No. 16-499

In The
Supreme Court of the United States

JOSEPH JESNER, et al.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF PROCEDURAL AND CORPORATE LAW PROFESSORS IN SUPPORT OF PETITIONERS

BURT NEUBORNE
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(212) 998-6172
burt.neuborne@nyu.edu

AMY J. WILDERMUTH
Counsel of Record
UNIVERSITY OF UTAH
S.J. QUINNEY
COLLEGE OF LAW
383 South University Street
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu

Counsel for Amici Curiae
Procedural and Corporate Law Professors

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The parties' consent to the filing of this brief was filed with the Clerk of this Court in accordance with Supreme Court Rule 37.[1]

Amici Curiae are law professors who research, teach, and write on procedural and corporate law. They disagree with the Second Circuit's conclusion that the Alien Tort Statute does not support jurisdiction in cases brought against corporations. They believe this conclusion is inconsistent with the statute's text as well as the historical practice and understanding of corporations' longstanding amenability to suit. More information about the specific interest of each professor is provided below.

Robin Kundis Craig is the James I. Farr Presidential Endowed Chair of Law at the S.J. Quinney College of Law at the University of Utah. She researches the law and policy of "all things water," including water rights, water pollution, and ocean and coastal issues, as well as climate change adaptation and the intersection of constitutional and environmental law.

Lincoln L. Davies is the Associate Dean for Academic Affairs and the Hugh B. Brown Professor of Law at the University of Utah S.J. Quinney College of Law.

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[1] In accordance with Supreme Court Rule 37.6, *Amicus Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amicus Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief. The parties have consented to the filing of this brief.

He teaches and writes on civil procedure, administrative law, and energy and environmental law.

Erika R. George is the Samuel D. Thurman Professor of Law at the University of Utah S.J. Quinney College of Law and former co-director of the Center for Global Justice. She teaches civil procedure, international human rights, corporate social responsibility and constitutional law.

Amos N. Guiora is a Professor of Law at the University of Utah S.J. Quinney College of Law. He teaches and writes on issues related to national security, limits of interrogation, religion and terrorism, the limits of power, multiculturalism and human rights.

Sanne H. Knudsen is the Associate Dean for Faculty Research & Development, Stimson Bulitt Endowed Professor of Environmental Law, and an Associate Professor at the University of Washington School of Law. Her teaching and research interests include civil procedure, administrative law, natural resources law, and environmental law.

Jeff Schwartz is the William H. Leary Professor of Law at the University of Utah S.J. Quinney College of Law. His research centers on securities law, investment-management regulation, and retirement policy.

Marcia Narine Weldon teaches and researches in the areas of corporate social responsibility, corporate governance, civil procedure, and business and human rights. She is a lecturer in law at the University of Miami School of Law and formerly served as a Deputy

General Counsel and Chief Compliance Officer for a multinational Fortune 500 company.

STATEMENT

This case involves five separate lawsuits filed against Arab Bank, PLC, headquartered in Jordan, for facilitating the operations of Palestinian terrorist groups in violation of international law. The terrorist organizations promised and then delivered financial payments to the relatives of those who perpetrated the attacks. Arab Bank, specifically through its branch in New York, transferred millions of dollars to finance these attacks. The Bank also actively incentivized and encouraged terrorist activities, including by making monetary transfers and currency conversions through its New York branch to facilitate payments to the relatives of those committing the attacks.

On the basis of these acts, plaintiffs asserted claims under the Alien Tort Statute (ATS), which provides: "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 the nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). The courts below held that there was no jurisdiction under the ATS for these claims against Arab Bank.

The question presented in this case is straightforward: Is naming a corporation like the Arab Bank as a defendant fatal to asserting jurisdiction under the ATS? Given the statute's text and the historical

practice and understanding of the ability to sue corporations, the answer is similarly straightforward: No.

SUMMARY OF ARGUMENT

The ATS is a jurisdictional statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). As a jurisdictional statute, the ATS "'does not create a statutory cause of action.'" *Id.* at 713 (quoting Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479 (1986)). Instead, it grants jurisdiction to the district courts to hear cases brought by aliens against those who have breached customary international law.

The terms of the ATS are clear. Any "alien" may bring a suit for a tort committed in "violation of the law of the nations or a treaty of the United States." The ATS is silent as to what sort of person or entity might be a defendant in such an action. Without any description or definition of eligible parties to serve as a defendant, the plain text of the statute imposes no limit on the proper defendant to such a suit. Moreover, the long practice and understanding of courts since before 1789, and particularly with respect to actions brought under the provisions of the first Judiciary Act, has been that corporations are amenable to suit. As a result, there is no bar to corporations being named as defendants in ATS actions.

