IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE I, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CA No. 01-1357 (RCL)
	)	Electronically Filed
EXXON MOBIL CORPORATION, *et al.*,	)	
	)	
Defendants.	)	
	)	

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT EXXON MOBIL CORPORATION'S
MOTION TO DISMISS THE ATS CLAIMS

Richard A. Samp (D.C. Bar No. 367194)
rsamp@wlf.org
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
Phone: (202) 588-0302
Fax: (202) 588-0386

Counsel for *Amicus Curiae*

Dated: August 21, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes:

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) [1] is a public-interest law firm and policy center with supporters in all 50 States and the District of Columbia. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in federal court to oppose creation of new and expanded private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, where doing so would increase the risk of diplomatic strife between the United States and other nations. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 582 F.3d 244 (2d Cir. 2009), *cert denied*, 562 U.S. 946 (2010). WLF filed a brief in this case in 2010 when it was before the U.S. Court of Appeals for the D.C. Circuit.

The Supreme Court has repeatedly doubted the propriety of federal courts creating private rights of action. It has held that courts should be particularly reluctant to do so in the context of the ATS, because separation-of-powers and foreign-relations concerns apply with particular force in that context. WLF believes that the decision to recognize a private right of action is best left to Congress when, as here, the plaintiffs are questioning the propriety a foreign government's conduct toward its own citizens, thereby creating a significant risk of diplomatic strife with the foreign government. Exxon's motion raises three separate grounds for dismissing the ATS. Although WLF agrees with all three, it writes separately to focus on the first: the court should not recognize ATS liability in cases of this sort because the risk of diplomatic strife

---

[1] WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

is too great.

STATEMENT OF THE CASE

Plaintiffs, 11 citizens of Indonesia, seek to recover for injuries they incurred in 1998-2001—allegedly at the hands of the Indonesia military—during a civil war in the Aceh region of the country. Plaintiffs allege that Indonesian military personnel violated their rights under customary international law. Exxon Mobil Corp. (Exxon) is named as a defendant, but Indonesia is not. Plaintiffs allege that Exxon aided and abetted the military's violation of their human rights by controlling and directing the military personnel assigned to guard Exxon's natural gas facilities in Aceh. They urge the Court to recognize a federal-common-law private right of action against Exxon under the Court's ATS jurisdiction. Plaintiffs concede that Congress has not created an express right of action for their claims.

The ATS, adopted in 1789, provides that a district court shall have original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law or nations or a treaty of the United States." 28 U.S.C. § 1350. Congress did not simultaneously create any private rights of action for aliens asserting law-of-nations claims. The Supreme Court nonetheless concluded that the 1789 Congress anticipated that courts would exercise their ATS jurisdiction to hear a narrow set of common-law actions derived from the law of nations: causes of action alleging offenses against ambassadors, violations of safe conduct, and piracy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720-21 (2004).

Citing separation-of-powers principles, *Sosa* held that primary responsibility for creating additional ATS private rights of action lies with Congress. While leaving the door slightly "ajar" for courts to exercise federal-common-law authority to recognize new forms of ATS liability on

their own, *Sosa* explained that courts should exercise "great caution" before doing so. 542 U.S. at 728. Among the reasons cited by the Supreme Court for establishing a "high bar to new private causes of action": any such actions are likely to have significant foreign-relations implications. *Id.* at 727.

The Supreme Court has directed courts to engage in a two-step process when determining whether to recognize new forms of ATS civil liability. First, claims based on the present-day law of nations should not be recognized if they rest on "violations of any international law norm with less definite content and acceptance among civilized nations" than the three causes of action recognized in 1789. *Id.* at 725. Second, "even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before [liability of the sort asserted by the plaintiff] can be imposed." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) (plurality opinion) (citing *Sosa*, 542 U.S. at 732-33).

Heeding *Sosa*'s guidance, Judge Oberdorfer dismissed Plaintiffs' ATS claims under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). In 2011, the D.C. Circuit reversed the ATS dismissal. 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013). The appeals court focused primarily on *Sosa* Step I. It held that the claims leveled at the Indonesian military (violations of norms against extrajudicial killing, torture, and prolonged arbitrary detention) "are clearly established norms of international law." *Id.* at 17. It reinstated ATS claims against Exxon for aiding and abetting misconduct by the Indonesian military because "aiding and abetting liability is clearly established in the law of nations and consequently such liability is available under the

ATS." *Id.* at 32.

