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USING THE FOREIGN CORRUPT PRACTICES ACT AS A MODEL FOR FEDERAL QUESTION JURISDICTION OVER CORPORATE COMPLICITY IN OVERSEAS HUMAN RIGHTS VIOLATIONS

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INTRODUCTION

Within the United States, many federal statutes and regulations prevent corporations from violating individual human rights, including economic rights.[1] If a corporation commits an act in the United States and that act violates a person's human rights, federal laws often allow the victim to sue the corporation for compensation in U.S. federal courts, which have jurisdiction over civil claims arising in the United States from federal law.[2] But access to recourse becomes more complicated when an individual seeks to sue a corporation in federal court for an act that occurred outside the United States.[3] This Note examines the jurisdictional obstacles that prevent federal courts from hearing human rights cases brought by foreign plaintiffs who come to the United States after surviving human rights violations in other countries and seek to sue corporations whose conduct contributed to the plaintiffs' harm.

For individual human rights victims who seek civil redress, federal courts are an appealing avenue for litigation because they provide many pro-plaintiff strategic benefits, including "class action lawsuits, discovery, jury trials, contingency fees, and potentially high damage awards."[4] This Note focuses on a specific type of human rights plaintiff who seeks to sue a corporation because conduct that occurred somewhere in the company's supply chain violated the plaintiff's human rights. To sue in federal court, these plaintiffs need a cause of action that allows the court to hear: (1) a civil claim brought by an individual plaintiff, (2) against a corporation, (3) alleging indirect liability (such as aiding and

1. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (prohibiting employers in the United States from targeting employees on the basis of disabilities); 29 C.F.R. § 570.35 (2023) (restricting the hours and conditions under which children aged fourteen through fifteen may legally work in the United States); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (prohibiting employers in the United States from discriminating against employees on the basis of "race, color, religion, sex, or national origin"); 18 U.S.C. § 1589 (prohibiting subjecting an individual in the United States to forced labor).

2. *See* 28 U.S.C. § 1331.

3. *See* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 12–13 (2013).

4. Gerlinde Berger-Walliser, *Reforming International Human Rights Litigation Against Corporate Defendants After* Jesner v. Arab Bank, 21 U. PA. J. BUS. L. 757, 757–59 (2019).

abetting liability), (4) for conduct outside the United States, (5) that violated the plaintiff's human rights.[5]

For many years, plaintiffs have sought to bring this type of case under the Alien Tort Statute, which comprises a single sentence reading, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6] The United States became a center for international human rights litigation after the Second Circuit's 1980 decision *Filartiga v. Pena-Irala* showed how the Alien Tort Statute might support a cognizable civil cause of action for human rights violations that occurred outside the United States.[7] But in the last two decades, federal courts have gradually narrowed the Alien Tort Statute's jurisdictional scope.[8] The Supreme Court's 2021 decision *Nestle USA, Inc. v. Doe* left the future of human rights litigation under the Alien Tort Statute unclear.[9]

Part I of this Note explains the current challenges to bringing a claim in federal district court under the Alien Tort Statute, examining existing case law for each component of the type of claim described above. Part I ends with a call to Congress to amend the statute to give federal courts subject matter jurisdiction over such claims. Part II examines how another federal statute, the Foreign Corrupt Practices Act, allows federal courts to hear claims with many similar attributes to the cases brought under the Alien Tort Statute. Part III explains why the Alien Tort Statute should allow federal courts to impose aiding and abetting liability on foreign and American corporations alike when those corporations' business decisions and corporate conduct contribute to social systems where human rights violations occur.

5. The author identifies these five elements as characteristics that distinguish the subset of human rights litigation addressed in this Note. For further explanation of how this specific type of human rights case arises, see *infra* Part III.

6. 28 U.S.C. § 1350.

7. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 457–58 (2001); *see also* Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 535 (2021). *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

8. *See* Richard M. Buxbaum & David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY J. INT'L L. 511, 512–15 (2010).

9. *See generally* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

I. CURRENT ISSUES WITH FEDERAL QUESTION JURISDICTION UNDER THE ALIEN TORT STATUTE

Any plaintiff who brings a civil case in federal district court must establish that the court possesses subject matter jurisdiction over the case.[10] Subject matter jurisdiction empowers the court to both hear disputes "over the nature of the case and the type of relief sought" and issue legally enforceable "rul[ings] on the conduct of persons or the status of things" at issue in the case.[11] Without subject matter jurisdiction, the court lacks these powers and thus cannot adjudicate the claims raised in the case.[12] Claims can be dismissed at any point during a lawsuit if the court loses (or never possessed) subject matter jurisdiction over them.[13]

Federal district courts are often called "courts of limited jurisdiction" because they only possess subject matter jurisdiction over certain types of claims.[14] Article III of the U.S. Constitution establishes the boundaries of federal district courts' subject matter jurisdiction.[15] Article III grants federal courts subject matter jurisdiction over "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[16] This type of subject matter jurisdiction, called federal question jurisdiction,[17] encompasses both claims where federal law itself provides for the cause

10. *See* Emiabata v. Farmers Ins. Corp., 848 F. App'x 27, 28 (2d Cir. 2021) (citing Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005)).

11. *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term "subject-matter jurisdiction").

12. Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973) ("Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction.").

13. FED. R. CIV. P. 12(h)(3).

14. MATT D. BASIL ET AL., FEDERAL SUBJECT MATTER JURISDICTION OUTLINE 1 (2011) (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)), https://jenner.com/system/assets/assets/5507/original/Federal_20Subject_20Matter_20Jurisdiction_20Outline_Jenner_20_26_20Block_0611.pdf?1323113751; *see also* Badgerow v. Walters, 142 S. Ct. 1310, 1315 (2022) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)); Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1704 (2020); KEVIN M. LEWIS & LIBERTY SACKER, CONG. RSCH. SERV., LSB10335, ACHIEVING BALANCE: WHICH CASES BELONG IN WHICH COURTS? 1 (2019).

15. *See* U.S. CONST. art. III, § 2, cl. 1.

16. *Id.* Although Article III creates several other forms of subject matter jurisdiction, this Note only discusses federal question jurisdiction. *See supra* notes 10–15 and accompanying text.

17. 28 U.S.C. § 1331 (section titled "Federal Question").

of action[18] and claims whose resolution requires interpreting federal law.[19]

At first glance, the Alien Tort Statute appears to be a clear-cut example of a federal statute that creates a cause of action over which federal courts possess federal question jurisdiction. The Alien Tort Statute states that federal "district courts shall have original jurisdiction of any civil action" brought under the statute.[20] Because a "suit arises under the law that creates the cause of action,"[21] a case brought under the Alien Tort Statute would clearly fall within federal question jurisdiction's boundaries.[22] Indeed, the long line of federal cases addressing the Alien Tort Statute consistently acknowledge that the statute allows courts to exercise federal question jurisdiction over cases brought under it.[23] So if federal courts agree with the proposition that federal question jurisdiction exists when a federal "law permits a claimant to bring a claim in federal court,"[24] why then do they decline to hear civil cases under the Alien Tort Statute "by an alien for a tort . . . committed in violation of the law of nations"?[25]

In *Nestle USA, Inc. v. Doe*, the Supreme Court ruled that federal courts could not hear a case that exhibited many characteristics common to Alien Tort Statute human rights cases.[26] In *Nestle*, six individuals from the Ivory Coast alleged that food manufacturers Nestlé USA and Cargill aided and abetted in their enslavement as children on cocoa farms that supplied cocoa to Nestlé and Cargill.[27] In addition to cocoa procurement agreements, the companies provided "technical and financial resources—such as training, fertilizer, tools, and cash—in

18. *E.g.*, Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738, 828–31 (1824) (allowing a federal court to hear a lawsuit by the Bank of the United States because the Act of Congress that created the bank explicitly gave the bank the right to sue and be sued in federal courts).

19. *E.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 310–12 (2005) (finding federal question jurisdiction in a lawsuit brought under the Michigan state law because the dispute hinged on whether the Internal Revenue Service, a federal agency, had followed federal tax laws when it served a notice of upcoming sale of property to cover back taxes).

20. 28 U.S.C. § 1350.

21. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

22. *Compare* 28 U.S.C. § 1350, *with* 28 U.S.C. § 1331.

23. *E.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1396 (2018); Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021).

24. *See, e.g.*, Ohlendorf v. United Food & Com. Workers Int'l Union Local 876, 883 F.3d 636, 640 (6th Cir. 2018) (quoting Traverse Bay Area Intermediate Sch. Dist. v. Mich. Dep't of Educ., 615 F.3d 622, 627 (6th Cir. 2010)).

25. 28 U.S.C. § 1350.

26. *Nestle*, 141 S. Ct. at 1936.

27. *See id.* at 1935.

exchange for the exclusive right to purchase cocoa" from the farms.[28] The plaintiffs argued that Nestlé and Cargill "'knew or should have known' that the farms were exploiting enslaved children yet continued to provide those farms with [these] resources" and buy cocoa supplies from them.[29]

The Court began by applying the two-prong extraterritoriality analysis from *RJR Nabisco, Inc. v. European Community*.[30] First, the Court reaffirmed its previous decision in *Kiobel v. Royal Dutch Petroleum Co.*, which held that the Alien Tort Statute does not contain any "clear, affirmative indication"[31] that Congress meant to allow federal courts to exercise extraterritorial jurisdiction over conduct that occurred outside the United States.[32] Next, the Court found that "the conduct relevant to the statute's focus [did not] occur[] in the United States," instead occurring entirely outside the United States.[33] Although the *Nestle* plaintiffs argued that Nestlé and Cargill's business presence in the United States permitted a domestic application of the Alien Tort Statute against the companies' overseas conduct, the Court thoroughly rejected using corporate activity as a basis for establishing jurisdiction.[34] Thus, the Court lacked federal question jurisdiction over the case.[35]

A. Granting Jurisdiction and Creating Causes of Action Are Not the Same Thing

The mysteries of the Alien Tort Statute stem from the perplexing reality that the statute "does not by its own terms provide or delineate the definition of a cause of action for violations of [the law of nations]."[36] Instead, the statute merely permits federal district courts to hear cases brought under the Alien Tort Statute if those cases assert a cause of action that itself exists.[37] In other words, federal courts possess the procedural power to hear a case under the Alien Tort Statute but not the substantive power to create the cause of action that would underlie such

28. *Id.*
29. *Id.*
30. *Id.* at 1936 (citing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).
31. *Id.* (quoting *RJR Nabisco, Inc.*, 579 U.S. at 337).
32. *Id.* (citing *RJR Nabisco, Inc.*, 579 U.S. at 337; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013)).
33. *Id.* at 1935–36 (quoting *RJR Nabisco, Inc.*, 579 U.S. at 337).
34. *Id.* at 1937.
35. *Id.* at 1936.
36. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 713–14 (2004)).
37. *See id.*

a case.[38] As both powers affect the boundaries of federal courts' federal jurisdiction, both powers must come from Congress.[39]

Federal courts obtained the first power when Congress enacted the Alien Tort Statute itself.[40] The statute was tucked into the Judiciary Act of 1789, which established the lower courts of the federal judiciary.[41] Although Judge Henry Friendly famously described the Alien Tort Statute as "a legal Lohengrin . . . no one seems to know whence it came,"[42] the Supreme Court identified a legislative intent to "promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable."[43] Two assaults in the 1780s against foreign diplomats[44] underscored the need to assure other countries that the United States would uphold international law.[45] This assurance also showed foreign merchants that American courts would uphold the rule of law when adjudicating disputes, encouraging foreign investment in American markets.[46]

Congress provided these assurances by giving federal courts subject matter jurisdiction over cases that allege a tort that violated international law.[47] However, Congress never defined the conduct that qualified as a "violation of the law of nations."[48] To create a cause of

38. *Nestle*, 141 S. Ct. at 1937.
39. *See* 28 U.S.C. § 1331.
40. 28 U.S.C. § 1350.
41. Buxbaum & Caron, *supra* note 8, at 511. The Constitution granted judicial authority to "such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.
42. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014) (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010)).
43. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 3 (2022) (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1406 (2018)), https://fas.org/sgp/crs/misc/R44947.pdf.
44. "Infringement of the rights of [a]mbassadors" was one of the three "offen[s]es against the law of nations" named in William Blackstone's *Commentaries* a few decades before Congress passed the Alien Tort Statute. 2 WILLIAM BLACKSTONE, COMMENTARIES *68. The other offenses were piracy and violating safe-conduct. *Id.*
45. Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1646–47 (2014). For a historical account of the two 1780s incidents, see MULLIGAN, *supra* note 43, at 4–5. Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1692–94 (2012).
46. Lee, *supra* note 45, at 1646–47.
47. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 450 (2011).
48. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1944 (2021) (Sotomayor, J., concurring).

action that falls within a federal court's federal question jurisdiction, a federal statute must clearly create both a specific right and an accompanying remedy when someone violates that right.[49] Because the Alien Tort Statute does not name specific torts that fall within its ambit, federal courts themselves must determine what causes of action the statute allows them to hear.[50]

B. The "Violation of the Law of Nations": Illustrating the Challenges to Identifying Causes of Action Under the Alien Tort Statute

The Supreme Court first addressed this problem in *Sosa v. Alvarez-Machain*, which recognized that human rights violations could fall under the Alien Tort Statute's ambit if they satisfied the statute's "violation of the law of nations" prong.[51] "Violation of the law of nations" includes "violation of safe conducts, infringement of the rights of ambassadors [i.e., violating diplomatic immunity], and piracy."[52] When Congress enacted the statute in 1789, English common-law courts recognized these three acts as belonging to a unique sphere of conduct that was both committed by individuals yet violated the law of *nations*, which governed relationships between countries.[53] Considering Congress's foreign policy motivations, the Supreme Court determined that the Alien Tort Statute's drafters intended for "torts" to include these three violations of international law as permissible causes of action that allowed the victim to sue the perpetrator separately from any diplomatic action that the victim's country might take against the perpetrator's country.[54] Thus, piracy, violations of safe conduct, and violations of diplomatic immunity all qualify as causes of action that federal courts may hear under the Alien Tort Statute.

Beyond these three actions, *Sosa* established a two-part test for courts to identify conduct that constituted a permissible cause of action under the Alien Tort Statute's "violation of the law of nations" language.[55] First, the court must find that the conduct violates a "specific, universal, and obligatory" norm of international law, with piracy, violations of safe conduct, and violations of diplomatic immunity

49. *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." (citing Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979))).

50. *Nestle*, 141 S. Ct. at 1935.

51. Sosa v. Alvarez-Machain, 542 U.S. 692, 699, 712 (2004).

52. *Id.* at 724.

53. *Id.* at 715; *see also supra* note 44 and accompanying text.

54. *Sosa*, 542 U.S. at 715, 724.

55. *Nestle*, 141 S. Ct. at 1938 (citing *Sosa*, 542 U.S. at 732).

providing standards for gauging the required specificity.[56] Federal courts have generally interpreted "norm" to mean customary international law,[57] which comprises rules that have over time become "general practice accepted as law."[58] Second, the court must weigh "the practical consequences of making that [conduct a] cause [of action] available to litigants in the federal courts."[59] Even if some conduct violates a rule of customary international law, courts cannot recognize the violation as the basis for a new cause of action under the Alien Tort Statute if they "can identify even one 'sound reaso[n] to think Congress might doubt the efficacy or necessity of [the new] remedy.'"[60]

C. Separation of Powers Implications When Creating Causes of Action Under the Alien Tort Statute

Separation of powers helps explain the reticence exhibited in the second step of the *Sosa* test.[61] Because international law governs sovereign states' behavior,[62] cases alleging international law violations raise thorny diplomatic and geopolitical questions even if neither party is a sovereign state. Federal courts have long considered such questions as Congress's, not the federal judiciary's, responsibility.[63] Thus, federal judges consistently declined to hear cases where the underlying conduct raises foreign policy issues.[64] Although the distribution of power over

56. *Id.* (quoting *Sosa*, 542 U.S. at 725, 732).

57. Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531, 533–34 (2012).

58. *See* Statute of the International Court of Justice art. 38, ¶ 1(b), June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945). Practitioners of international law define "customary international law" as rules of international law that have: (1) widespread state practice complying with the rule, and (2) *opinio juris*, or recognition by states that they are legally required to follow the rule. *See* North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

59. *Sosa*, 542 U.S. at 732–33.

60. *Nestle*, 141 S. Ct. at 1938–39 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018)).

61. *See generally* Elizabeth Earle Beske, *Litigating the Separation of Powers*, 73 ALA. L. REV. 823 (2022) (detailing the history of Supreme Court separation of powers litigation).

62. Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 (2006).

63. *E.g.*, United States v. Pink, 315 U.S. 203, 222–23 (1942) ("[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . [and] the propriety of the exercise of that power is not open to judicial inquiry . . . ."); Meshal v. Higgenbotham, 804 F.3d 417, 426 (D.C. Cir. 2015) ("Matters touching on national security and foreign policy fall within an area of executive action where courts hesitate to intrude absent congressional authorization.").

64. *E.g.*, Bancoult v. McNamara, 445 F.3d 427, 432–37 (D.C. Cir. 2006); Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 954 (5th Cir. 2011); Presbyterian

foreign policy between different branches of the federal government has varied over time, federal courts remain wary of influencing foreign policy decisions.[65]

In *Nestle*, the Supreme Court affirmed courts' longstanding aversion to making foreign policy.[66] Although the Court did not expressly invoke the political question doctrine, *Nestle*'s "sound reason to think Congress might doubt a judicial decision to create a cause of action"[67] language echoed *Baker v. Carr*'s analysis of the political question doctrine.[68] For example, *Nestle* raised concern that federal courts lack "the 'institutional capacity' to consider all factors relevant to creating a cause of action that will 'inherent[ly]' affect foreign policy."[69] This concern echoes the *Baker* Court's inquiry into whether courts possess "judicially discoverable and manageable standards for resolving" the legal issues in a case.[70] Additionally, *Nestle* noted that the plaintiffs there asked the Court to create a cause of action under the Alien Tort Statute for child trafficking when Congress had previously "settled on the current approach to private remedies against human trafficking only after its 'understanding of the problem evolved' through years of studying 'how to best craft a response.'"[71] Had the Court created that cause of action, the judiciary would have "second-guess[ed] Congress' [legislative] decision,"[72] thus "undertaking independent resolution" of a settled legislative question while "expressing lack of the respect due coordinate branches of government."[73] Finally, *Nestle* recognized that jurisdiction under the Alien Tort Statute only exists because Congress enacted it.[74] Congress's authority to enact the Alien Tort Statute comes from Article III of the

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Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399, at *30 (S.D.N.Y. Aug. 30, 2005).

65. *E.g.*, Haig v. Agee, 453 U.S. 280, 293–300 (1981) (describing the executive and legislative branches' respective roles in determining passport policy). For further discussion of the political interactions between different branches, see generally Robert A. Friedlander, *Foreign Policy and the Separation of Powers: Who Sets the Course for the Ship of State*, 22 CORNELL INT'L L.J. 245 (1989). Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL ON FOREIGN RELS. (Mar. 2, 2017, 2:28 PM), https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president.

66. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021).

67. *Id.* at 1939–40.

68. For discussion of the factors that can make a case a political question, see Baker v. Carr, 369 U.S. 186, 217 (1962). Nixon v. United States, 506 U.S. 224, 228–29 (1993).

69. *Nestle*, 141 S. Ct. at 1940 (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)).

70. *Baker*, 369 U.S. at 217.

71. *Nestle*, 141 S. Ct. at 1940.

72. *Id.*

73. *Baker*, 369 U.S. at 217.

74. *See Nestle*, 141 S. Ct. at 1940.

Constitution.[75] As such, the Constitution arguably contains "a textually demonstrable constitutional commitment"[76] giving Congress, not the courts, the power to create causes of action.[77]

D. No Cause of Action Clearly Permits Foreign Corporate Liability Under the Alien Tort Statute

Human rights victims have used the Alien Tort Statute to bring cases against corporations since the 1990s.[78] The Second Circuit "paved the way for subsequent corporate litigation under the" Alien Tort Statute when it held that "private parties can be held liable for violations [of international law] that do not require state action, including genocide, war crimes, and crimes against humanity."[79] The Ninth Circuit expanded the net of potential defendants when it ruled that the Alien Tort Statute permitted federal question jurisdiction over "claims against corporations and their executive officers."[80] Traditionally, corporate liability claims commonly appear in Alien Tort Statute cases involving firms that are active in "the extractive industries (e.g., oil and gas exploration and development), when multinational corporations become involved in projects with repressive governments in their search for oil, gas, or precious metals."[81] In recent decades, plaintiffs have also brought Alien Tort Statute cases alleging that slavery and other human rights violations "occur deep in the supply chains of" the named corporate defendants.[82]

Because the Alien Tort Statute's text does not expressly state that corporations may be sued as defendants, federal courts cannot impose liability on corporations unless the statute separately permits an implied

75. *See* U.S. CONST. art. III, § 2, cl. 1 (stating that federal courts may hear cases "arising under" federal law).

76. *Baker*, 369 U.S. at 217.

77. *Nestle*, 141 S. Ct. at 1937 ("That job belongs to Congress, not the Federal Judiciary.").

78. *Corporate Human Rights Abuses*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/issues/corporate-human-rights-abuses (last visited Feb. 11, 2023).

79. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 311 (2d ed. 2008) (citing Kadic v. Karadzic, 70 F.3d 232, 241–44 (2d Cir. 1995)).

80. Chambers, *supra* note 7, at 535 (citing Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003)).

81. STEPHENS ET AL., *supra* note 79, at 309.

82. *See* Ameena Y. Majid et al., *Supreme Court Opinion Suggests US Corporations Are Not Immune from Liability Under the Alien Tort Statute*, SEYFARTH SHAW LLP (June 23, 2021), https://www.seyfarth.com/news-insights/supreme-court-opinion-suggests-us-corporations-are-not-immune-from-liability-under-the-alien-tort-statute.html.

private right of action against corporate defendants.[83] Past Supreme Court decisions have found implied private rights of action in federal laws whose plain language did not explicitly provide for one.[84] However, a finding that a federal statute contains an implied private right of action does not necessarily mean that the statute contains an implied private right of action against corporations.[85] For example, in *Correctional Services Corp. v. Malesko*, the Supreme Court ruled that the implied private right of action it had previously found under the Fourth Amendment did not permit federal courts to impose civil liability against corporate defendants.[86] The Court reasoned that expanding a private right of action to cover a different type of defendant would "imply new substantive liabilities."[87] *Malesko* suggests that the court may need to issue separate decisions to recognize implied private rights of action under the same federal law but against different types of defendants.[88]

Alien Tort Statute case law on corporate liability considers two types of defendants, foreign corporations and domestic corporations. Here, the term "foreign corporation" encompasses any business entity with both a place of incorporation and principal place of business located outside the United States.[89] Foreign corporations warrant a separate analysis under *Sosa*'s cause of action test because federal courts may implicate foreign policy by claiming power under an American statute over a non-American company.[90] For example, "the balance of prudential concerns clearly

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83. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–04 (2018) (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001)).

84. *Malesko*, 534 U.S. at 66 ("[The Supreme Court's] authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in [its] general jurisdiction to decide all cases 'arising under [federal law].'" (quoting 28 U.S.C. § 1331)); *e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (holding that SEC Rule 10b-5 contained an implied private right of action). For further discussion on the historical development of Supreme Court doctrine on implied private rights of action, see generally Donna L. Goldstein, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 FORDHAM L. REV. 611 (1982).

85. *See Malesko*, 534 U.S. at 66.

86. *Id.* at 63, 66. The Court had previously found an implied private right of action permitted individuals to sue federal government officials in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

87. *Malesko*, 534 U.S. at 66.

88. *See id.* at 67–70 (listing individual cases where the Supreme Court permitted civil liability against different classes of defendants under the same private right of action).

89. *See* Alvarez Galvez v. Fanjul Corp., 533 F. Supp. 3d 1268, 1279 (S.D. Fla. 2021); Berger-Walliser, *supra* note 4, at 787–88.

90. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting "there is a strong argument that federal courts should give strong weight to the Executive Branch's view of the case[s'] impact on foreign policy" before hearing "class actions seeking damages

weighs against permitting foreign plaintiffs to sue foreign defendants for breaches of fiduciary duty in the management of foreign corporations, duplicating similar commercial litigation in the domestic courts of the country where the corporation operates."[91] Similarly, federal courts might threaten American efforts to promote international action against climate change by holding a foreign corporation "accountable [under U.S. federal law] for purely foreign activity . . . [and] requir[ing] them to internalize the costs of climate change and would presumably affect the price and production of fossil fuels abroad."[92]

The Supreme Court unambiguously precluded jurisdiction under the Alien Tort Statute over foreign corporations in *Jesner v. Arab Bank, PLC*.[93] In *Jesner*, the petitioners alleged that Arab Bank, PLC, a Jordanian bank with a branch office in New York, "caused or facilitated" acts of terrorism by electronically moving funds and facilitating financial transactions on behalf of terrorist organizations in the Middle East.[94] Although many corporations had been sued under the Alien Tort Statute before *Jesner*,[95] the *Jesner* Court conducted a step-by-step inquiry into "whether the United States judiciary has authority in an ATS action to determine if a corporation has, by its human agents, violated tenets of international law that protect human rights and impose liability on the corporation."[96] Following the second step of the *Sosa* test, the Court found multiple "sound reasons" why Congress might not wish to permit federal question jurisdiction over Alien Tort Statute cases against foreign corporations.[97] If courts were allowed to hear such cases, they might "discourage[] American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations . . . and deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights."[98] The courts might also trigger a diplomatic crisis by "imply[ing] that other nations, also applying

from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa" (citations omitted)).

91. Abu Nahl v. Abou Jaoude, 968 F.3d 173, 184 (2d Cir. 2020).

92. City of New York v. Chevron Corp., 993 F.3d 81, 103 (2d Cir. 2021) (noting that, in that situation, other branches of the federal government have already created "diplomatic channels that the United States uses to address this issue, such as the U.N. Framework and the Paris Agreement").

93. 138 S. Ct. 1386, 1408 (2018); Berger-Walliser, *supra* note 4, at 780.

94. *Jesner*, 138 S. Ct. at 1393–96.

95. *E.g.*, Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527–31 (4th Cir. 2014).

96. Berger-Walliser, *supra* note 4, at 778 (citing *Jesner*, 138 S. Ct. at 1394).

97. *Jesner*, 138 S. Ct. at 1402, 1405–06.

98. *Id.* at 1406 (alteration in original).

the law of nations, could hale [American] [corporations] into their courts for alleged violations of the law of nations."[99] That outcome would unquestionably raise foreign policy or national security questions that could lead Congress to find "sound reasons to . . . doubt the efficacy or necessity" of a judicially created cause of action against foreign corporations.[100]

However, *Jesner* perplexingly ignored domestic corporations, thus providing only limited guidance for subsequent cases.[101] Even the Justices themselves appeared to disagree (if they voiced any view) on whether *Jesner*'s majority opinion extended the bar on foreign corporate liability to all corporations sued under the Alien Tort Statute.[102] Some courts have held that *Jesner* established no rule on domestic corporate liability because it did not address the issue.[103] Other courts have held that the Alien Tort Statute still permits them to hear cases against domestic corporate defendants because *Jesner* technically narrowed its holding to claims against foreign corporations.[104] Likewise, practitioners appear divided on whether domestic corporations may be sued under the Alien Tort Statute.[105]

Modern human rights litigation depends on holding corporations, not just mere individuals, liable because a company collectively, more often than any specific individual who works for it, conducts the commercial activities responsible for whatever human rights violations occur in the

99. *Id.* at 1405 (second alteration in original) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013)).

100. *Id.* at 1402 (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017)).

101. *See* Brill v. Chevron Corp., No. 15-cv-04916, 2018 U.S. Dist. LEXIS 137579, at *18 (N.D. Cal. Aug. 14, 2018) (calling *Jesner* a "patchwork decision").

102. John H. Beisner, *Supreme Court Mulls Scope of Alien Tort Statute in* Nestle, Cargill, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 22, 2020), https://www.skadden.com/insights/publications/2020/12/insights-special-edition-us-supreme-court-term/scotus-mulls-scope-of-alien-tort-statute; Majid et al., *supra* note 82.

103. *E.g.*, Alvarez Galvez v. Fanjul Corp., 533 F. Supp. 3d 1268, 1276–77 (S.D. Fla. 2021); *Brill*, 2018 U.S. Dist. LEXIS 137579, at *18.

104. *E.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018), *rev'd sub nom.* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

105. *Compare* Jonathan Hacker et al., *Supreme Court Further Limits Alien Tort Suits Against Corporations*, O'MELVENY & MYERS LLP (Apr. 26, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-further-limits-alien-tort-suits-against-corporations/ ("There are reasons to believe that courts will find the ATS does not extend to corporate liability."), *with* JONATHAN I. BLACKMAN ET AL., SUPREME COURT RULES FOREIGN CORPORATIONS NOT LIABLE UNDER ALIEN TORT STATUTE 5 (2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/supreme-court-rules-foreign-corporations-not-liable-under-alien-tort-statute.pdf (naming "U.S. individuals and corporations as the most realistic defendants in ATS suits going forward."), *and* Majid et al., *supra* note 82 ("This decision leaves open the question of whether US corporations can be liable under the ATS.").

company's supply chain.[106] The Supreme Court's failure to secure plaintiffs' right to sue foreign corporations in U.S. federal court ignored the peskily reoccurring trope of geographically distant corporations "being sued by foreign claimants for alleged violations of their human rights committed" in a faraway land "where legal redress is effectively non-existent."[107] The Supreme Court had an opportunity to fix that situation with *Jesner*.[108]

E. No Cause of Action Clearly Permits Aiding and Abetting Liability Under the Alien Tort Statute

As with corporate liability, a separate cause of action must extend liability under the Alien Tort Statute to include aiding and abetting liability.[109] Just as plaintiffs cannot assume that the existence of a private right of action guarantees corporate liability, the existence of a private right of action under federal law does not necessarily mean that that law also permits aiding and abetting liability.[110] In contrast, Congress may expressly permit or alter aiding and abetting liability under any federal statute.[111]

Nestle did not expressly say that no aiding and abetting liability exists under the Alien Tort Statute, only that no aiding and abetting liability exists for conduct that cannot overcome the presumption against extraterritoriality.[112] Many past cases that unsuccessfully alleged aiding and abetting liability failed because the underlying conduct failed to overcome the presumption against extraterritorial application of federal

106. *See* David Scheffer, *Is the Presumption of Corporate Impunity Dead?*, 50 CASE W. RSRV. J. INT'L L. 213, 221 (2018); Ruti Teitel, *On Corporate Responsibility, Human Rights, and Transitional Justice:* Quo Vadis*?*, 112 AM. SOC'Y INT'L L. 324, 325 (2018).

107. Peter Muchlinski, *Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law:* Nevsun Resources Limited v Araya, 1 AMICUS CURIAE 505, 506 (2020).

108. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1393–96 (2018).

109. Many circuits have ruled on whether they recognize aiding and abetting as a theory of liability in Alien Tort Statute cases. *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260–61 (2d Cir. 2007); Bowoto v. Chevron Corp., No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, at *13–14 (N.D. Cal. Aug. 21, 2006) (citing Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996)); Doe v. Drummond Co., 782 F.3d 576, 597–98 (11th Cir. 2015) (citing Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008)).

110. *E.g.*, Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 158 (2008) (concluding that SEC Rule 10b-5's "implied private right of action does not extend to aiders and abettors").

111. *E.g.*, R. DANIEL O'CONNOR ET AL., DODD-FRANK, AIDING-AND-ABETTING SCIENTER, AND PRINCIPLES OF FAIRNESS: WHY THE SEC SHOULD NOT BE ALLOWED TO APPLY SECTION 20(E) RETROACTIVELY 2–3 (2011), https://www.ropesgray.com/-/media/Files/articles/2011/07/Dodd-Frank-Aiding-and-Abetting.pdf.

112. Nestl*e* USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021). For discussion of the Alien Tort Statute's current bar on extraterritorial application, see *infra* Section I.F.

law, which is a separate issue from whether aiding and abetting liability itself exists under the statute.[113] Absent a binding Supreme Court ruling to the contrary, "it remains at least theoretically possible for plaintiffs to sue U.S. companies for aiding and abetting violations."[114] Following *Jesner*, the Ninth Circuit allowed plaintiffs alleging aiding and abetting liability under the Alien Tort Statute to amend their complaint by naming any domestic corporate defendants, implying that aiding and abetting liability by itself exists.[115] Previously, the Second Circuit also determined that "a plaintiff may plead a theory of aiding and abetting liability under the" Alien Tort Statute and plaintiffs who do so "have pleaded a theory of liability over which [the court] ha[s] subject matter jurisdiction."[116] The Eleventh Circuit has also recognized aiding and abetting as a "cognizable" claim under the Alien Tort Statute.[117] A two-part threshold question thus emerges for plaintiffs who allege aiding and abetting liability.[118] Does some other jurisdictional bar preclude liability for either: (1) the conduct that constitutes the alleged aiding and abetting (such as the presumption against extraterritoriality), or (2) the named accomplices (such as the *Jesner* bar against foreign corporate defendants)? If the answer to both questions is no, then an aiding and abetting claim is likely permitted.[119]

113. *See* Estate of Alvarez v. Johns Hopkins Univ., No. 15-0950, 2022 U.S. Dist. LEXIS 71336, at *34–38 (D. Md. Apr. 18, 2022).

114. Kayla Winarsky Green & Timothy McKenzie, *Looking Without and Looking Within:* Nestlé v. Doe *and the Legacy of the Alien Tort Statute*, 25 AM. SOC'Y INT'L L. 1, 4–5 (2021).

115. *See* Doe v. Nestle, S.A., 906 F.3d 1120, 1126–27 (9th Cir. 2018), *rev'd sub nom. Nestle*, 141 S. Ct. 1931.

116. Mastafa v. Chevron Corp., 770 F.3d 170, 181 (2d Cir. 2014) (quoting Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007)).

117. *See* Doe v. Drummond Co., 782 F.3d 576, 597 (11th Cir. 2015) (citing Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008)).

118. *See, e.g.*, Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 217 (2d Cir. 2016) (quoting Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009)).

119. Because this Note focuses on federal question jurisdiction and not on how to prove the merits of an Alien Tort Statute case, it does not address the equally murky debate over the proper substantive standard for proving that a defendant aided and abetted a tort that violates international law. Some courts have adopted the customary international law standard for aiding and abetting liability, which permits liability if the defendant: "(1) provide[d] practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) d[id] so with the purpose of facilitating the commission of that crime." *Id.* (quoting *Presbyterian Church of Sudan*, 582 F.3d at 259); *see also* Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011).

F. The Presumption Against Extraterritorial Application of Federal Law Bars Many Alien Tort Statute Claims Involving Overseas Conduct

Even if a case successfully navigates the *Sosa* test and names only domestic corporate defendants, a final jurisdictional obstacle awaits many Alien Tort Statute plaintiffs who hope to sue in federal district court.[120] The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* introduced a presumption against extraterritorial application of the Alien Tort Statute and required the underlying conduct in Alien Tort Statute cases to "touch and concern the territory of the United States . . . with sufficient force" to justify domestic tort liability.[121] Conduct that occurs entirely outside the United States fails to satisfy *Kiobel*'s "touch and concern" test.[122] Nor does corporate presence[123] or corporate citizenship[124] in the United States by itself satisfy the test.

In *Kiobel*, for instance, the plaintiffs were Nigerian nationals who sued the Royal Dutch Petroleum Company for aiding and abetting Nigerian military police's "beating, raping, killing, and arresting residents and destroying or looting property" during protests in Nigeria.[125] Even though the *Kiobel* plaintiffs pled "specific, universal, and obligatory" violations of customary international law as required by *Sosa*,[126] the Court rejected the plaintiffs' claims on the basis of lack of extraterritorial reach.[127] Although the statute uses the qualifier "any" to

120. *See* Austen L. Parrish, Kiobel*'s Broader Significance: Implications for International Legal Theory*, 107 AJIL UNBOUND 19, 19 (2014).

121. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

122. *Id.*; *see* Green & McKenzie, *supra* note 114, at 2; *see also* Vázquez, *supra* note 57, at 541–45.

123. *Kiobel*, 569 U.S. at 125.

124. Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013); *see Kiobel*, 569 U.S. at 124–25.

125. *Kiobel*, 569 U.S. at 113.

126. *Id.* at 115–17 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

127. *Id.* at 118; *cf.* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527–31 (4th Cir. 2014) (holding that foreign conduct that violates international law sufficiently touches the United States if committed by American employees of a corporation that conducts business in the United States and possesses American corporate citizenship); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 214, 217 (2d Cir. 2016) (exercising jurisdiction under the Alien Tort Statute where defendant allegedly "used its correspondent banking account in New York to facilitate dozens of international wire transfers" thereby constituting sufficient relevant conduct within the United States to rebut the presumption against extraterritoriality); United States v. Prevezon Holdings, Ltd., 251 F. Supp. 3d 684, 693 (S.D.N.Y. 2017) (presumption against extraterritoriality rebutted where the underlying conduct involved wire transfers and "the U.S. correspondent banks were necessary conduits to transport proceeds allegedly derived from the [fraud, and the financial conduct at issue]

describe the "civil action[s] by an alien for a tort only, committed in violation of the law of nations" that federal courts may hear, *Kiobel* stated "that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality."[128]

G. *What Congress Can Do to Fix the Alien Tort Statute*

Nestle, like cases before it, sent a clear message that Congress, not the federal courts, should reform the Alien Tort Statute.[129] To allow plaintiffs like those in *Kiobel*, *Jesner*, and *Nestle* to bring their cases in federal courts, a federal statute would need to contain language allowing federal courts to impose: (1) aiding and abetting liability, (2) against both foreign and American corporations, (3) for extraterritorial conduct and/or harm, (4) that constituted a "violation of the law of nations or a treaty of the United States." The Alien Tort Statute already provides for the fourth element.[130] Although the Supreme Court could have chosen to interpret the Alien Tort Statute differently,[131] it instead reaffirmed its seventeen-year-long reluctance to "create a cause of action" for the other three elements.[132] Thus, Congress would need to enact a statute and create causes of action for those elements.[133]

Such a statute need not replace the Alien Tort Statute. Congress could supplement the Alien Tort Statute by adding another section to title 28 of the United States Code (which addresses the jurisdiction of federal district courts) that empowers federal courts to hear cases from private plaintiffs that allege aiding and abetting liability against foreign and American corporations for extraterritorial conduct and/or harm under the Alien Tort Statute.[134] Alternatively, Congress could modify the Alien Tort Statute, which currently comprises a one-sentence section within title 28,[135] by splitting it into two subsections, with the existing sentence becoming subsection 1 and the new language added as subsection 2. Either way, this modified statute would provide the

. . . . [The transfers] could not have been completed without the services of these U.S. correspondent banks.").

128. *Kiobel*, 569 U.S. at 108, 118; 28 U.S.C. § 1350.

129. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021).

130. 28 U.S.C. § 1350.

131. *See* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 920–25 (2009).

132. *See Nestle*, 141 S. Ct. at 1937–38.

133. *Id.* at 1938–39.

134. The Alien Tort Statute is in chapter 85 of title 28 of the United States Code. 28 U.S.C. § 1350.

135. *Id.*

necessary legislative intent to permit federal courts to hear cases like *Kiobel*, *Jesner*, and *Nestle*.[136]

Congress attempted in the recent past to make these changes.[137] On May 5, 2022, Senators Dick Durbin and Sherrod Brown introduced a proposed Alien Tort Statute Clarification Act that would "authorize extraterritorial jurisdiction" under the Alien Tort Statute.[138] The bill transforms the existing one sentence Alien Tort Statute into a subsection (a) titled "In General.—" and adds a new subsection (b) titled "Extraterritorial Jurisdiction."[139] Under the new subsection, federal district courts would have "extraterritorial jurisdiction" against two types of defendants: (1) individuals who are United States nationals or permanent residents, and (2) defendants who are "present in the United States, irrespective of the nationality of the alleged defendant."[140] Senators Durbin and Brown also included a proposed finding by Congress that "[t]he Alien Tort Statute should be available against those responsible for human rights abuses whenever they are subject to personal jurisdiction in the United States, *regardless of where the abuse occurred*."[141]

However, the Alien Tort Statute Clarification Act only addressed some of the issues that *Nestle* left unanswered. On one hand, the amendment would have removed the existing presumption against extraterritoriality by providing a "clear, affirmative indication" of congressional intent supporting extraterritorial application.[142] On the other hand, the amendment did not say whether aiding and abetting a tort that violates international law constitutes a separate, cognizable cause of action in its own right.[143] The bill merely acknowledged in its proposed findings that corporations can "aid and abet human rights violations."[144] In addition, the amendment did not mention corporations or corporate liability.[145] Although the proposed findings mentioned "[i]mpunity for corporations who violate human rights," the amendment

136. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 319 (2005).
137. *See* Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).
138. *Id.*
139. *Id.* § 3.
140. *Id.*
141. *Id.* § 2 (emphasis added).
142. Nestl*e* USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).
143. *Id.* (rejecting plaintiffs' argument that the Court could create a new cause of action for their aiding and abetting claim).
144. S. 4155, § 2.
145. *Id.* § 3.

only addressed "defendants."[146] It shed no light on whether Congress wanted, by passing the bill, to continue distinguishing between foreign and domestic corporate defendants.[147]

If anything, the amendment's plain language might have suggested that Congress did not intend to permit corporate liability at all.[148] The amendment named two groups of potential defendants under the Alien Tort Statute.[149] The first group, any "national of the United States or an[y] alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act),"[150] only includes individuals.[151] The Immigration and Nationality Act defines "national of the United States" as "a citizen of the United States" or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[152] These definitions align with how the words are ordinarily used to describe an individual's nationality or immigration status. From these definitions, a court could read the first group's description and conclude that the other group—a "*defendant* [who] is present in the United States, irrespective of the *nationality* of the alleged defendant"—also includes only individuals.[153] Therefore, the Alien Tort Statute Clarification Act moved in the right direction but did not go far enough.

II. MODELING FEDERAL QUESTION JURISDICTION AFTER THE FOREIGN CORRUPT PRACTICES ACT

Part I explained the various doctrinal challenges that prevent plaintiffs from using the Alien Tort Statute to establish federal question jurisdiction over claims that a corporation aided and abetted a human rights violation outside the United States. That Part ended with a call on Congress to enact a new statute that removes each of these jurisdictional bars so that more human rights victims may sue for damages in federal court. In Part II, this Note will show how an existing statute already

146. *Id.* §§ 2–3.
147. *See id.*
148. *See* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541 (2017) ("The plain meaning rule says that otherwise-relevant information about statutory meaning is forbidden when the statutory text is plain or unambiguous.").
149. S. 4155, § 3.
150. *Id.*
151. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163, 166 (1952) (codified at 8 U.S.C. § 1101(a)(3)).
152. *Id.* § 101(a)(22) (codified at 8 U.S C. § 1101(a)(22)).
153. S. 4155, § 3 (emphasis added).

contains language that achieves each of these objectives, albeit in a different context.

Part II looks to the Foreign Corrupt Practices Act ("FCPA")[154] as evidence that Congress can draft a statute that removes the jurisdictional bars raised in Part I. The FCPA establishes causes of action that allow the federal government to sue parties for violating the statute's antibribery provisions.[155] Congress enacted the FCPA to prevent American corporations from bribing foreign government officials to obtain unfair competitive advantages overseas.[156] As Part II will show, the FCPA allows federal district courts to hear civil cases brought against corporations that aid and abet in bribery overseas. Although commentators have previously looked to the FCPA as a model for imposing liability on corporations involved with overseas human rights violations,[157] this Note looks to the FCPA as a linguistic, not substantive, model.

A. Corporate Liability Under the FCPA

The federal agencies responsible for enforcing the FCPA, the U.S. Department of Justice and the U.S. Securities and Exchange Commission, explicitly state that both "persons and entities" may face

154. The Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, §§ 103–104, 91 Stat. 1494, 1495–98 (codified as amended at 15 U.S.C. §§ 78dd-1–78dd-3), contains the FCPA's antibribery provisions. The FCPA also contains books and records requirements. *Id.* § 102 (codified as amended at 15 U.S.C. § 78m(b)(2)–(3)). This Note focuses only on the antibribery provisions.

155. *See* 15 U.S.C. § 78dd-2(d)(1), (g)(1)(B), (g)(2)(B); *id.* § 78dd-3(d)(1), (d)(3).

156. Hans B. Christensen et al., Policeman for the World: The Rise in Extraterritorial FCPA Enforcement and Foreign Investment Competition 1 (June 2020) (unpublished manuscript) (on file with Harvard Business School), https://www.hbs.edu/faculty/Shared%20Documents/conferences/imo-2020/Hans%20Christensen%20Paper.pdf.

157. *E.g.*, Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence*, 18 N.Y.U. J.L. & BUS. 773, 813–15 (2022) (examining how the FCPA might serve as a template for mandatory human rights due diligence); Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359, 1359 (2021) (looking to the FCPA as a model for prosecuting corporations for human rights abuses under criminal law); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 DUKE L.J. 1023, 1107 (2015) (noting that Congress could pass an FCPA-influenced statute regardless of how federal courts interpret the ATS); Rachel Ratcliffe, Note, *The FCPA's Legacy: A Case for Imposing Aiding-and-Abetting Liability on Corporations Through an Amended Alien Tort Claims Act*, 49 TEX. INT'L L.J. 83, 108–16 (2014); Ziad Haider, Note, *Corporate Liability for Human Rights Abuses: Analyzing* Kiobel *& Alternatives to the Alien Tort Statute*, 43 GEO. J. INT'L L. 1361, 1380–81 (2012).

civil liability under the FCPA.[158] The plain language of the statute alone debunks any argument that the FCPA does not permit corporate liability.[159] The fact that the FCPA divides its antibribery provisions into those binding "issuers"[160] and those binding "domestic concerns"[161] itself suggests that the statute was written with corporate liability in mind.[162]

First, the FCPA forbids issuers of securities from paying or offering to pay a foreign government official with the purpose of "influencing any act or decision of such foreign official in [their] official capacity . . . [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or . . . securing any improper advantage."[163] The FCPA uses the term "issuer" as defined in the Securities Exchange Act of 1934 ("Exchange Act"), which the FCPA itself amended.[164] The Exchange Act defines "issuer" as "any person who issues or proposes to issue any security" under the Exchange Act.[165] The Exchange Act then defines "person" as "a natural person, *company*, government, or political subdivision, agency, or instrumentality of a government."[166] "[C]orporations and other business entities" that issue securities under the Exchange Act therefore qualify as "issuers" who may be sued for violating the FCPA.[167]

Second, the FCPA forbids any "domestic concern" from "inducing such foreign official to use [their] influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to,

158. U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 9 (2d ed. 2020) [hereinafter DOJ & SEC FCPA RESOURCE GUIDE], https://www.justice.gov/criminal-fraud/file/1292051/download. Unlike the Alien Tort Statute, the FCPA does not provide for a private right of action: only the federal government may sue someone for violating the FCPA. *Id.* at 3 n.22.

159. *See* Baude & Doerfler, *supra* note 148, at 541.

160. 15 U.S.C. § 78dd-1.

161. *Id.* § 78dd-1(a)(1)(A)(i)–(iii). For further explanation of how the FCPA defines the term "domestic concern," see *infra* note 169 and accompanying text.

162. A third prong addresses obligations of parties that are neither "issuers" nor "domestic concerns." 15 U.S.C. § 78dd-3. This third prong is addressed later in this Section.

163. 15 U.S.C. § 78dd-1(a)(1)(A)(i)–(iii). This provision also prohibits giving or offering a non-monetary gift for the stated purposes. *Id.*

164. *See generally* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1–78dd-3). The "definitions" section of the Exchange Act applies to all parts of title 15 of the United States Code "unless the context otherwise requires." 15 U.S.C. § 78c(a).

165. 15 U.S.C. § 78c(a)(8).

166. *Id.* § 78c(a)(9) (emphasis added).

167. Graphic Scis., Inc. v. Int'l Mogul Mines Ltd., 397 F. Supp. 112, 124 (D.D.C. 1974) (dictum).

any person."[168] The FCPA itself defines "domestic concern" as including "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."[169] Congress could not have provided a more unambiguous indication that "domestic concerns" includes companies. The FCPA further underscores this point by establishing one set of civil penalties for individuals and another set for "domestic concern[s] that [are] not a natural person."[170] Federal courts have taken the hint that the FCPA permits them to hold corporations liable under the FCPA as "domestic concerns."[171]

Between them, the "issuer" and "domestic concern" categories encompass all domestic companies. If an American company issues securities, it would likely come within the ambit of the "issuer" prong. A company becomes an "issuer" under the FCPA when it registers securities for sale under section 12 of the Exchange Act.[172] Under section 12, no security can be bought or sold on a national securities exchange in the United States unless its issuer either registered the security under section 12 registration requirements or claims one of the section 12 exemptions.[173] Thus, all American corporations that register even one share of stock under section 12 qualify as "issuers."[174] If an American company does not qualify as an issuer, then it automatically falls into the "domestic concern" category, which expressly applies to "any [non-issuer] corporation . . . which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United

168. 15 U.S.C. § 78dd-2(a)(1)(B).
169. *Id.* § 78dd-2(h)(1)(B).
170. *Id.* § 78dd-2(g)(1).
171. *E.g.*, United States v. Hoskins, 902 F.3d 69, 84–85 (2d Cir. 2018) (dictum) (quoting 15 U.S.C. § 78dd-2(h)(1)(B)); United States v. Coburn, 439 F. Supp. 3d 361, 384 (D.N.J. 2020) (dictum).
172. 15 U.S.C. § 78dd-1(a).
173. 15 U.S.C. § 78*l*(a)–(b); 15 U.S.C. § 78dd-1(a). For certain exemptions to these registration requirements, see 15 U.S.C. § 78*l*(g)(2).
174. The "domestic concern" prong covers all American corporations "other than an issuer which is subject to" the "issuer" prong. 15 U.S.C. § 78dd-2(a). The "issuer" prong is equally clear that only an "issuer which *has* a class of securities registered pursuant to section 78*l*" is subject to the "domestic concern" prong. 15 U.S.C. § 78dd-1(a) (emphasis added); *see* 15 U.S.C. § 78dd-2. Thus, corporations that have not registered securities under section 12 but nevertheless "issue" securities in the vernacular sense of the verb "issue" would qualify as "domestic concerns."

States."[175] The FCPA allows federal courts to impose civil liability against members of either group.[176]

But what of foreign corporations? Many non-American companies must also follow the FCPA and may therefore be sued for violating it.[177] First, a foreign corporation that "has a class of securities registered pursuant to section 78*l*" of the Exchange Act falls under the "issuer" category.[178] The FCPA does not distinguish between U.S.-based issuers and non-U.S.-based issuers.[179] Second, foreign corporations may fall under the FCPA's "catch-all" third category, which imposes liability on parties who violate the FCPA "while in the territory of the United States" even if they are not "issuers" or "domestic concerns."[180] Like the "issuer" category, the "catch-all" category is defined by conduct, not nationality.[181]

The FCPA exhibits the level of specificity Congress may need to demonstrate legislative intent to permit corporate liability—certainly foreign corporate liability—under a statute. Federal courts have repeatedly held that they may only hear cases "limited to those subjects encompassed within a statutory grant of jurisdiction."[182] If the court doubts whether Congress has given it subject matter jurisdiction over a claim, it must dismiss the claim.[183] The case would thus be dismissed before the court considers its merits.[184] If courts will not create new causes of action or permit claims under new theories of liability, Congress must give them the power to hear these types of cases.[185] Without a "statutory grant of jurisdiction"[186] that expressly permits foreign and domestic corporate liability, foreign corporate liability will never be permitted under the Alien Tort Statute and domestic corporate liability

175. 15 U.S.C. § 78dd-2(h)(1)(B).

176. *See id.* § 78dd-2(g).

177. Daniel Margolis & James Wheaton, *Non-U.S. Companies May Also Be Subject to the FCPA*, FIN. FRAUD L. REP., Sept. 2009, at 168, 168–69.

178. 15 U.S.C. § 78*l*(a)–(b); 15 U.S.C. § 78dd-1(a).

179. Margolis & Wheaton, *supra* note 177, at 169.

180. 15 U.S.C. § 78dd-3(a); United States v. Hoskins, 902 F.3d 69, 85 (2d Cir. 2018); Margolis & Wheaton, *supra* note 177, at 170–71.

181. 15 U.S.C. § 78dd-3(a).

182. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982).

183. *See* Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884) ("[T]he rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception . . . [that] this court, of its own motion, [must] deny its own jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.").

184. *See, e.g.*, Kaplan v. Cent. Bank of the Islamic Republic of Iran, 896 F.3d 501, 515 (D.C. Cir. 2018).

185. *See* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1938 (2021).

186. *Ins. Corp. of Ir.*, 456 U.S. at 701.

will remain an unsettled question.[187] If Congress moves to definitively resolve these issues, it would do well to emulate its drafting of the FCPA and eliminate any lingering doubt that it will allow courts to hear cases against corporations under the Alien Tort Statute.

B. Extraterritorial Application Under the FCPA

In *United States v. Hoskins*, the Second Circuit addressed the issue of whether the FCPA permits federal courts to impose liability for conduct that occurred outside the United States.[188] In *Hoskins*, the court upheld the principle that FCPA liability does not extend to conduct by foreign parties acting entirely outside the United States when those parties or their conduct fall outside the boundaries of the statute's existing extraterritorial application.[189] *Hoskins* did not necessarily preclude federal courts from imposing liability for any extraterritorial conduct.[190] Instead, the decision precluded jurisdiction over extraterritorial conduct when the an actor fell outside every category of parties who are subject to the FCPA.[191] In other words, federal courts may hear cases alleging extraterritorial FCPA violations if the defendant is an "issuer" or "domestic concern."[192] Federal question jurisdiction over FCPA civil cases thus depends on whether the statute applies to the defendant, not on where the underlying conduct occurred.

The Second Circuit's stance on extraterritoriality followed Supreme Court precedents on the presumption against extraterritorial application of domestic federal law. To determine whether Congress intended to allow federal courts to enforce a federal statute against conduct outside the United States, courts follow a two-step inquiry laid out in *RJR Nabisco, Inc. v. European Community*.[193] First, courts examine the language of the statute itself and ask "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[194] The first step does not differentiate federal statutes by purpose, instead requiring a

187. *Nestle*, 141 S. Ct. at 1935–36.
188. United States v. Hoskins, 902 F.3d 69, 96–97 (2d Cir. 2018).
189. CHRISTOPHER B. BRINSON, CONG. RSCH. SERV., LSB10197, CAN A FOREIGN EMPLOYEE OF A FOREIGN COMPANY BE FEDERALLY PROSECUTED FOR FOREIGN BRIBERY? 1 (2018).
190. *See* Michael S. Diamant et al., *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 365 (2019).
191. *Hoskins*, 902 F.3d at 97.
192. *See id.*
193. Virginia Chavez Romano, *Extraterritoriality and US Corporate Enforcement*, *in* GLOBAL INVESTIGATIONS REVIEW, AMERICAS INVESTIGATIONS REVIEW 2020, at 30, 31 (2019) (citing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).
194. *RJR Nabisco, Inc.*, 579 U.S. at 337.

"clear, affirmative indication" of permissible extraterritorial application "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[195] If the statute contains such an indication, then the court will conclude that the statute possesses the necessary legislative intent to permit federal courts to apply the statute to conduct that occurred outside the United States.[196] A federal statute may contain an explicit provision that grants federal courts jurisdiction over violations of the statute that occur outside the United States.[197] For example, the federal statutory definition of racketeering, which criminalizes "knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property,"[198] explicitly extends to cases "when 'the defendant is a United States person'" and the transactions "tak[e] place outside the United States."[199]

However, if the statute lacks any "clear, affirmative indication" of extraterritorial application,[200] courts move on to the second step of the analysis, which examines the underlying conduct at issue in the case.[201] The second step asks whether the "focus" of the statute "involves a domestic application of the statute" to conduct linked to the United States.[202] The "focus" of a statute is the specific type of conduct that the statute is meant to regulate (*Morrison v. National Australia Bank Ltd.* poetically termed the "focus" as the "objects of the statute's solicitude").[203] If the underlying conduct in the case that is relevant to the statute's focus occurred within the United States, then a federal court may exercise subject matter jurisdiction over the case even if the case includes other conduct that occurred abroad.[204] If, however, the underlying conduct relevant to the statute's focus occurred outside the United States, then federal courts cannot exercise federal question jurisdiction to hear the case because doing so would require "impermissible extraterritorial

195. *Id.*

196. *See id.* (identifying the first step's purpose as determining whether "the presumption against extraterritoriality has been rebutted").

197. *See, e.g.*, *id.* at 338.

198. 18 U.S.C. § 1957(a).

199. *RJR Nabisco, Inc.*, 579 U.S. at 338 (quoting 18 U.S.C. § 1957(d)(2)).

200. *Id.* at 337.

201. Romano, *supra* note 193, at 31.

202. *RJR Nabisco, Inc.*, 579 U.S. at 337.

203. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–67 (2010) (identifying the "focus" of section 10(b) of the Securities Exchange Act as "deceptive conduct 'in connection with the purchase or sale of any security'" (quoting Securities Exchange Act of 1934, 15 U.S.C. § 78j(b))).

204. *RJR Nabisco, Inc.*, 579 U.S. at 337; *see* 28 U.S.C. § 1331 (regarding the general rule on federal question jurisdiction).

application regardless of any other conduct that occurred in U.S. territory."[205]

The *RJR Nabisco* case applied the first step of the extraterritoriality inquiry to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a federal statute that established civil and criminal liabilities for participating in racketeering.[206] The Court found that certain parts of RICO did demonstrate a clear and affirmative indication of extraterritorial application because they "plainly apply to at least some foreign conduct."[207] Because the federal statutory definition of racketeering provided for extraterritorial application of its criminalization[208] and RICO was intended to address racketeering-related organized crime, "a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome."[209]

Because RICO defines "racketeering" by collectively referencing numerous existing federal statutory provisions,[210] the Court divided RICO into these statutory components for purposes of the extraterritoriality analysis and called for a provision-by-provision determination of whether a case brought under specific provisions permitted extraterritorial application of the requisite provision.[211] The Court felt that doing so best reflected Congress's intent for "RICO to have (some) extraterritorial effect" even though RICO itself contains no provision outright granting federal courts jurisdiction to apply the Act extraterritorially.[212] Because Congress had previously "defined 'racketeering activity' . . . to encompass violations of predicate statutes that do expressly apply extraterritorially" and "only acts that are 'indictable' (or, what amounts to the same thing, 'chargeable' or 'punishable') under one of the statutes identified in § 1961(1)" of RICO, extraterritorial application of RICO depends on finding grounds for extraterritorial application of whichever underlying provision supports liability under RICO.[213]

205. *RJR Nabisco, Inc.*, 579 U.S. at 337; *see also Morrison*, 561 U.S. at 268 (finding that the Securities Exchange Act was designed to target domestic conduct only).
206. *RJR Nabisco, Inc.*, 579 U.S. at 329; *see* 18 U.S.C. § 1961.
207. *RJR Nabisco, Inc.*, 579 U.S. at 338.
208. *See infra* text accompanying notes 212–13; *see also* 18 U.S.C. § 1961.
209. *RJR Nabisco, Inc.*, 579 U.S. at 339.
210. *See* 18 U.S.C. § 1961(1).
211. Maggie Gardner, RJR Nabisco *and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 138–39 (2016).
212. *RJR Nabisco, Inc.*, 579 U.S. at 340.
213. *Id.* at 339–40.

The Court's approach identified two important characteristics of federal statutes that satisfy the first step of the extraterritoriality analysis. First, a "clear, affirmative indication" of extraterritorial application must "manifest[] an unmistakable congressional intent" that unambiguously provides federal question jurisdiction to hear the claim at issue.[214] Second, a "clear, affirmative indication" need not be an explicit provision stating that the statute applies extraterritorially.[215] Context clues can also provide sufficient indication that a federal statute applies to conduct occurring outside the United States. [216] In RICO's case, those context clues came from the structure and composition of the statute.[217]

In *Hoskins*, the court could not find any "clear, affirmative indication" that Congress intended to permit extraterritorial application of the FCPA to parties not already obligated to comply with the statute.[218] Echoing the *RJR Nabisco* Court's analysis of RICO, the *Hoskins* court determined that "[b]ecause some provisions of the FCPA have extraterritorial application, 'the presumption against extraterritoriality operates to limit th[ose] provision[s] to [their] terms.'"[219] Because the FCPA's antibribery provisions comprehensively defined the various types of individuals and entities covered by each of its respective prongs,[220] there was nothing in the statute to support the proposition that it imposes "liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—*unless* that person commits a crime within the territory of the United States."[221]

Conversely, however, *Hoskins* can be interpreted as supporting liability for extraterritorial conduct when committed by an "issuer" or "domestic concern." Indeed, even after *Hoskins*, the U.S. Department of Justice and the U.S. Securities and Exchange Commission maintain the view that they still have the power to bring civil cases in federal courts against issuers and domestic concerns that violate the FCPA "anywhere in the world."[222] The subject matter of the FCPA's antibribery provisions

214. *Id.* at 337, 339.
215. *Id.* at 337, 340 ("Assuredly context can be consulted as well.").
216. *Id.* at 340.
217. *Id.* at 340–41.
218. United States v. Hoskins, 902 F.3d 69, 95–97 (2d Cir. 2018).
219. *Id.* at 96 (alteration in original) (citing *RJR Nabisco, Inc.*, 579 U.S. at 339).
220. *See supra* Section II.A.
221. *Hoskins*, 902 F.3d at 96 (quoting 15 U.S.C. § 78dd-3(a)).
222. *Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. & EXCH. COMM'N (Feb. 2, 2017), https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml; DOJ & SEC FCPA RESOURCE GUIDE, *supra* note 158, at 10 ("The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States.").

also suggest that they were designed to regulate overseas conduct.[223] All three prongs of the FCPA's antibribery provisions address actions aimed at inducing "*foreign*" government officials to use their "influence with a *foreign* government or instrumentality."[224] All three provisions prohibit "inducing [a] *foreign* official to do or omit to do any act in violation of the lawful duty of such official."[225] It would be virtually impossible to enforce a statute intended to outlaw bribes to foreign officials[226] unless that statute permitted liability for paying such a bribe in a foreign country.[227] The entire FCPA framework, as Congress laid out in the statute, falls apart if federal courts cannot impose liability under the statute for foreign bribery that occurs outside the United States.

Unlike cases brought under the FCPA, Alien Tort Statute cases have consistently failed to overcome the presumption against extraterritorial application of federal law.[228] The FCPA provides an example of how Congress might write a statute that can overcome the presumption against extraterritorial application. To give federal district courts jurisdiction over claims involving extraterritorial conduct, Congress must affirmatively indicate that it wants federal district courts to possess this power.[229] This jurisdictional grant could be as simple as a sentence permitting federal district courts to hear cases involving extraterritorial conduct.[230]

C. *Aiding and Abetting Liability Under the FCPA*

In *Hoskins*, the Second Circuit also explored the statutory basis for imposing aiding and abetting liability under the FCPA. As with extraterritorial liability, *Hoskins* held that the FCPA did not permit aiding and abetting liability unless the defendant was already subject to

223. *See RJR Nabisco, Inc.*, 579 U.S. at 337, 340.

224. 15 U.S.C. § 78dd-1(a)(1)(B) (emphasis added); 15 U.S.C. § 78dd-2(a)(1)(B) (emphasis added); 15 U.S.C. § 78dd-3(a)(1)(B) (emphasis added).

225. 15 U.S.C. § 78dd-1(a)(1)(A) (emphasis added); 15 U.S.C. § 78dd-2(a)(1)(A) (emphasis added); 15 U.S.C. § 78dd-3(a)(1)(A) (emphasis added).

226. *See* Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 IND. INT'L & COMPAR. L. REV. 1, 12–19 (2013).

227. *See generally* ORGANISATION FOR ECON. CO-OPERATION & DEV., FOREIGN BRIBERY FACTSHEET (2014), https://www.oecd.org/daf/anti-bribery/Foreign_Bribery_Factsheet_ENGLISH.pdf.

228. *See* Estate of Alvarez v. Johns Hopkins Univ., No. 15-0950, 2022 U.S. Dist. LEXIS 71336, at *34–38 (D. Md. Apr. 18, 2022).

229. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021).

230. *See, e.g.*, Alien Tort Statute Clarification Act, S. 4155, 117th Cong. § 3 (2022).

the FCPA.[231] The Second Circuit found that federal courts lacked jurisdiction to impose aiding and abetting liability in *Hoskins* because the defendant was "a foreign national who [was] not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern" and had acted entirely while outside the United States.[232] However, the specific facts of *Hoskins* mean that the case should not be construed as rejecting aiding and abetting liability per se under the FCPA. Rather, *Hoskins* should be, and has been, viewed as rejecting a specific type of aiding and abetting liability—aiding and abetting by a foreign party acting entirely outside the United States.[233]

The language of the FCPA's antibribery provisions suggests that the statute permits civil liability for aiding and abetting conduct that violates those provisions. The Exchange Act contains a provision, section 78t(e), that defines aiding and abetting as "knowingly or recklessly provides substantial assistance to another person in violation of a provision" of the Exchange Act.[234] Prior to *Hoskins*, federal courts had permitted aiding and abetting liability in cases where there was "(1) existence of a securities violation by a primary wrongdoer; (2) knowledge of the violation by the aider and abettor; and (3) proof that the aider and abettor substantially assisted in the primary violation."[235] *Hoskins*'s objection to imposing aiding and abetting liability to the facts in that case did not disturb this framework because its objections were rooted in the Department of Justice's attempt in that case to extend aiding and abetting liability over individuals not already covered by the FCPA

231. United States v. Hoskins, 902 F.3d 69, 96–97 (2d Cir. 2018). Following the Second Circuit's 2018 decision, the case went to trial, where a key factual issue was whether the defendant was an "agent" of a domestic concern. Daniel Koffmann & Neil Phillips, United States v. Hoskins*: Reshaping the Agency Theory of Corporate Criminal Liability*, REUTERS (Sept. 1, 2022, 12:21 PM), https://www.reuters.com/legal/legalindustry/united-states-v-hoskins-reshaping-agency-theory-corporate-criminal-liability-2022-09-01/.

232. *Hoskins*, 902 F.3d at 96–97; *see also* United States v. De Leon-Perez, No. 17-CR-00514, 2022 U.S. Dist. LEXIS 162659, at *9–10, *10 n.10 (S.D. Tex. July 11, 2022) (quoting *Hoskins*, 902 F.3d at 97) (finding that the defendant's foreign agents' overseas conduct placed the agents outside the FCPA's scope).

233. Ryan Rohlfsen et al., *Second Circuit Holds that FCPA Does Not Apply to Foreigners Without U.S. Ties*, ROPES & GRAY LLP (Aug. 28, 2018), https://www.ropesgray.com/en/newsroom/alerts/2018/08/Second-Circuit-Holds-that-FCPA-Does-Not-Apply-to-Foreigners-Without-US-Ties; Dooley v. United Techs. Corp., 803 F. Supp. 428, 438–39 nn.11–12 (D.D.C. 1992) (holding that the court lacked subject matter jurisdiction to hear FCPA claims against a domestic concern's foreign agents).

234. 15 U.S.C. § 78t(e). This section applies to the entirety of chapter 2B of title 15 of the United States Code, which is the chapter containing the Exchange Act and the FCPA. *Id.*

235. SEC v. Jackson, 908 F. Supp. 2d 834, 863 (S.D. Tex. 2012) (quoting SEC v. Treadway, 430 F. Supp. 2d 293, 336 (S.D.N.Y. 2006)); SEC v. Apuzzo, 689 F.3d 204, 206–07 (2d Cir. 2012) (quoting SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009)) (applying these same three elements to a case alleging aiding and abetting liability).

itself.[236] Thus, *Hoskins* may be viewed as adding an additional element to the aiding and abetting liability test, rather than eliminating or drastically narrowing it. Federal courts may only impose aiding and abetting liability under the FCPA when the aider and abettor is already subject to the FCPA.[237]

The law governing FCPA aiding and abetting liability bears some striking similarities to that governing aiding and abetting under the Alien Tort Statute. Neither statute expressly forbids federal courts from imposing aiding and abetting liability per se. However, both forms of aiding and abetting seem to apply only if the aiders and abettors are themselves already subject to the statute. After *Nestle*, the Alien Tort Statute may still permit federal courts to impose aiding and abetting liability if the underlying conduct overcomes the presumption against extraterritoriality and the plaintiffs have not sued any foreign corporation.[238] After *Hoskins*, the FCPA appears to preclude aiding and abetting liability only for parties who fall outside its scope.[239] The similarities offer a preview of how future courts may view aiding and abetting liability under the Alien Tort Statute. While Congress certainly could amend the statute to add a cause of action for aiding and abetting liability,[240] courts would likely have the power to impose such liability in at least some cases—even if Congress never adds the words "aiding and abetting" to the statute.

D. No Private Right of Action Under the FCPA

This Note does not advocate replacing the Alien Tort Statute with the FCPA for one crucial reason: the FCPA does not permit a private right of action while the Alien Tort Statute does. A private right of action expands access to justice by allowing "a private plaintiff to bring an action based directly on a public statute, the Constitution, or federal common law" in court.[241] When no private right of action exists for a given cause of action, individual plaintiffs have no right to seek remedies under that cause of action—only the government may use that cause of action to seek

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236. *Hoskins*, 902 F.3d at 94.

237. *Id.* at 97; United States v. Coburn, 439 F. Supp. 3d 361, 384 (D.N.J. 2020) (citing *Hoskins*, 902 F.3d at 84).

238. *See* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021).

239. *See Coburn*, 439 F. Supp. 3d at 384 (noting it would be an "error in the *Hoskins* sense" to bring a claim under the FCPA "against someone who is not potentially liable under the FCPA").

240. *See* Green & McKenzie, *supra* note 114, at 4–5.

241. Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. U. CHI. L.J. 117, 120 (2017).

damages from an offender.[242] Private rights of action are inextricably linked to federal question jurisdiction. Congress creates federal question jurisdiction when it creates a new private right of action under federal law.[243] Courts have consistently held that the FCPA only allows the United States government to sue private parties for violating the statute.[244] In contrast, the Alien Tort Statute expressly permits "any civil action by an alien," thereby creating a private right of action for non-governmental plaintiffs who can satisfy the requirements to sue under the statute.[245]

Though seemingly morphological, private rights of action are vital to ensuring individual human rights victims' access to judicial recourse.[246] Private plaintiffs, as individual victims of human rights violations, may not necessarily agree with the priorities of governmental actors.[247] As private citizens, individual plaintiffs can use their personal experiences to "supplement the information of public enforcers and may have better information about certain types of problems"[248] because they have

242. *Id.* at 122 n.22 ("Because there is no private right of action for damages under the [Federal Water Pollution Control Act], any fines levied would be *payable to the Government* and *not to the plaintiff*." (quoting Sierra Club v. SCM Corp., 580 F. Supp. 862, 863 n.1 (W.D.N.Y. 1984))).

243. Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378–79 (2012) ("[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331."). *But see* Fried v. Lehman Bros. Real Est. Assocs. III, L.P., No. 11 Civ. 4141, 2012 U.S. Dist. LEXIS 10340, at *8 (S.D.N.Y. Jan. 24, 2012) ("A federal private right of action is certainly indicative of a substantial federal issue but is not a prerequisite or bar to federal question jurisdiction.").

244. *See, e.g.*, Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990); Sci. Drilling Int'l, Inc. v. Gyrodata Corp., No. 99-1077, 99-1084, 1999 U.S. App. LEXIS 20790, at *7 (Fed. Cir. Aug. 30, 1999); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 996 (M.D. Tenn. 2012) (citing *Lamb*, 915 F.2d at 1029–30); J.S. Serv. Ctr. Corp. v. Gen. Elec. Tech. Servs. Co., 937 F. Supp. 216, 226 (S.D.N.Y. 1996) (quoting *Lamb*, 915 F.2d at 1029).

245. Penaloza v. Drummond Co., 384 F. Supp. 3d 1328, 1337 (N.D. Ala. 2019); *see* Allaithi v. Rumsfeld, 753 F.3d 1327, 1329 (D.C. Cir. 2014) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013)); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997).

246. *See* U.N. Off. of the High Comm'r for Hum. Rts., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04, at 1 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

247. *See* ALEXANDRA F. LEVY, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf ("Civil lawsuits fill gaps in the criminal system.").

248. Sean A. Pager & Michael Sant'Ambrogio, *Trading Up: Is Section 337 the New ATS?*, 107 IOWA L. REV. 1159, 1176 (2022).

experienced real-world conditions first-hand. Private rights of action reflect the reality that most "business and human rights cases . . . [involve] clearly identifiable victims in need of redress" as "victims of corporate human rights abuses."[249] Indeed, human rights litigation in U.S. federal courts began when "lower federal courts held that the ATS provided a private cause of action under international law."[250] Thus, the fact that the FCPA prohibits private rights of action significantly reduces its potential as a viable avenue for human rights litigation. Although the FCPA provides a valuable model for establishing sufficiently broad federal question jurisdiction, it does not provide a strong route to justice for many individual human rights victims. Private rights of action work by "empowering the victim to seek redress for a completed and legally recognized wrong done to [them]."[251] Therefore, this Note does not encourage fully emulating the FCPA's model for civil liability in federal courts. Instead, this Note urges members of Congress to duplicate the FCPA's advantageous components and incorporate them into a new statute that expands the Alien Tort Statute's existing scope. This approach borrows the FCPA's best elements while preserving the Alien Tort Statute's greatest strength: its express private right of action.[252]

III. WHY WE NEED TO STRENGTHEN THE ALIEN TORT STATUTE

Restorative justice depends on establishing corporate liability for indirect involvement in human rights violations. The modern corporation oversees a business model that depends on supply chains spanning multiple countries.[253] For businesses, global supply chains may represent the most efficient solution to the day-to-day challenges of producing and transporting large quantities of goods in a fast-paced consumer

249. Chambers & Martin, *supra* note 157, at 828.

250. Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RSRV. J. INT'L L. 17, 19 (2018).

251. Nathan I. Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 280 (2005).

252. *See* Pager & Sant'Ambrogio, *supra* note 248, at 1177 ("Defenders of the [Alien Tort Statute] and transnational litigation argue that private suits often supply 'the scalpel needed to cut through the tangled web of money and politics and lay bare the moral and social dimensions of global wrongdoing.'").

253. MATTHEW J. SLAUGHTER, AMERICAN COMPANIES AND GLOBAL SUPPLY NETWORKS: DRIVING U.S. ECONOMIC GROWTH AND JOBS BY CONNECTING WITH THE WORLD 31–33 (2013), https://www.uscib.org/docs/2013_american_companies_and_global_supply_networks.pdf; *see also* Willy C. Shih, *Global Supply Chains in a Post-Pandemic World*, HARV. BUS. REV., https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world (last visited Feb. 11, 2023).

economy.[254] But the globalization of business activities also globalizes the risks that those activities will harm the people and communities where those business activities occur.[255] Many corporate supply chains benefit from enterprises that use forced labor, child labor, debt bondage, and fraudulent contracts that trick employees into agreeing to work for longer hours or less pay than expected.[256] In many manufacturing industries, corporations fail to ensure that their factories and processing plants are safe places to work, resulting in fires, collapses, and other significant workplace safety threats to workers' lives.[257]

Proponents of corporate social responsibility have highlighted the role that faraway business decisions play in the societal structures within which many human rights violations occur. Political theorist Iris Marion Young linked human rights and corporate conduct in her influential "social connection model."[258] Under the social connection model, a corporation bears responsibility for human rights violations that occur in its "system of interdependent processes of cooperation and competition."[259] The social connection model acknowledges that "structural injustice" in the global economy allows individuals and companies to benefit financially by participating in "processes that produce unjust outcomes."[260] By participating in the "diverse institutional processes" that make up the global supply chains behind their business activities, corporations assume responsibility for harms that occur when those processes produce human rights harms.[261] In other

254. SLAUGHTER, *supra* note 253, at 33 (describing global supply chains as "elaborate and fluid structures in which companies locate different production tasks in different countries, some performed in house and others with external partners . . . [leading to] more innovation, lower costs, faster customer responsiveness and lower risks").

255. *See* Björn Fasterling, *Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk*, 2 BUS. & HUM. RTS. J. 225, 230 (2017); Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102, 106 (2006).

256. UL, ADDRESSING HUMAN RIGHTS ISSUES IN GLOBAL SUPPLY CHAINS 3 (2015), https://library.ul.com/wp-content/uploads/sites/40/2015/02/UL_WP_Final_Addressing-Human-Rights-Issues-in-Global-Supply-Chains_v7-HR.pdf.

257. GERALD T. HATHAWAY, ADDRESSING LABOR RIGHTS IN GLOBAL SUPPLY CHAINS: THE EXISTING LAWS AND REGULATIONS 1 (2021), https://www.americanbar.org/content/dam/aba/events/labor_law/2021/midwinter/inter/materials/02-hathaway-addressing-labor-rights-supply-chain.pdf.

258. *See* Young, *supra* note 255, at 119.

259. *Id.*

260. *Id.*

261. *See id.*

words, business is an ecosystem made up of living and breathing beings who all possess rights in relation to each other.[262]

The facts in many Alien Tort Statute cases vindicate the social connection model. Often, corporate activities produce profits at the expense of human rights.[263] Royal Dutch Shell's bottom line benefited from the Nigerian military's use of force to stop civilian protesters who were protesting the company's oil drilling operations.[264] Arab Bank, PLC's bottom line benefited from the bank servicing clients who used its banking services to finance acts of terrorism in the Middle East.[265] Nestlé's bottom line benefited from the cheap cocoa that the company obtained to turn into chocolate, cocoa that was cheap because it had been harvested by child slaves in a region where cocoa farms could get away with using child slave labor.[266] A federal statute strengthening the Alien Tort Statute would reflect the reality that individuals around the world suffer human rights harms when companies with American business links make commercial decisions that perpetuate social systems where human rights violations are allowed to occur.[267]

CONCLUSION

In the aftermath of the Supreme Court's decision in *Nestle USA, Inc. v. Doe*, federal courts no longer possess federal question jurisdiction to hear cases from human rights plaintiffs alleging foreign corporate liability for aiding and abetting in conduct outside the United States that led to human rights violations. A new federal statute could reestablish courts' power to hear cases brought under the Alien Tort Statute against both American and foreign corporations for extraterritorial conduct and

262. *Id.* at 103 ("There are some moral obligations that human beings have to one another as human; these are cosmopolitan obligations or obligations to respect human rights.").

263. *E.g.*, Aditi Bagchi, *Production Liability*, 87 FORDHAM L. REV. 2501, 2520 (2019) ("Knowing that they cannot themselves successfully evade enforcement of labor standards, lead firms may choose to externalize production at sites that are less susceptible to regulatory oversight.").

264. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013).

265. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1393–96 (2018).

266. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021).

267. Florian Wettstein, *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, 96 J. BUS. ETHICS 33, 36 (2010) ("We may speak of indirect complicity if the corporation's activities do not directly contribute to the violation of human rights, but rather support, in a general way, the ability of the perpetrator to carry out systematic human rights violations."); *accord* Corwin Aragon & Alison M. Jaggar, *Agency, Complicity, and the Responsibility to Resist Structural Injustice*, 49 J. SOC. PHIL. 439, 451 (2018) ("[S]tructural injustices live in the seemingly innocuous actions of everyday social practice . . . that leave none of us without bias.").

where the plaintiffs allege that the corporate defendant aided and abetted in conduct that caused a human rights harm in violation of customary international law. Though not a perfect match, the FCPA currently allows the federal government to sue foreign and American corporations for aiding and abetting in overseas conduct violating federal antibribery laws,[268] providing a model for how a new statute might establish similarly expansive federal question jurisdiction. This new statute would keep the federal judiciary at the forefront of human rights litigation and allow federal courts to hold corporations that do business in the United States[269] responsible for the collateral human rights damage caused by their corporate supply chains.

268. 15 U.S.C. §§ 78dd-1–78dd-3.

269. No statute creating federal question jurisdiction would exempt plaintiffs from showing that the court also possesses personal jurisdiction over the defendant, even if that defendant were a foreign corporation. *See* Daimler AG v. Bauman, 571 U.S. 117, 126–28 (2014) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317–18 (1945)). A court possesses personal jurisdiction over foreign corporations that purposefully conduct business in the state where the court is located. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).