ARGUMENT

I. THE EVOLUTION AND HISTORY OF CORPORATIONS SUPPORTS SUBJECTING ARAB BANK TO LIABILITY UNDER THE ATS

A. The Emergence of the Modern Business Corporation

The business corporation began as a device to delegate the performance of public functions to profit-seeking private investors. *See generally* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333, 1383-1402 (2006). Roman law recognized the *societas publicanorum*, enabling entrepreneurs (the *publicani*) to assemble capital needed to build roads and aqueducts using investment vehicles with freely traded shares, extended life, limited liability, and entity-shielding. *Id.* at 1356-62. The concept re-emerged in Genoa during the fourteenth century in the form of government-chartered joint-stock companies designed to exploit state-granted monopolies in salt mining and coal importation, *id.* at 1364-76, and evolved during the seventeenth and eighteenth centuries into the great merchant joint stock companies of Holland and England that functioned as profit-making adjuncts of the state in governing India and settling in what became the United States. *See generally Moodalay v. The East India Company*, (1785) 28 Eng. Rep. 1245 (Ch.) 1246; 1 Bro. C. C. 469, 470; *The Case of Thomas Skinner, Merchant v. The East-India Company*, (1666) 6 State Trials 710 (H.L.) 711.

In the early history of the United States, the Founders continued to view the business corporation as a vehicle to permit government delegation of a public function to a small group of favored profit-driven investors. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1594-97 (1988). The Jacksonian era, however, marked a new age for corporations. Although some have argued that it might have been theoretically possible to use contracts to handcraft a business enterprise that would afford the equivalent legal rights and duties enjoyed by participants in a business corporation, the difficulty of entering into, monitoring, and enforcing such a web of reciprocal contracts, as well as the impossibility of including unknown future tort victims within such a contractually-defined universe, rendered an off-the-rack legal concept a practical necessity. *See* Hansmann et al., 119 Harv. L. Rev. at 1341 n.15.

From this practical necessity, the modern business corporation was born. State after state offered ordinary entrepreneurs access to an investment vehicle with perpetual life, limited liability, and entity-shielding. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541, 549 n.4 (1933) (Brandeis, J., dissenting) (setting forth a chronological listing of democratized state incorporation statutes). In short, viewed historically, the modern business corporation evolved as a device to democratize, define, and enforce a bundle of legal rights and duties belonging to the corporation's human constituents.

B. Making Corporations Derivatively Liable for the Unlawful Employment-Related Acts of Their Employees

As the corporate form continues to evolve, one thing that has remained constant is that corporations can be held liable for damages. *See Cook Cty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125-26 (2003) (citing 1 Stewart Kyd, A Treatise on the Law of Corporations 13 (1793)); *Brokaw v. N.J. R. & T. Co.*, 32 N.J.L. 328, 330-31 (1867) (stating that corporations have long been liable for tortious acts of employees); *see also Mayor of Lynn v. Turner* (1774) 98 Eng. Rep. 980 (KB). American courts very early in their history recognized this ability to hold corporations liable. *See, e.g.*, *Riddle v. Proprietors of Merrimack River Locks & Canals*, 7 Mass. 169, 188 (1810) (although a corporation cannot be imprisoned, it may be liable for damages); *Chestnut Hill & Springhouse Tpk. Co. v. Rutter*, 4 Serg. & Rawle 6, 13 (Pa. 1818) (same).

By the time New Jersey adopted the first unrestricted incorporation statute in 1889, N.J. Laws, ch. 185, at 279 (1889), the corporate form had emerged as a dominant mode of economic organization in the United States and throughout the industrialized world. Justice Stephen Field estimated that by the mid-1890s, American corporations controlled more than 75% of the nation's wealth. *See* Seymour Dwight Thompson, Commentaries on the Law of Private Corporations VI (1st ed. 1895) (preface).

The explosion of unrestricted investment vehicles favored with perpetual life, limited liability, and entity-shielding contributed to a remarkable worldwide surge in productive capacity, benefiting millions. But the success of the corporate form also placed enormous power in the hands of a relatively small number of insiders who controlled the corporation's assets de jure or de facto. It also funded a small army of corporate employees and agents who, in carrying out their duties, occasionally fell short of their legal responsibilities.