The D.C. Circuit did not directly address *Sosa* Step II—that is, whether judicial recognition of claims that survive Step I is "a proper exercise of judicial discretion" in light of the type of claim being asserted. Instead, the court merely addressed the possibility that "case specific deference to the political branches" might warrant dismissal of the claims against Exxon. 654 F.3d at 59 (quoting *Sosa*, 542 U.S. at 733 n.21).[2] Accordingly, the appeals court never addressed whether courts should leave to Congress the decision of whether to authorize ATS suits that question the propriety of a foreign government's conduct toward its own citizens.

In 2013, the D.C. Circuit largely vacated its 2011 judgment in light of the Supreme Court's 2013 decision in *Kiobel* and remanded the case to this Court. 527 F. App'x 7.[3] On remand, the Court in July 2015 denied Defendants' motion to dismiss, a motion that focused largely on the extraterritorial nature of Plaintiffs' claims. The Court's Memorandum Opinion did not focus on the issue addressed here: what types of ATS claims create a sufficiently great risk of diplomatic strife that any decision to recognize a private right of action must be made by Congress, not the federal courts.

SUMMARY OF ARGUMENT

Congress's "principal objective" in adopting the ATS was reduce the risk of diplomatic

---

[2] The court ultimately declined to apply case-specific deference; it concluded that although the State Department said in a 2002 letter to the district court that the lawsuit "would in fact risk a potentially serious adverse impact on significant interests of the United States," the letter was not sufficiently unambiguous and recent to require dismissal of the lawsuit. *Id.* at 59-62.

[3] The D.C. Circuit did not vacate two portions of the 2011 judgment: its affirmance of this Court's dismissal of claims under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, and its reversal of the Court's dismissal of the Plaintiffs' non-federal tort claims.

strife with other nations. *Jesner*, 138 S. Ct. at 1397. The Founders sought "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Ibid.*

But as *Sosa* recognized, some types of lawsuits by aliens alleging law-of-nations violations potentially have precisely the opposite effect: they may *increase* the risk of diplomatic strife. 542 U.S. at 727-28. Under those circumstances, *Sosa* Step II directs federal courts *not* to exercise their very limited federal-common-law powers to recognize a private right of action but rather to defer to Congress on such matters.

WLF can think of few types of lawsuits more likely to generate strife with a foreign government than a suit, as here, that asks an American court to sit in judgment of that government's treatment of its own citizens within its own borders. Indeed, it is precisely to avoid such strife that Congress has adopted statutes, such as the Foreign Sovereign Immunities Act (FSIA), to severely restrict federal-court jurisdiction over claims against foreign sovereigns. Those restrictions explain Plaintiffs' decision not to name Indonesia as a defendant. Yet ATS suits such as this one—in which a defendant is accused of aiding and abetting a foreign government's alleged violations of its own citizens' human rights—require courts hearing the claims to determine whether the foreign government itself committed human rights abuses.

The Supreme Court has aptly described aiding-and-abetting suits against multi-national corporations as suits that "use corporations as surrogate defendants to challenge the conduct of foreign governments." *Jesner*, 138 S. Ct. at 1404 (plurality opinion). Given the significant risk that hearing such ATS claims will generate diplomatic strife, *Sosa* Step II counsels that the

decision to create a private right of action rests with Congress, not the courts. Because Congress has not adopted legislation authorizing Plaintiffs' ATS claims, the motion to dismiss those claims should be granted.

Importantly, Plaintiffs do not assert primary involvement by Exxon in the alleged violations of their human rights; rather, they assert that Exxon aided and abetted violations committed by the Indonesian military. Under these circumstances, the Court need not consider whether it should recognize federal-common-law claims against defendants alleged to have participated directly in extrajudicial killings, torture, and prolonged arbitrary detentions. The Court also need not consider whether to recognize federal-common-law claims when the defendant is alleged to have aided or abetted the misconduct of one or two rogue officials within a foreign government. Here, Plaintiffs are challenging the conduct of entire units of a foreign government's military; under those circumstances, the risk is self-evident that the foreign government may object to an American court sitting in judgment of that challenge.

ARGUMENT

I. PLAINTIFFS LACK A PRIVATE RIGHT OF ACTION TO ASSERT LAW-OF-NATIONS CLAIMS THAT CREATE A SUBSTANTIAL RISK OF CREATING DIPLOMATIC STRIFE

The ATS grants federal courts jurisdiction to hear tort claims filed by aliens alleging violation of their rights under "the law of nations." 28 U.S.C. § 1350. But all parties agree that Congress has not adopted legislation creating a private right of action for claims of the sort asserted by Plaintiff. So the question here is whether, in the absence of congressional authorization, federal courts should exercise their seldom-exercised federal-common-law authority to recognize the requested private right of action.

WLF respectfully submits that the answer to that question is "no." The Supreme Court

has instructed federal courts to exercise "great caution in adopting the law of nations to private rights" for many reasons, including the substantial risk that private enforcement will create diplomatic strife between the United States and other nations. *Sosa*, 542 U.S. at 727-28. The private right of action asserted by Plaintiffs—a claim that a corporation aided and abetted law-of-nations violations committed by a foreign government—creates a particularly severe risk of diplomatic strife.

"The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406. The Supreme Court instructed federal courts not to authorize a private right of action of the sort asserted in that case because "here, *and in similar cases*, the opposite is occurring"—the provision of an ATS right of action was creating strife with foreign governments. *Id.* (emphasis added). *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) ("[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations. *The Federalist* No. 80 (A. Hamilton)."). As *Sosa* explained:

> It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.

Sosa, 542 U.S. at 727. Indeed, *Sosa* questioned whether a court should entertain "at all" a suit under the ATS to enforce such a limit. *Id.* at 728.

A. It Is the Role of Congress, Not the Courts, to Determine Whether to Authorize a Private Right of Action that Questions a Foreign Government's Treatment of Its Own Citizens

It is not simply the ATS's unique history—its adoption as a means of reducing the risk of diplomatic conflict—that has led the Supreme Court to strictly limit judicial authority to recognize private rights of action not expressly granted by Congress. A decision by a federal court to recognize an ATS private right of action under its federal-common-law powers also "implicates serious separation-of-powers ... concerns." *Jesner*, 138 S. Ct. at 1398; *id.* at 1403 (stating that "foreign-policy and separation-of-powers concerns [are] inherent in ATS litigation" and that those concerns arguably "preclude courts from ever recognizing any new causes of action under the ATS").

Jesner noted the Supreme Court's "general reluctance to extend judicially created private rights of action" in any context, explaining:

> The Court's recent precedents cast doubt on the authority of courts to extend or create private rights of action even in the realm of domestic law, where the Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. That is because the Legislature is in the better position to consider if the public interest would be served by imposing a new liability. Thus, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, ... courts must refrain from creating the remedy in order to respect the role of Congress.

Id. at 1402 (citations omitted).

The Supreme Court stated that nothing in the language of the ATS or precedents interpreting it provide any grounds for excepting the ATS from the general principle that it is the role of Congress, not the courts, to determine the availability of private rights of action. *Id.* at 1403. To the contrary, *Jesner* held that separation-of-powers concerns apply with "particular force" to ATS right-of-action issues in light of the Constitution's express commitment of

foreign-policy matters to the political branches of government. *Id.* (stating that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns") (citing *Kiobel*, 569 U.S. at 116-17).

Many Supreme Court decisions affirm the quite limited role that the Constitution assigns to the judicial branch in foreign-policy matters. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (citations omitted); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (stating that foreign-policy decisions are "decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry"). In light that body of precedent and the significant foreign-policy considerations implicated by any decision to authorize private enforcement of law-of-nations norms, the Supreme Court quite understandably has established a "high bar to new private causes of action for violating international law." *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 727).

B. *Jesner* Demonstrates that Congress Has Not Authorized Courts to Recognize Private Rights of Action for Alleged Law-of-Nations Violations that Question the Power of a Foreign Government over Its Own Citizens

The Supreme Court's recent *Jesner* decision not only reiterates the Court's longstanding aversion to judicially created private rights of action but also makes clear that Plaintiffs' claims fall within a category of ATS claims for which Congress alone must decide whether to create a private right of action.

At issue in *Jesner* were ATS claims by aliens who suffered injury when a Jordanian bank

(Arab Bank, PLC), acting through senior corporate officials, allegedly committed terrorist acts in violation of international human-rights laws.[4] The Court affirmed dismissal of the ATS claims, holding that the ATS did not authorize United States courts to recognize a private right of action by aliens against foreign corporations. 138 S. Ct. at 1408 (stating that "judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of Government").

The justices voting to affirm did not agree on all of the reasons for doing so.[5] All five justices agreed, however, that: (1) Congress adopted the ATS "to promote harmony in international relations"; (2) creating a private right of action against foreign corporations could create a significant risk of diplomatic conflict; and (3) judicial recognition of a private right of action against foreign corporations despite those risks would render "the cautionary language of *Sosa* ... little more than empty rhetoric." *Id*. at 1406-07.

Jesner is dispositive of Plaintiffs' ATS claims. *Jesner* determined that courts are not authorized to recognize private rights of action against foreign corporations for law-of-nations claims, in large measure because such claims implicate serious foreign-policy and separation-of-powers concerns and because "[t]he political branches ... surely are better positioned than the

---

[4] The plaintiffs alleged that the bank was a direct participant in the terrorist activity. Accordingly, *Jesner* did not address the relevance, for ATS purposes, that a defendant is alleged to have participated only indirectly (*e.g.*, as a conspirator or an aider/abettor).

[5] Justice Kennedy wrote the principal opinion, which was joined in full by Chief Justice Roberts and Justice Thomas. 138 S. Ct. at 1393-1408. Justices Alito and Gorsuch each wrote opinions that concurred in part with Justice Kennedy's opinion and concurred in the judgment. *Id.* at 1408-12, 1412-19.

Judiciary to determine if corporate liability would or would not create special risks of disrupting good relations with foreign governments." *Id.* at 1408. But if an ATS lawsuit against a foreign corporation is too likely to create a rift with the corporation's home government to permit courts to act on their own, then surely the same must be said of any ATS lawsuit that accuses the government itself of violating the human rights of its own citizens.

Jesner highlighted the diplomatic rifts that have arisen "here, and in similar cases" in which a foreign sovereign objected strongly to federal-court recognition of ATS claims against a corporation domiciled within that foreign country. *Id.* at 1406-07. In particular, the Court noted Jordan's vehement objections to the ATS litigation against Arab Bank. Jordan termed the litigation "a grave affront" to its sovereignty and stated that "this suit ... threatens to destabilize Jordan's economy and undermine its cooperation with the United States." *Id.* at 1407 (quoting Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* at 3). There is no credible basis for believing that Jordan would have felt any less affronted if the entity accused of violating the law of nations was the government of Jordan itself and the nominal defendant happened not to be a Jordanian national. *Jesner*'s rationale thus requires dismissal of Plaintiffs' claims; paraphrasing that decision, "Judicial deference requires that any imposition of corporate liability" for aiding and abetting a foreign government's "violations of international law must be determined in the first instance by the political branches of government." *Id.* at 1408.

Although it noted Jordan's objections, the Supreme Court nonetheless saw no need to engage in a case-specific examination of the extent of the diplomatic strife caused or likely to be caused by granting a private right of action against Arab Bank under the ATS. Instead, the Court's judgment categorically barred *all* ATS suits against foreign corporations in the absence

of enabling congressional legislation. A similar categorical ruling is required here. The record is clear that both the United States and Indonesia have repeatedly objected to these ATS proceedings based on foreign-relations concerns.[6] But the Court need not undertake a case-specific examination of the recency and specificity of those objections to rule categorically that it is for Congress alone to decide whether to recognize ATS rights of action based on claims that a foreign government has violated the human rights of its own citizens.

On rare occasions, *Congress* has authorized civil actions that target alleged overseas misconduct by a foreign government, as when the United States has designated the government a "state sponsor of terrorism" and the government's terrorist activities have injured Americans. *See* 28 U.S.C. § 1605A. But the general rule adopted under the Foreign Sovereign Immunities Act (FSIA) is that foreign governments are not subject to suit in United States courts. 28 U.S.C. § 1604.[7] Judicially authorized ATS private rights of action that permit American courts to sit in judgment of a foreign government's treatment of its own citizens within its own borders are in considerable tension with the FSIA's broad grant of immunity.

---

[6] *See, e.g., Doe v. Exxon Mobil Corp*., 473 F.3d 345, 359 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) (referencing a 2002 letter to the Deputy Secretary of State, in which the Indonesian Ambassador to the United States stated: "As a matter of principle, we cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution, ... the Indonesian military, for operations taking place in Indonesia.").

[7] Indeed, Congress included restrictive language in the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, to ensure that foreign government were not targeted by civil suits filed under the statute. The TVPA authorizes civil actions against "individuals" who engage in torture or extrajudicial killing under color of foreign law. Congress adopted the word "individual" (rather than potentially broader terms, such as "person") "to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances." *Mohamad v. Palestinian Authority*, 566 U.S. 449, 459 (2012) (quoting S. Rep. No. 102-249 at 7 (1991)).

The Solicitor General (under both Republican and Democratic administrations) has consistently urged the Supreme Court to rule that *Sosa* Step II bars recognition of ATS rights of action under circumstances largely indistinguishable from this case. In *Khulamani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom., American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008), the Second Circuit authorized an ATS lawsuit to proceed against a large group of corporations (both foreign and domestic) alleged to have aided and abetted law-of-nations violations by the government of South Africa. In urging the Supreme Court to review (and ultimately overturn) the Second Circuit's decision, the United States argued:

> [T]here should be a compelling presumption against recognizing a power in the courts to project U.S. law into foreign countries through the fashioning of federal common law. The court of appeals not only ignored that presumption, it exacerbated the risk of "international discord" by endorsing aiding and abetting suits in which the primary conduct at issue is the foreign state's own conduct in its own territory, and the sovereign is itself immune from civil suit in our domestic courts. Recognition of ATS liability in such circumstances is the antithesis of the "great caution" that this Court admonished the courts to use in exercising their modest federal-common-law-making authority under the ATS.

Amicus Brief for the United States in *American Isuzu Motors, Inc. v. Ntsebeza* at 12, No. 07-919 (U.S., Feb. 2008) (quoting *Sosa*, 542 U.S. at 728).

The United States urged similar caution in the supplemental *amicus* brief it filed in *Kiobel* (addressing extraterritoriality issues):

> [A]lthough petitioners' suit is against private corporations alleged to have aided and abetted human rights abuses by the Government of Nigeria, adjudication of the suit would necessarily entail a determination about whether the Nigerian Government or its agents have transgressed limits imposed by international law. Imposition of such liability would result from decisions of the Judiciary, which lacks the expertise of the political Branches to weigh the relevant considerations, and the jurisdiction of the courts would be invoked by private plaintiffs without "the check imposed by prosecutorial discretion," *Sosa*, 542 U.S. at 727, that the Executive can exercise in

the criminal context.

Supplemental *Amicus* Brief for the United States in *Kiobel v. Royal Dutch Petroleum Co.* at 17, No. 10-1491 (U.S. June 2012).[8]

The Solicitor General's views on the questionable propriety of American courts sitting in judgment of the actions of foreign sovereigns are consistent with those of Presidents and legal commentators throughout our history. *See* Letter of George Washington to James Monroe (Aug. 25, 1796), in 35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799,* at 189 (John C. Fitzpatrick ed. 1940) ("[N]o Nation had a right to intermeddle in the internal concerns of another."); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (No. 15,551) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. ... No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy."). Congress is nonetheless authorized to create private rights of action that entail American courts sitting in judgment of the actions of foreign sovereigns, based on its considered determination that the benefits of such suits outweigh the obvious diplomatic costs. *Jesner* and *Sosa* make clear, however, that courts are not permitted to make that determination on their own.

[8] Because all the defendants in *Kiobel* were foreign corporations, the Solicitor General took no position on whether its proposed rule should also apply to American corporations. *Id.*

II. BECAUSE EXXON IS SUED AS AN AIDER AND ABETTER, THE COURT CANNOT ADJUDICATE PLAINTIFFS' CLAIMS WITHOUT JUDGING THE PROPRIETY OF INDONESIA'S CONDUCT

WLF does not suggest that an American defendant who directly violates the law of nations should be exempt from potential ATS liability simply because its misconduct occurred in tandem with similar misconduct by a foreign government. Under those circumstances, a federal court could adjudicate claims against the defendant without simultaneously sitting in judgment on the conduct of the foreign government.

But where, as here, a corporate defendant is not accused of primary wrongdoing but rather is simply alleged to have aided and abetted the misconduct of the foreign government, it is not possible to adjudicate the claims against the defendant without, in effect, putting the foreign government on trial. Both *Sosa* and *Jesner* urged courts to demonstrate great caution in recognizing private rights of action under the ATS—precisely to avoid litigation creating such significant risks of creating diplomatic strife. *Sosa*, 542 U.S. at 727 (questioning the propriety of ATS suits "under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits"); *Jesner*, 138 S. Ct. at 1404 (plurality opinion) (basing the decision to bar claims against foreign corporations in part on Congress's desire to avoid lawsuits in which "plaintiffs ... use corporations as surrogate defendants to challenge the conduct of foreign governments," and citing *Kiobel* (in which corporations were sued under the ATS for aiding and abetting "crimes against humanity" by the Nigerian government) as an example of such surrogate litigation). As the United States argued in *American Isuzu Motors*, courts that endorse aiding-and-abetting suits "in which the primary conduct is the foreign state's own conduct in its own territory" are ignoring *Sosa*'s "great caution" directive and thereby "exacerbat[ing] the risk

of 'international discord.'" *Amicus* Brief for the United States in *American Isuzu Motors, Inc. v. Ntsebeza* at 12; see *id.* at 19 ("Such litigation will *inevitably* give rise to tension in relations between the United States and the country whose conduct is at issue.") (emphasis added).

Moreover, as the D.C. Circuit recently held, *Sosa* Step II is intended to prevent district courts from exercising *any* jurisdiction over ATS claims that risk creating diplomatic strife, not merely to bar the entry of judgment. *Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F.3d 501, 515-16 (D.C. Cir. 2018). The Court explained that *Jesner* "barred ATS actions against foreign corporations to avoid the 'serious foreign policy consequences' entailed by permitting such suits to proceed. [138 S. Ct. at 1407.] ... The bar as understood in *Jesner* thus aims to preclude judicial inquiry altogether, not merely to defeat ATS claims on the merits." *Ibid* (citations omitted). There is thus no basis for deferring consideration of Exxon's *Sosa* Step II defense until a later stage of this 17-year-old suit.

Importantly, even though the 2018 *Jesner* decision significantly clarifies ATS private-right-of-action issues, granting Exxon's motion to dismiss the ATS claims based on diplomatic-strife grounds would not require the Court to reconsider any previous appeals-court rulings in this case. The D.C. Circuit's now-vacated 2012 decision reinstating the ATS claims against Exxon focused almost exclusively on *Sosa* Step I. The appeals court held that the claims leveled at the Indonesian military (violations of norms against extrajudicial killing, torture, and prolonged arbitrary detention) "are clearly established norms of international law." 654 F.3d at 17. It concluded that the ATS claims against Exxon for aiding and abetting misconduct by the Indonesian military similarly cleared the *Sosa* Step I hurdle because "aiding and abetting liability is clearly established in the law of nations and consequently such liability is available under the

ATS." *Id.* at 32. But the appeals court did not address *Sosa* Step II, which requires the following analysis: "even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before [liability of the sort asserted by the plaintiff] can be imposed." *Jesner*, 138 S. Ct. at 1399 (plurality opinion) (citing *Sosa*, 542 U.S. at 732-33). It is *Sosa* Step II that Exxon now asks the Court to address.

Finally, granting Exxon's motion to dismiss the ATS claims would not preclude future ATS claims in which the defendant is alleged to have aided and abetted law-of-nations violations by one or two rogue government officials. Under those circumstances, the risk that an ATS lawsuit will create diplomatic strife may be considerably reduced because the foreign government is less likely to feel affronted by an American court passing judgment on the actions of one or two citizens of its country. In such cases, it may be appropriate for a court to undertake a case-specific inquiry to determine the likelihood that continuation of the lawsuit will have significant diplomatic consequences. But such considerations are inapplicable here. Plaintiffs are challenging the conduct of entire units of the Indonesian military; under these circumstances, *Jesner* mandates a finding that the risks of diplomatic conflict are too great to permit their claims to proceed.

CONCLUSION

WLF respectfully requests that the Court grant Exxon's motion to dismiss the ATS claims. Exxon has demonstrated that federal courts should not exercise ATS jurisdiction to recognize federal-common-law rights of action in cases of this sort. Both *Jesner* and *Sosa* show that it must be left to Congress to determine whether to recognize claims arising under the ATS when, as here, a proposed right of action creates a very high risk of diplomat strife between the United States and the government of a foreign country.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp (D.C. Bar No. 367194)
rsamp@wlf.org
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
Phone: (202) 588-0302
Fax: (202) 588-0386

Dated: August 21, 2018

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2018, I electronically filed this proposed *amicus curiae* brief of Washington Legal Foundation with the Clerk of the Court for the U.S. District Court for the District of Columbia by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp