C. Rossiter ed., 1961) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."); *see also* 13 Journals of the Continental Congress 1774-1789, at 284 (W.C. Ford ed., 1909) ("[T]he authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace."). The Founders recognized that rights and obligations under international law could be enforced through myriad domestic legal and political approaches. *See Henfield's Case*, 11 F. Cas. 1099, 1117 (Case No. 6,360) (C.C.D. Pa. 1793) (speech of Attorney General Randolph).

The Founders created a uniquely American system by distributing enforcement responsibility for international obligations among the three coordinate

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from Secretary of the Department of Foreign Affairs John Jay. Jay, in turn, could only recommend Congress pass a resolution urging New York to institute judicial proceedings. Casto, *Law of Nations*, at 494.

branches of the federal government. In particular, the Founders intended judicial remedies – including civil remedies through the ATS – to help implement the law of nations. *See* Slaughter, at 478; David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution*, *the Law of Nations*, *and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 939-40 (2010).[10] As a federal subject matter jurisdiction statute, the Founders ultimately viewed the ATS as a tool to allocate jurisdiction among state courts of general jurisdiction and federal courts of limited jurisdiction.[11] The nascent

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[10] As evidenced by the Marbois Affair, the Founders understood that an incident between two foreigners could create international tensions as easily as one between a citizen and a foreigner. *See* Slaughter, at 478-79. The Founders were also aware that state courts had jurisdiction over disputes between two foreigners. The Founders would not have intended suits between two foreigners to necessarily remain in state courts. *See* 10 *The Documentary History of the Ratification of the Constitution* 1398, 1406-07 (John P. Kaminski & Gaspare J. Saladino eds., 1993) ("Cannot we trust the State Courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen?" (quoting George Mason)); *see also* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 844 (1989). Indeed, federal courts of the time emphasized the importance of ensuring foreigners a remedy, so long as the defendant or his interests were within the jurisdiction. *See* 1 Op. Att'y Gen. 87, 87 (1799) ("It may be assumed, as a doctrine perfectly and incontrovertibly established, that the judicial power of a nation extends to every person and every thing in its territory . . . .").

[11] A holding that federal courts lack ATS jurisdiction over suits against corporations would not preclude litigation against corporations, which would continue in state courts. Indeed, the

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United States was free to so configure such enforcement mechanisms precisely because international law did not define the domestic means of enforcement. The Founders understood that international law has always left such questions to the sovereign. *See* 13 Journals of the Continental Congress, at 283.

C. The Founders Intended the Alien Tort Statute to Draw on Common Law Principles such as Agency to Give the Statute Practical Effect, Including a Meaningful Remedy

The First Congress intended the ATS to have "practical effect." *Sosa*, 542 U.S. at 719 (ATS not passed for "jurisdictional convenience"). Congress recognized that to fulfill this intent, courts would use domestic common law to resolve ancillary issues. For example, the Founders understood that a master was responsible for the torts of his agent. *See* 3 Matthew Bacon, *New Abridgment of the Law* 560-62 (4th ed. 1778) (citing agency liability cases). General tort principles as defined by domestic common law ensured that ATS claims would not be left "lying fallow."

ATS expressly provided plaintiffs a choice to pursue a remedy in "the courts of the several States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. To forbid plaintiffs from suing in federal court is an entirely different matter. Given the implications of ATS litigation for U.S. foreign relations, relegating adjudication of international law claims against corporations to state courts would contradict the statute's purpose.

Sosa, 542 U.S. at 719. Only in so relying on general tort principles could courts give practical effect to ATS claims.

The statute thus brought "torts in violation of the law of nations . . . within the common law of the time." *Sosa*, 542 U.S. at 714. The Founders were familiar with Blackstone's observation that "[t]he principal offences against the law of nations, [are] animadverted on as such by the municipal laws of England." 4 William Blackstone, Commentaries *68; *see Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796) (Chase, J.) ("The law of nations is part of the municipal law of Great Britain . . . ."); 1 Op. Att'y Gen. 68, *4 (1797) ("The common law has adopted the law of nations in its fullest extent, and made it a part of the law of the land."). To the Founders, animadversion "carried the broader implication of 'turn[ing] the attention officially or judicially, tak[ing] legal cognizance of anything deserving of chastisement or censure; hence, to proceed by way of punishment or censure.'" *Sosa*, 542 U.S. at 723 n.16 (quoting 1 *Oxford English Dictionary* 474 (2d ed. 1989)). The ATS animadverted upon the law of nations by giving the federal courts cognizance over such violations through a common law damage remedy. *See Sosa*, 542 U.S. at 714.

The First Congress would have expected the common law to resolve ancillary issues in order to fulfill the statute's remedial purpose. Indeed, because internationally constituted tribunals did not exist when the ATS was adopted, Congress could not have

intended courts to look to international bodies for guidance on issues such as corporate liability. The common law has historically resolved matters such as agency and loss allocation in law of nations cases, providing background principles to give effect when the law of nations was silent on a particular matter. *Cf.* Andre Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 Am. J. Int'l. L. 760, 795 (2007) ("Since international law determines only general principles, leaves much of the detail of the fashioning of relief to the domestic level, and relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context, different states will inevitably come up with different responses."); *The Mary Ford*, 3 U.S. (3 Dall.) 188, 190 (1796).[12] Thus, the Founders would have expected

[12] In the eighteenth century, customary international law, general principles of international law, and domestic law were not firmly distinct bodies of law as courts understand them today. Instead, all were part of the domestic law administered by judges (what *Sosa* called "the common law of the time," 542 U.S. at 714). To determine ancillary issues judges did not always identify the body of law on which they relied because all were viewed as part of this domestic common law. Courts drew on such common law principles for issues including agency to provide appropriate remedies. *See infra* Part II; *see also* James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 660-61 (1992) (discussing where remedy for trespass should be sought and citing *Le Caux v. Eden*, (1781) 99 Eng. Rep. 375 (K.B.); 2 Dougl. 595). Maritime cases were exemplary in this regard, involving both the law of nations and domestic law. *See* William Searle Holdsworth, *A History of English Law: The Judicial System* 570 (1903) ("[B]y the end of the seventeenth century this Law Merchant was

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that judges would apply legal principles of the time to provide a remedy for a wrong.

For example, in *Booth v. L'Esperanza*, Judge Bee applied domestic agency law to enforce a law of nations norm adjudging a prize of war. 3 F. Cas. 885 (Case No. 1,647) (D. S.C. 1798). Bee held that by the law of nations, "the captors acquired such a right [to the vessel] as no neutral nation could impugn, or destroy." *Id.* (quoting *The Mary Ford*, 3 U.S. at 198). Bee, however, applied "the laws of this state," South Carolina, to find that a slave following his master's orders maintained the master's possession of the vessel. *Id.* at 885-86; *see also Bolchos v. Darrel*, 3 F. Cas. 810, 810-11 (Case No. 1,607) (D. S.C. 1795) (discussing domestic common law doctrine of mortgagor rights in resolving ATS case).

II. INCORPORATION DID NOT EXEMPT JURIDICAL ENTITIES FROM LIABILITY, AND COURTS USED DOMESTIC LAW TO ALLOCATE LOSSES FOR INJURIES COMMITTED BY AGENTS IN VIOLATION OF THE LAW OF NATIONS

Sosa recognized that the ATS employs an overarching approach that combines international law

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being gradually absorbed into the general legal system of the country . . . . Jurisdiction was therefore assumed by the ordinary courts [in England] of law and equity."); *see also Sosa*, 542 U.S. at 715 (discussing law merchant and maritime law as part of U.S. law).

and domestic common law: International law defines the norm controlling the regulated conduct, while domestic common law governs remaining rules related to the tort remedy. *See Sosa*, at 720-21, 724; *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring). Thus, the Founders expected domestic law to fill lacunae when the law of nations was silent. Historically, domestic law has governed allocation of losses to corporations for injuries suffered as a result of violations of the law of nations.

Courts and corporate entities themselves did not presume that incorporation would insulate juridical entities from suit for law of nations violations. Although the Founders had not encountered corporations in their precise modern form, they were familiar with holding principals (including juridical entities) liable for their agents' misconduct, even when the principal itself had not directly committed the tort. For example, the East India Company could incur liability for its agents' torts under domestic principles of master and servant.[13] In maritime suits, the juridical entity of the ship was regularly held liable for violations of the law of nations by the captain or crew.

[13] As a general matter, once English law reached the relevant jurisdiction, such as a colony, questions of remedy were defined by English municipal law. *Dutton v. Howell*, (1693) 1 Eng. Rep. 17, 22-23 (H.L.); Shower P.C. 24, 32-33. The law of nations determined questions such as when a colony was considered "occupied" by the Crown, though English law operated to enforce its guarantees. *Id*.

Courts thus did not exempt juridical entities from liability for agents' violations of the law of nations.

A. Early English Corporations, Including the British East India Company, Were Held Liable for the Torts of Corporate Agents

The English corporation was domestically created and governed by letters patent, government charters granted for enumerated functions. *See Hotchkis v. Royal Bank of Scotland*, (1797) 2 Eng. Rep. 1202, 1203 (H.L.); 6 Bro. P.C. 465, 466. Like modern corporations, early incorporated entities were legal persons governed by domestic law. *See* Pet. of Royal Bank of Scotland (July 18, 1728) at 3 (corporations were "considered as one Person" before the law). As such, the corporations were "capable in law to sue and be sued." *Hotchkis* at 465; *see Cojamaul v. Verelst*, (1774) 2 Eng. Rep. 276, 277 (H.L.); 4 Bro. P.C. 407, 408 (company has powers to "sue and be sued"); *Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245, 1246 (Ch.); 1 Bro. C.C. 469, 471 (treating Company as similar to natural persons with regards to timing for discovery and stating "[a]t the outset I thought the cases of a corporation and of an individual were different; but I am glad to have the authority of Lord *Talbot*, that they are not.").

Furthermore, incorporation did not shield a juridical entity from liability for the actions of its

agents. The East India Company was no exception.[14] In 1666, Thomas Skinner sued the Company in London for "robbing him of a ship and goods of great value, . . . assaulting his person to the danger of his life, and several other injuries done to him" by Company agents beyond the realm. *The Case of Thomas Skinner*, *Merchant v. The East India Company*, (1666) 6 State Trials 710, 711 (H.L.). Skinner's claims were based, in part, on violations of the law of nations. *Id.* at 719 ("the taking of his ship, a robbery committed *super altum mare*").[15] The House of Lords feared that failure to remedy acts "odious and punishable by all laws of God and man" would constitute a "failure of justice." *Id.* at 745. Faced with "a poor man oppressed by a rich company," *id.*, the Lords decreed that the "Company should pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000*l.*" *Id.* at 724.

The Company's liability turned on the issue of corporate agency. The Company conceded liability for

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[14] Of all eighteenth century business entities, the East India Company "resembled more closely the modern corporation, with limited liability, transferable shares, and trading capital owned in the name of the company." Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* 12 (1918).

[15] In the Founding era and before, the taking of a ship on the high seas (*super altum mare*) was considered piracy. 1 James Kent, *Commentaries on American Law* 171 (1826).

agents' acts undertaken by its order or with its knowledge:

> [T]he Company are not liable for the debt or action of their factors, *unless done by their order*; and if the Company should be liable to every one's clamours, and pretences for wrongs done, or pretended to be done by their factors (when if any such thing were done the same was not by their *order or knowledge*, nor applicable to their use and account) the same will necessarily impoverish and ruin the Company: And the Company gave no order for the seizure of Thomas Skinner's ship . . . .

Id. at 713 (emphasis added).[16] The Company argued only that it could not be held liable for the unauthorized

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[16] The East India Company contested both the jurisdiction of the House of Lords as a court of original, as opposed to appellate, jurisdiction, *Skinner*, 6 State Trials at 718-19, and the jurisdiction of English courts for claims created overseas, 1 A. Grey, Debates of the House of Commons From the Year 1667 to the Year 1694, at 152 (1763). "[A]ll the judges had considered of the matter referred to them, and having met and considered thereof, were of opinion; That the matters touching the taking away the petitioner's ship and goods, and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon his majesty's ordinary [common law] courts in Westminster." *Skinner*, 6 State Trials at 719. The Company *never* suggested that its corporate form exempted it from liability. Charles II ultimately brokered a political settlement that vacated the judgment, on grounds that "when the Lords fined and imprisoned persons for complaining by petition to the House of Commons, it was a breach of their privilege." *Id*. at 768. American courts understood *Skinner* to hold that "the

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acts of its agents. The Lords implicitly rejected this argument by awarding damages. *Id*. at 724. Neither party made reference to the law of nations in arguing the issue of corporate agency: The law of nations defined only the norm against taking the ship, not who should bear the losses. As with any cause of action, the Company was responsible for its agents' torts.[17]

Domestic agency law also controlled questions of liability when the Company was sued for the acts of its governors.[18] In these suits, courts first determined whether the governor acted within the authority

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courts could give relief" for the torts committed by the Company through its agents (including false imprisonment and assault), "notwithstanding these were done beyond the seas." *Eachus v. Trustees of the Illinois & Michigan Canal*, 17 Ill. 534, 536 (1856).

[17] The Company similarly did not argue it was exempt from suit outside the law of nations context. *See Ekins v. The East India Company*, (1718) 1 Eng. Rep. 1011, 1012 (H.L.); 2 Bro. P.C. 382, 383; 1 P. Wms. 395 (Company liable for agent's actions undertaken for Company use and benefit); *see also Shelling v. Farmer*, (1725) 93 Eng. Rep. 756, 756 (K.B.); 1 Str. 646, 646-47 (discussing settlement for substantial damages between East India Company and plaintiff for "injuries by the Company's agents").

[18] British colonial governors of the Company played a dual role as sovereign and as corporate agent. Like corporations, British governors were created and empowered by letters patent – sovereign delegations under domestic law. *See*, *e.g.*, *Dutton* 1 Eng. Rep. at 17. Thus, similar agency principles applied to British governors. *See Mostyn*, 98 Eng. Rep. at 1021 (case against British governor of Minorca for assault, false imprisonment, and banishment where liability was defined by common law); *Dutton*, 1 Eng. Rep. at 17; *see generally* Nasser Hussain, *The Jurisprudence of Emergency* 75-76 (2003) (discussing liability of governors). Governors had duties and could incur tort liability if they abused power.

granted to the Company as a juridical entity by letters patent. If the governor's actions were found to be within the letters patent, then the court would ask whether he acted within the scope of his agency to the juridical entity.[19] If his actions deviated from the scope of his agency, liability attached to the governor personally, for he had committed a frolic.[20] But if the governor's actions were within the scope of his agency, the proper defendant could be the corporation. *See Skinner*, 6 State Trials at 713. Procedural hurdles curtailed the number of suits against corporations aggregate, but the corporate form did not automatically shield companies from suit.[21]

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[19] 1 Stewart Kyd, *A Treatise on the Law of Corporations* 261-62 (1793) (corporation may authorize specific acts by deed); *id*. at 314 ("It seems that the acts of the regular servants of a corporation, done in their official character, shall in general bind the corporation."); *see also Horn v. Ivy*, (1669) 86 Eng. Rep. 33, 33-34 (K.B.); 1 Ventr. 47, 47-48 (corporation may authorize acts beyond letters patent through general agency).

[20] This fiction that most abuses of authority were frolics later collapsed in tort law generally. *See infra* Part III.

[21] For example, discovery was not available against a corporate aggregate, meaning a corporation could not be directly compelled to produce its books. *See* Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 Colum. L. Rev. 43, 46 (1980) (producing books required swearing of oath, which corporation could not do as soulless body aggregate). Without the books, it was difficult to know whether the corporation had authorized a given act, and such authorization was a necessary prerequisite to corporate liability under eighteenth century agency law. *See*, *e.g.*, *Wych v. Meal*, (1734) 24 Eng. Rep. 1078 (Ch.); 3 P. Wms. 310; *Shelling*, 93 Eng. Rep. at 756; *cf.* discussion *supra* of *Skinner* (showing suit was possible and liability questions hinged on authority of

(Continued on following page)

The corporation never presumed it was exempt from liability in tort actions. In the 1770s, for example, Armenian merchants sued the Company's Governor of Bengal, Harry Verelst, for "trespass, assault, and false imprisonment" by Company agents. *Rafael v. Verelst*, (1775) 96 Eng. Rep. 579, 579 (K.B.); 2 Black. W. 983, 983 (*Rafael 1*). Liability turned on whether the Nawab of Bengal was acting as a "mere creature" of the Company. *Rafael 1*, at 580. Ruling on a special verdict, the court ultimately found the Nawab to be a Company agent and assessed substantial damages against Verelst. *See Rafael v. Verelst*, (1776) 96 Eng. Rep. 621, 622-23 (K.B.); 2 Black. W. 1055, 1058-59 (*Rafael 2*).[22]

In consultation with Verelst, Company advisors strategically protected Company assets by deciding it was "prudent" for Verelst to "support the Prosecutions in his own name." Appendix B (Company Board of

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agents, not whether juridical entity was subject to suit). Instead, plaintiffs would sue corporate agents, who could be compelled to appear in court and produce the corporate books.

[22] Heard by Blackstone and Chief Justice DeGrey (among other justices), the court considered whether the Nawab truly acted as an agent of the Company. *See Rafael 1*, at 581 (opinion of DeGrey, C.J.) (unlike other judges in initial case, "I consider him but as an agent, or instrument in the hands of the defendant."); *Rafael 2*, at 623 (opinion of Blackstone, J.) ("The Nabob is a mere machine, – an instrument and engine of the defendant."). The merchants brought suit in England in a series of similar cases. *Rafael 1*; *Rafael 2*; *Cojamaul*, 2 Eng. Rep. 276; *see also Nicol v. Verelst*, (1779) 96 Eng. Rep. 751 (K.B.); 2 Black. W. 1278 (case involving Company's arrest of merchant for infringement on its trade monopoly); *Bolts v. Purvis*, (1775) 96 Eng. Rep. 601 (K.B.); 2 Black. W. 1022 (same).

Directors determining jury would grant smaller damage award "against an Individual, than against a Company as a collective body."); *see also* Appendix C (Company Committee for Law Suits discussing case against Company and Sir Thomas Chamber and deciding Chamber should "give in his answere [sic] Before the Company . . . as may be most secure and Advantageous to the Company."). Although seeking to minimize liability, the Company still acknowledged that Verelst had acted within his "Duty" to the Company.[23]

In other cases, the Company invoked sovereign immunity to protect itself from liability. When the Nawab of Arcot sued the Company to collect debts owed under a treaty, the court held that "the Nabob [sic] treated with the *India* Company as with an independent sovereign," rendering the debts a "political transaction" and the Company immune. *Nabob [sic] of Arcot v. The East India Company*, (1793) 29 Eng. Rep. 841, 849 (Ch.); 4 Bro. C.C. 181, 198. Absent sovereign immunity, however, the *Arcot* court presumed that the corporate form did not alter the Company's potential liability. *Id.* at 849; *see Moodalay*, 28 Eng. Rep. at 1246 (Company "have rights as a Sovereign Power, they have also duties" akin to natural persons).

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[23] Thus, the Company decided that Verelst "should be supported by the Company and indemnified from the Damages and Costs given against him." Appendix D. Accordingly, Verelst "readily undertook the defence of the Suit under a full confidence" of the Company's "firm support & assistance *considering the Cause the Companys* & not his own." Appendix B (emphasis added).

History shows that the East India Company's corporate form did not exempt it from liability for its agents' torts. The Company itself acted on that principle. Like natural persons, the Company was bound to follow international law, and English courts drew upon common law agency principles to provide redress against the Company.

B. Courts Allocated Losses to Ships, as Juridical Entities, for Violations of the Law of Nations Both Before and After Congress Passed the Alien Tort Statute

Through domestic *in rem* jurisdiction, American courts enforced claims against ships for violations of the law of nations.[24] *See*, *e.g.*, *The Malek Adhel*, 43 U.S. (2 How.) 210, 233-34 (1844); *The Mariana Flora*, 24 U.S. (11 Wheat.) 1, 40-41 (1826) ("piratical aggression by an armed vessel . . . [which] may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations."). In so doing, domestic courts allocated losses among those involved in the shipping enterprise, whether ship owners, the captain, the crew, or the vessel itself. *See The Malek*

[24] Such domestic adjudication affirms Judge Edwards' approach in *Tel-Oren*, 76 F.2d at 778. *See*, *e.g.*, *The Resolution*, 2 U.S. (2 Dall.) 1, 3-5 (Fed. App. Pa. 1781) (stating domestic courts are proper venues for assessing validity of captures); *The Lively*, 15 F. Cas. 631, 632-34 (Case No. 8,403) (C.C.D. Mass. 1812) (stating domestic courts determine questions of capture and damages). *Sosa* recognized maritime cases as one important branch of the law of nations. 542 U.S. at 715.

Adhel, 43 U.S. at 234; *The Mary Ford*, 3 U.S. at 190 (opinion of Lowel, J.). As Chief Justice Marshall explained, the juridical entity of the ship was subject to suit:

> [I]t is a proceeding against the vessel, for an offence committed by the vessel . . . . It is true, that inanimate matter can commit no offense. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master.

The Little Charles, 26 F. Cas. 979, 982 (Case No. 15,612) (C.C.D. Va. 1818); *see The Malek Adhel*, 43 U.S. at 234 (relying on *The Little Charles*); *see also The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("The thing is here primarily considered the offender, or rather the offence is attached primarily to the thing."); *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 99 (High Ct. Err. & App. Pa. 1784) ("ship would be answerable" for claims for mariners' wages).[25]

The rationale for subjecting ships to suit follows the fundamental purposes of tort law: To ensure an

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[25] Lower courts have correctly understood this history. *See Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships.").

effective remedy and deter wrongful acts committed as part of the enterprise. *See*, *e.g.*, *The Malek Adhel*, 43 U.S. at 233-34 ("[T]he vessel . . . is treated as the offender, ... as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."); *see also Purviance v. Angus*, 1 U.S. (1 Dall.) 180, 185 (High Ct. Err. & App. Pa. 1786) (Rush, J., dissenting) ("By rendering the owners responsible for the captains, the law hath laid them under the strongest obligations to employ none but men of skill, capacity and integrity, to navigate their vessels."). This legal regime emerged, in part, because ship owners were often absent from the jurisdiction, and a crew might be unable to pay damages.

The ship was but one component of a broader enterprise resembling a modern corporation, with limited liability for owners embodied in the ship. The underlying presumption was therefore that both ship owners and ships could be sued, with losses allocated within the enterprise. *See*, *e.g.*, *Dean v. Angus*, 7 F. Cas. 294, 296 (Case. No. 3,702) (Adm. Pa. 1785) (discussing related case where suit was brought "against the brigs . . . and against certain persons . . . as owners and captains of the said brigs"). Ships frequently were sued for the crew's misconduct. *See The Little Charles*, 26 F. Cas. at 982 (case against ship for crew's actions "does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner"); *The Malek Adhel*, 43 U.S. at 233 (claim against ship for crew's actions considered "without any regard

whatsoever to the personal misconduct or responsibility of the owner thereof").

Domestic law determined questions of loss allocations.[26] In *The Mary Ford*, for example, the trial judge stated:

> [F]or a long time, the law of nations has been settled on principles consonant to justice and humanity, in favour of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated by such part thereof, or such pecuniary satisfaction, as the laws of particular States have specially provided, or, in want of such provision, (as the writers on the law of nations agree) by such reward as in the opinion of those who, by the municipal laws of the country, are to judge, is equitable and right. In our country, no special rule being established, this court is to determine what, in such case, is equitable and right.

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[26] Domestic law similarly governed questions aside from the substantive norm. *See*, *e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795) (rights of French privateer determined by law of nations; domestic law governs whether captain is properly considered privateer); *The Palmyra*, 25 U.S. at 14-15 (discussing use of domestic *in rem* jurisdiction for forfeiture of suspected pirate vessel); *see also* William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers*, *Smugglers*, *and Pirates*, 37 Am. J. Legal Hist. 117, 128-29, 136 (1993) (discussing importance of federal institutions adjudicating maritime questions involving law of nations).

3 U.S. at 190; *see also The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (domestic law allocates "responsibility for the conduct of the officers and crew" to owners who although "innocent of the demerit of this transaction" are "bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages."). Specifically, courts used domestic agency principles to determine who should bear the losses. *See Three Brigs*, 1 U.S. at 95 (owners held partially liable when their ships wrongfully captured another vessel); *see also Purviance*, 1 U.S. at 180 (allowing some recovery against malfeasant captain involved in same incident as *Three Brigs*).[27] Thus, domestic law governed loss allocation, whether by agency principles or by limiting liability (either to the ship or the corporation).

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[27] In 1779, American Silas Talbot lawfully captured a British vessel as a prize of war. *Three Brigs*, 1 U.S. at 95. When three other American captains seized Talbot's prize in violation of the law of nations, Talbot successfully sued the owners of the three captains' ships for damages. *Id*. The owners of one brig, in turn, sought indemnification from their captain, which the court denied. *See Dean*, 7 F. Cas. at 296 ("[O]wners are answerable for torts done by the captains they employ . . . not because they employed Angus, but because they were owners of the brigs."), *overruled in part by Purviance*, 1 U.S. at 180 (allowing one-third indemnification because captain found negligent). English courts likewise applied agency principles to shipmasters and owners. *See*, *e.g.*, *The Vrouw Judith*, (1799) 165 Eng. Rep. 130, 130; 1. C. Rob. 150, 151 ("[T]he act of the master of the vessel binds the owner in respect to the conduct of the ship as much as if it was committed by the owner himself.").

III. AS THE MODERN CORPORATION EMERGED, COURTS USED DOMESTIC COMMON LAW TO ALLOCATE LOSSES AGAINST CORPORATIONS FOR INJURIES COMMITTED BY THEIR AGENTS

When English courts first grappled with the liability of the East India Company, the use of the corporate form to organize a business was rare. Nevertheless, the English courts determined that the Company was liable for its agents' torts, including torts in violation of the law of nations.[28] In the early nineteenth century, when the modern corporation proliferated in the United States, American courts quickly reached the same conclusion. In particular, courts came to understand that corporate tort was not a corporate action per se, but a way of allocating damages to the corporation for torts committed by its agents. *See* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 649-51 (1989). Thus, shortly after the adoption of the ATS, corporate liability became commonplace based on domestic agency principles.

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[28] English courts applied the same rules in tort cases not involving the law of nations. *Mayor of Lynn v. Turner*, (1774) 98 Eng. Rep. 980 (K.B.); 1 Cowp. 86; *Yarborough v. The Bank of England*, (1812) 104 Eng. Rep. 990, 990 (K.B.); 16 East. 6, 7 (company "liable to the consequences of such act [done or ordered on its behalf], if it be of a tortious nature, and to the prejudice of others"). Whether a case involved the law of nations was irrelevant to the question of whether these tort principles applied.

A. As Private Business Corporations Emerged in America, Courts Allocated Losses to Corporations for Actions of Corporate Agents

Business corporations were rare when the First Congress adopted the ATS. "The archetypal American corporation of the eighteenth century is the municipality, a public body charged with carrying out public functions." Morton J. Horwitz, *The Transformation of American Law 1780-1860* 112 (1977); *see also* Schwartz, at 648. By 1780, "colonial legislatures had conferred charters on only seven business corporations, and a decade later that number had increased to but forty." Horwitz, at 112; *see also* Simeon Eben Baldwin, *History of the Law of Private Corporations in the Colonies and States*, *in* 3 *Select Essays in Anglo-American Legal History* 236, 250 (1909) (fewer than eighty business corporations known to American public in 1800).

Late eighteenth century jurists regarded the corporation "as an artificial and suspicious statutory entity." Schwartz, at 649. For most of the eighteenth century, American courts sought to cabin corporate power by limiting corporate rights and duties to those enumerated in their charters.[29] As American

[29] Many eighteenth century jurists believed a corporation could only authorize that conduct which its charter permitted. Since the corporation's charter would not have authorized tortious conduct, torts were frolics, and the remedy lay against the "tortious employee." Schwartz, at 649. Blackstone's statement

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corporations proliferated and pursued more modern functions, U.S. domestic common law recognized the changes and adapted accordingly.[30] *Id.* at 650. American courts quickly applied principles such as agency and loss allocation that had previously resulted in liability against analogous entities. In particular, courts held that modern entities were engaged in profit making that could involve torts committed by their agents. In this sense, these entities resembled English chartered corporations such as the East India Company. Likewise, as corporations (like ships) became increasingly important to trade and commerce, courts applied loss allocation principles against the corporate enterprise to provide a meaningful remedy.

By the early nineteenth century, the evolution in American treatment of corporations was established. Courts had severed corporate liability from

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that a corporation could not "sue and be sued" for "personal injuries" exemplified this instrumentalized conception of the corporation, typified by narrowly chartered public corporations. 1 William Blackstone, Commentaries *464. Corporate tort liability, however, derived from Blackstone on agency and contract, not from Blackstone's primitive conception of corporations.

[30] The Founders were familiar with evolution of common law tort principles at the domestic level and would have expected developments in the law over time. The legal landscape around entity liability and loss allocation in the tort context was no different. Domestic tort rules applicable to entities would have also applied in the law of nations context, which did not negate otherwise applicable tort principles. *See*, *e.g.*, *Livingston*, 15 F. Cas. at 663 (discussing evolution of transitory tort principles).

the preconditions of capias, exigent, and ne exeat, and dismissed the fiction that all torts were frolics. *See Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. (7 Tyng) 169, 178, 185 (1810) (corporation cannot be imprisoned for trespass, but may be liable for damages or amercement as "some actions of trespass might, at common law, be maintained against aggregate corporations"); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 12-13 (1818) (stating master-servant relationship may create corporate liability). Courts recognized that losses for torts attributable to the corporation should be allocated against the corporation's funds, which distinguished the modern business corporation from its historical predecessor. *See*, *e.g.*, *Adams v. Wiscasset Bank*, 1 Me. 361, 364 (1821) (losses assessed against bank's corporate fund); *Smith v. Bank of Washington*, 5 Serg. & Rawle 318, 319-20 (1819) (corporate form means bank's "responsibility is limited to its own funds"); *Riddle*, 7 Mass. at 187-88 (corporate liability should be extended to general corporations with funds to pay damages); *cf. McCready v. Phila. Guardians of Poor*, 9 Serg. & Rawle 94, 97 (1822) (damages for breach of corporate duty cannot be maintained against those without corporate fund).

B. Corporate Liability is Not a Norm of Conduct but Rather a Method of Allocating Losses to Corporate Principals for Agents' Torts

Concomitant with the establishment of the modern business corporation and subsequent dismissal of the fiction that all torts were frolics, courts began regularly assessing damages against corporations for employees' torts. *See Chestnut Hill*, 4 Serg. & Rawle at 12. Corporate liability was not considered conduct, but rather a means of allocating losses to corporate principals for agents' torts. *Prosser & Keeton* § 69, at 500 ("The losses caused by the torts of employees, which . . . are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business."); *see* Young B. Smith, *Frolic and Detour IV*, 23 Colum. L. Rev. 716, 718 (1923) ("[M]aking the master liable for his servant's unauthorized torts . . . include[s] in the costs of operation inevitable losses to third persons incident to carrying on an enterprise . . . ."); *cf.* Thomas M. Cooley, *A Treatise on the Law of Torts*, *or the Wrongs which Arise* 67-68 (John Lewis ed., 1907) (rule "well settled" that corporations are liable for agents' torts).

The 1818 *Chestnut Hill* case explicitly rejected the argument that corporations were uniquely exempt

from liability for their agents' torts.[31] 4 Serg. & Rawle at 6. The corporation was liable for its servants' trespass because "[t]he rule between corporations and their servants, is substantially the same," as between natural persons and their servants. *Id.* at 11; *see* Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 328 (4th ed. 1840); *cf. Bank of Columbia v. Patterson's Adm'r*, 11 U.S. 299, 305 (1813) ("acts" of corporate agent "within the scope of his authority, would be binding on the corporation").

Courts did not limit tort liability to acts authorized by the corporation's charter because a "master is responsible for the [illegal] acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them." *Chestnut Hill*, 4 Serg. & Rawle at 12; *see*, *e.g.*, *Townsend v. Susquehanna Tpk. Rd. Co.*, 6 Johns. 90, 90 (N.Y. Sup. Ct. 1810) (corporation liable for servant's negligence); *Wilson v. Rockland Mfg. Co.*, 2 Del. 67, 67 (Del. Super. Ct. 1836) (same); *Moore v. Fitchburg R.R. Corp.*, 70 Mass. (4 Gray) 465, 465 (1855) (same); James Grant, *A Practical Treatise on the Law of Corporations in General* 278 (1850) ("a corporation is liable in tort for the tortious act of their agent, though not appointed by their common seal, if such act be done in the course of his ordinary service"); Francis

[31] The court ignored defendants' appeal to Kyd's treatise, which mirrored Blackstone's narrow view of corporate liability for personal injuries. *See* 4 Serg. & Rawle at 8.

Hilliard, 2 *The Law of Torts or Private Wrongs* 474-75 (1859).

Chestnut Hill exemplifies that corporate liability is an allocation of loss to the corporation for torts. The court decried the "mischievous" consequences of demanding plaintiffs seek remedy from "laborers who have no property to answer the damages." 4 Serg. & Rawle at 17; *see also* Schwartz, at 650 (*Chestnut Hill* part of movement to "modernize the rules of corporate liability" and allocate losses to corporate principals). Like precursor juridical entities, modern corporations thus became liable for their agents' torts without regard to the source of the substantive norm of conduct. Accordingly, corporate tort liability does not exclude liability for agents' torts in violation of the law of nations.

History – in both American and English courts – indicates that courts can render tort judgments against corporations for violations of the law of nations, using domestic law to allocate losses for injuries committed by corporate agents. Incorporation has never shielded juridical entities from liability. This Court should reject the Second Circuit's ahistorical conclusion to the contrary.

CONCLUSION

This Court should reverse the Second Circuit's decision because to exempt corporate defendants from ATS suits contravenes the historical record as well as the text and purpose of the statute.

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APPENDIX B

DELIBERATIONS OF BRITISH EAST INDIA COMPANY COMMITTEE OF CORRESPONDENCE (N.D. CA. 1776)

These Deliberations relate to the British East India Company's litigation strategy in *Rafael v. Verelst*. The Deliberations are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69, India Office Records, British Library, London, UK. The Committee of Correspondence was the Company's chief operating committee and consisted of the Chairman, Deputy Chairman, and senior directors of the Court (i.e., Board) of Directors. Anthony Farrington, *Guide to the records of the India Office Military Department*, IOR L/MIL & L/WS 1 (1982). The Deliberations follow:

> Mr. Verelst finding the Armenians had Petitioned the Court of Drs and threatened Prosecutions. Mr. V– in person applied to the Directors but more particularly to the Committee of Correspondence, & requested their Protection should any Prosecution take place against him. Prosecutions were immediately commenced, and on the repetition of Mr. Verelst request, the Committee of Correspondence consisting of [names not inserted]
>
> consulted with Mr. Sayre their Council [sic], as the measures most prudent to be pursued to save the Company in Damages should any be given on a suit of Law to the Armenians –

the result of this advice was that Mr. V– should support the Prosecutions in his own name; for this reason that should Damages be given by a Jury, they would be to a less amount against an Individual, than against a Company as a collective body. Mr. V– therefore readily undertook the defence of the Suit under a full confidence from the whole tenor of their conduct & assurances that he should at all times have their firm support & assistance, considering the Cause the Companys & not his own.

APPENDIX C

UPON DEBATE OF THE WHOLE BUSINESS TOUCHING THE BILL OF THE SONS OF GREENHILL AGAINST THE COMPANYE & SIR THOMAS CHAMBER, ATT A COMITTEE FOR LAW SUITES 23 JUNE 1668

This document is from the East India Company: Minutes of the Court of Directors and Court of Proprietors 1599-1858, IOR/B/29, India Office Records, British Library, London, UK. The Committee on Law Suits was one of a number of committees established by the Court of Directors of the East India Company to manage the detailed business of the Court. *See* Martin Moir, *A General Guide to the India Office Records* (1988).

> Att a Comittee for Law Suites 23 June 1668
> Present
> Governor: John Jollife Esq.
> Sr Andrew Riccard
> Nicholas Morrice Esq.
>
> Upon Debate of the whole Business touching the Bill of the Sons of Greenhill against the Company & Sir Thomas Chamber. & Mr. Moses was Directed Seriously to consider and advise there-upon, and whether Best for Sir Thomas Chamber to give in his answere Before the Company or after, or that they put in their answeres joyntly togather, and to proceed upon the whole as may be most secure and Advantageous to the Company.

The Committee were of opinion that Sir Thomas Chamber doe put in his answer first.

APPENDIX D

PAPERS OF HARRY VERELST, EAST INDIA COMPANY SERVANT, BENGAL; GOVERNOR OF BENGAL 1767-69

These documents are found in Correspondence with the Court of Directors and related papers on lawsuits brought by William Bolt's Armenian agents, Harry Verelst Papers, Eur 218/69 ff. 98a-100a, India Office Records, British Library, London, UK.

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To the Honble [sic] the Court of Directors for the Affairs of the United Company of Merchants of England trading to the East Indies.

The Memorial of Harry Verelst Esq. late President and Governor of Fort William in Benga[l]

Gentlemen

By the Report of the Committee of Correspondence and Law Suits of the 12th June 1776 on the several Memorials presented to you praying an Indemnification against the Armenian Suits – it appears the Committee were of Opinion that I should be supported by the Company and indemnified from the Damages and Costs given against me in the Actions and also the Costs of defending the same.

The said Report, with the Commees [sic] Recommendation, was afterwards laid before the Court of Proprietors who were pleased to

order the Damages and Costs recovered by the Armenians to be paid and they were paid accordingly.

That your Memorialist has been greatly harafsed and vexed with the said Suits for upwards of seven years and been put to great Costs and Expenses in defending the same to the amount of [not inserted.]

That in regard it appeared to the Committee on a

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full Investigation of the facts and Circumstances of the Case respecting the Armenians that your Memorialis[t] had been actuated by a Sense of Duty to the Company on his Station of President and Governor of Fort William and not from any private or Interested Motives – He therefore humbly hopes you wil[l] not permit him to suffer in his private fortune but think it also reasonable to indemnify him against the Expenses incurred in defending the said Suits.