Concerns over the competence and honesty of corporate employees and agents drove the nineteenth century law of agency. *See* Restatement (Second) of Agency §§ 2, 219, 220, 228, 229 (1958). The law imposed contractual liability on the corporate treasury for agreements made by corporate employees with actual, apparent, and, ultimately, legally implied power to bind the corporation.

Contract theory could not, however, provide a vocabulary for the consequences of tortious behavior by corporate employees. Instead, courts turned to *respondeat superior* and other theories of vicarious liability to render the corporate treasury civilly liable for damages caused by the unlawful employment-related acts of a corporate employee. *See* John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315 (1894); Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 449-52 (1923).

The theory underlying derivative corporate tort liability has never been tidy, in large part because there

is no clear consensus on what a corporation is. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010). As Professors Belifanti and Stout explain, "the corporation has been described as: (1) an entity; (2) an aggregate of people; (3) a web of contracts; (4) a government concession or 'franchise government'; (5) a collection of specific investments; and (6) the property of its shareholders." Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, U. Pa. L. Rev. (forthcoming 2017), Cornell Legal Studies Research Paper No. 17-17, at 8, available at SSRN: https://ssrn.com/abstract=2942961. Each of these theories offers a different way to view the key attributes of a corporation, which include "its semiautonomous, perpetual nature[;] legal personhood[;] and the interwoven web of human relationships and interactions that often present in the corporate form." *Id.* Professors Belinfanti and Stout also offer another way to think about corporations: systems theory, which embraces, among other things, that a corporation may have more than one purpose. *Id*. at 20-54.

It is not necessary to resolve these contested visions of the corporation in this case. Despite the theoretical difficulties and disagreements, every legal system to adopt the corporate form has recognized that, as a matter of fundamental fairness and the effective maintenance of the corporate rule of law, corporations must be civilly liable for the unlawful employment-related behavior of corporate employees. As

a result, from the very beginning, in exchange for limited liability, perpetual life, and the other benefits of the corporate form, the assets of newly emergent business corporations were made available to compensate victims for damages caused by the unlawful, employment-related behavior of corporate employees. For hundreds of years, it has been understood that this is "the deal." *Cf. Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 686-87 (1989) (Scalia, J., dissenting) (describing "the deal" entered into by participants in a corporation), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

The notion that corporations would be held liable for certain torts is therefore not new. It was widely recognized and understood prior to the passage of the 1789 Judiciary Act. It would be inconsistent with this history and practice, and Congress's silence regarding who or what is a proper defendant under the ATS, to categorically bar a corporation from being named as a defendant under the ATS.

II. THE ATS IS A JURISDICTIONAL STATUTE UNDER WHICH CORPORATIONS ARE PROPER PARTIES

A. Based on the Text and History of § 1350, Corporations Are Proper Parties Under the ATS

In the early years of the Republic, the United States faced a difficult problem: a nation, even a new one, was expected to provide a remedy for violations of

treaties and the law of nations against aliens living within its borders. *See Sosa*, 542 U.S. at 716. The Continental Congress, however, was unable to create such a remedy; only States were able to do so. *See id.* Although the Continental Congress urged States to adopt an appropriate method for vindicating these rights, state-level action was not forthcoming. *See id.* After a series of high profile and embarrassing incidents involving foreign nationals, the United States was at risk of serious damage to its foreign relations at a critical time in the nation's history. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 466-67 (2011).

The Framers at the Constitutional Convention responded to these concerns in three ways. First, the Supreme Court was granted original jurisdiction of cases involving ambassadors and diplomats. U.S. Const., Art. III, § 2. Second, the Congress, in the Judiciary Act of 1789, created jurisdiction in the federal courts in admiralty cases and in cases we now call diversity cases, in which, among other things, an alien could be a party. 1 Stat. 80, ch. 20, § 11. *See* Stephen C. Yeazell & Joanna C. Schwartz, Civil Procedure 209 (9th ed. 2016). Finally, in § 9 of the Judiciary Act, now known as the ATS, Congress granted broad jurisdiction to the federal district courts for an "alien" to bring a claim based on a violation of the law of nations or in violation of a treaty that occurred within the United States or on the high seas. *See generally* Bellia & Clark, 78 U. Chi. L. Rev. at 470-71.

Accordingly, the ATS provided jurisdiction in the federal courts for certain categories of cases that could not otherwise be brought under the other jurisdictional provisions. For violations of treaties in particular, the ATS's grant of jurisdiction might seem odd today because lower federal courts have federal question jurisdiction over violations of federal law, including treaties. *See* 28 U.S.C. § 1331 (2012). Federal question jurisdiction, however, was not granted to the lower federal courts until after the Civil War in 1875. *See* Yeazell & Schwartz at 209-10 ("Most striking from a modern perspective is the absence of any general federal question jurisdiction [in the 1789 Judiciary Act]."). The ATS therefore filled an important gap.

Likewise, § 11 of the 1789 Judiciary Act – the first version of the current diversity statute, 28 U.S.C. § 1332 (2012) – provided that aliens could be a party to a diversity suit. That section, however, did not permit an alien to sue another alien. *Jackson v. Twentyman*, 27 U.S. 136, 136 (1829) ("[T]he 11th section of the act must be construed in connexion with and in conformity to the constitution of the United States. That by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party."); *Mossman v. Higginson*, 4 U.S. 12, 14 (1800) ("It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits 'where an alien is *a party*;' but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet

the case, 'where, indeed, an alien is one party,' but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties."). Accordingly, in order to provide redress to the claims like those that would have arisen from situations like the Marbois incident of May 1784 – one foreign national assaulting another foreign national on U.S. soil – the ATS was needed.

Understanding why the ATS was needed is one thing. Understanding what it provides is another. Like § 1331's grant of general federal question jurisdiction, and § 1332's grant of diversity jurisdiction, the ATS is a jurisdictional statute. It therefore does *not* provide a cause of action.

Once jurisdiction is established, the plaintiff must demonstrate that it has asserted a valid cause of action. It must, in other words, show that it has stated a claim upon which relief can be granted in order to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6). *See* 5B Fed. Prac. & Proc. Civ. § 1356: *Motions to Dismiss – Purpose of the Rule 12(b)(6) Motion* (3d ed. 2017) ("[T]he purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief.").[2] The Federal Rules of

[2] Courts have struggled at times in federal question cases when determining whether to dismiss a case that fails to properly assert a claim under federal law for lack of jurisdiction under § 1331 or failure to state a claim. *See* 5B Fed. Prac. & Proc. Civ. § 1350: *Motions to Dismiss – Lack of Jurisdiction Over the Subject Matter* (3d ed. 2017). As this Court has instructed, if there is any *arguable* basis for the claim, the question should not be jurisdictional but rather should be whether the complaint states a claim

Procedure thus set out different motions one can bring to dismiss a case. A 12(b)(1) motion deals with lack of jurisdiction; a 12(b)(6) motion asserts a party lacks a claim. They are separate inquiries.

The nature of the cause of action that one might assert varies depending on the kind of case that is brought. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), made clear, for example, that federal courts are to apply state substantive law in diversity cases. 19 Fed. Prac. & Proc. Juris. § 4508: *The* Erie *Doctrine, Rules Enabling Act, and Federal Rules of Civil Procedure – Matters Covered by the Civil Rules* (3d ed. 2017); Yeazell & Schwartz at 267. Likewise, *Sosa* directed litigants asserting jurisdiction under the ATS to look to the "present-day" law of nations but to proceed with caution: "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Sosa*, 542 U.S. at 725, 729; *see Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011) ("[I]n using the broad term 'law of nations' Congress allowed the coverage of the statute to change with changes in customary international law" but "the mood is one of caution.").

Once the jurisdiction and cause of action inquiries are properly separated and understood in historical context, the wide open nature of who or what might be sued under the ATS becomes clear. With no definition or limit found in the text of the ATS, there is no bar to

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for relief. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998).

a corporation being named as a defendant under the ATS.

B. Corporations Have Long Been Proper Parties Under the 1789 Judiciary Act

The identity of the parties is only relevant to the jurisdictional question when jurisdiction turns on party identity. For example, diversity jurisdiction expressly turns on citizenship. When a case is brought under § 1332(a)(1), in addition to demonstrating that the amount in controversy is more than $75,000, a plaintiff must assert that it is a citizen of one state – for example, Utah – and the defendant is a citizen of a different state – say, California. 28 U.S.C. § 1332(a)(1); *see Strawbridge v. Curtiss*, 7 U.S. 267 (1806).

When bringing a case under the ATS, however, the only relevant party identity is a requirement that the party bringing the suit be an "alien." The text of § 1350 therefore requires only that a plaintiff must be from a foreign state and not a U.S. citizen. The statute admits of no limit on the type of person or entity that might be considered an "alien."

Even more importantly, there is *nothing* in the ATS that identifies any limit on what sort of person or entity might be a defendant in such an action. This absence is striking standing alone, and is particularly remarkable when contrasted with the specific category – "alien" – required for plaintiffs. It is therefore clear that Congress intended no limit on who or what may be a proper defendant in an ATS suit. *See Argentine*

Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989). As such, there is no exemption for corporations under the statute.

Today, defendants in ATS cases are typically foreign defendants, as they are in this case. This follows from a basic understanding of the other grounds for federal court jurisdiction. If a case was brought today that involved a treaty violation, it could be brought under the current federal question grant of jurisdiction in § 1331. If the cause of action was not based on a treaty and involved a U.S. citizen with an amount in controversy over $75,000, the case could be brought under the diversity statute, § 1332. Although one could imagine cases brought against U.S. citizens with an amount in controversy less than $75,000, the kinds of claims that are recognized substantively under the ATS – such as deliberate torture, slavery, and genocide – would see to make it less likely that the amount in controversy would not be met.

As a result, although only the plaintiff in an ATS case must be an "alien," it is helpful to examine how the 1789 Judiciary Act viewed foreign parties generally when granting jurisdiction to federal courts based on party identity. That history makes clear that corporations have long been parties to suits as "aliens" and as "citizens."

Under the diversity statute, § 11 of the 1789 Judiciary Act, alien corporations could be sued as "aliens":

> By the constitution of the United States, the judicial power, so far as depending upon citizenship of parties, was declared to extend to controversies 'between citizens of different states,' and to those between 'citizens' of a state and foreign 'citizens or subjects.' And congress, by the judiciary act of 1789, in defining the original jurisdiction of the circuit courts of the United States, described each party to such a controversy, either as 'a citizen' of a state, or as 'an alien.' Act Sept. 24, 1789, c. 20, § 11 (1 Stat. 78); Rev. St. § 629. Yet the words 'citizens' and 'aliens,' in these provisions of the constitution and of the judiciary act, have always been held by this court to include corporations.

Barrow S.S. Co. v. Kane, 170 U.S. 100, 106 (1898).[3] If the terms "alien" and "citizen" have "always" included corporations, it follows *a fortiori* that where there is no definition of the proper defendant, corporations are proper defendants under the ATS.

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[3] Until 1809, corporations were considered "citizens" under § 11 of the Judiciary Act. 13F Fed. Prac. & Proc. Juris. § 3623: *Diversity Jurisdiction in Actions Involving Corporations – General Principles of Corporate Citizenship*, n.4 (3d ed. 2017). In *Bank of the United States v. Deveaux*, 9 U.S. 61, 77 (1809), the Court held that there must be an express statutory authorization for a corporation to sue in its own name to qualify as a "citizen." In 1844, the Court overruled *Deveaux*, holding that a corporation is "entitled, for the purpose of suing and being sued, to be deemed a citizen of that state." *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497 (1844).

In fact, it has been so uniformly understood that a foreign corporation is an "alien" and "citizen" under the diversity statute that the only longstanding issue in this realm is where exactly a corporation should be considered a citizen of. Prior to 1958, a foreign corporation was a citizen "solely of the foreign state in which it was incorporated." *E.g.*, *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898); *National S.S. Co. v. Tugman*, 106 U.S. 118 (1882). In order to correct perceived abuses in invoking federal jurisdiction, Congress revised § 1332(c) to provide that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332 (1958); *see Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). This resulted in a decades-long split of authority on the citizenship of foreign corporations that was remedied by a 2011 amendment to § 1332(c), which now provides that "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." *See* 13F Fed. Prac. & Proc. Juris. § 3628: *Alien Corporations* (3d ed. 2017).

When concluding foreign corporations are proper parties under the original Judiciary Act of 1789, the principal concern has never been whether corporations could be sued but instead how to properly identify their citizenship. As this Court stated now more than a hundred years ago, "[t]he constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural

persons, in regard to the jurisdiction of suits by or against them." *Barrow*, 170 U.S. at 106. Consistent with this background of amenability to suit and the absence of any defining language in the ATS regarding a proper defendant, there is no basis for concluding that the naming of a corporation as defendant is fatal to jurisdiction under the ATS. Corporations therefore may properly be defendants under the ATS.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BURT NEUBORNE
NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
New York, NY 10012
(212) 998-6172
burt.neuborne@nyu.edu

AMY J. WILDERMUTH
Counsel of Record
UNIVERSITY OF UTAH
S.J. QUINNEY
COLLEGE OF LAW
383 South University Street
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu