No. 19-1530

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ESTATE OF ARTURO GIRON ALVAREZ,
By and through Maria Ana Giron Galindo, et al.,

Plaintiffs-Appellees

v.

THE JOHNS HOPKINS UNIVERSITY, et al.,

Defendants-Appellants

On Appeal from the
United States District Court for the District of Maryland,
Case No. 1:15-cv-00950-TDC
The Honorable Theodore D. Chuang

BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1530 Caption: Estate of Arturo Giron Alvarez v. The Johns Hopkins University, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

International Law Scholars
(name of party/amicus)

who is amici curiae, makes the following disclosure:
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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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If yes, identify all such owners:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Paul Hoffman Date: September 18, 2019

Counsel for: International Law Scholars

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I certify that on September 18, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTEREST OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29, *Amici* respectfully submit this brief in support of the Appellees. Both parties have consented to the filing of this brief.[1]

Amici are legal experts in the fields of international law and human rights.[2] They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law, respect for human rights, and the principles of accountability for perpetrators and redress for victims. Their work has been cited by courts at all levels of the federal judiciary for guidance in determining the content of international law and its impact in domestic proceedings.

Amici believe domestic corporations are subject to liability under the Alien Tort Statute ("ATS") when they violate international norms that are specific, universal, and obligatory, the standard set forth by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2014). *Amici* further believe the Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) applies solely to foreign corporations and does not foreclose ATS relief against domestic corporations.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

[2] A list of the *amici curiae* appears in the Addendum.

Amici would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

This case is about non-consensual human experimentation performed by U.S. domestic corporations in Guatemala during the 1940s and 1950s. The victims of these medical experiments—individuals who were unknowingly infected with syphilis, their estates, and their descendants—are now seeking justice and accountability.

The Appellants began conducting medical experiments regarding sexually transmitted diseases in the United States during the 1930s and 1940s. These experiments were part of the infamous Tuskegee Study, where poor, African American sharecroppers were deceived about their medical condition "so that the researchers could test and observe the effects of untreated syphilis in humans." *Estate of Alvarez v. Johns Hopkins University*, 275 F. Supp. 3d 670, 681 (D. Md. 2017). According to the pleadings, these studies were soon extended to Guatemala because the Appellants concluded they could conceal the experiments from the public. *Id.* at 682. Throughout the late 1940s and into the 1950s, the Appellants intentionally infected hundreds of individuals, including children, in Guatemala. *Id*. None of these individuals consented to this medical experimentation. When the Guatemalan experiments were finally disclosed in 2010, it led to the creation of a

U.S. presidential commission and a formal apology from the United States.[3] *Id*. at 683.

The victims, their estates, and descendants subsequently filed suit in the United States. The Third Amended Complaint alleges claims of non-consensual human experimentation under the Alien Tort Statute. The defendants include a U.S. drug company, a U.S. foundation, and a U.S. university.

In *Estate of Alvarez v. Johns Hopkins University*, 373 F. Supp. 3d 639 (D. Md. 2019), the district court properly rejected the Appellants' efforts to dismiss this lawsuit. Guided by the Supreme Court's decision in *Jesner*, the district court found that domestic corporations are subject to suit under the ATS. *Id*. at 649. The Appellants now seek interlocutory review to challenge the district court's decision.

The Fourth Circuit should affirm the district court's decision for two reasons. First, Appellants and their *amicus* disregard the Supreme Court's clear holding in *Jesner* by repeatedly relying upon the reasoning of the three-Justice plurality. Ironically, Appellants fault the district court for recognizing the sole issue that garnered a majority of Justices in *Jesner*: that *foreign* corporations are not subject to ATS liability. Second, Appellants' arguments that a federal cause of action for corporate liability is required under the ATS and their reliance on the

[3] *See* PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, "ETHICALLY IMPOSSIBLE:" STD RESEARCH IN GUATEMALA FROM 1946 TO 1948 (Sept. 2011).

Torture Victim Protection Act ("TVPA") as a guide for interpreting the ATS are also misplaced. Requiring Congress to adopt legislation authorizing a cause of action under the ATS is contrary to the text of the statute and the Supreme Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). It would also leave the ATS a dead letter, which the Supreme Court explicitly declined to do in both *Sosa* and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

In sum, the district court ruled correctly, and its reasoning should be affirmed.

ARGUMENT

I. APPELLANTS DISREGARD THE SUPREME COURT'S CLEAR HOLDING IN *JESNER V. ARAB BANK, PLC*.

In *Jesner v. Arab Bank, PLC*, the question presented to the Supreme Court was whether the Alien Tort Statute "categorically forecloses corporate liability." At the outset of the opinion, Justice Kennedy offered a similarly broad framing of the question presented in *Jesner*, 138 S. Ct. at 1394.

> Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.

Despite this broad framing, the *Jesner* majority explicitly limited its decision to the issue of ATS liability for *foreign* corporations. Thus, the Court stated that "it

would be inappropriate for courts to extend ATS liability *to foreign corporations*." *Id*. at 1403 (emphasis added). Indeed, the Court's holding is unambiguous: "the Court holds that foreign corporations may not be defendants in suits brought under the ATS." *Id*. at 1407.

Despite *Jesner*'s clear holding, Appellants fault the district court's decision for recognizing the sole issue that garnered a majority of Justices in *Jesner*: that *foreign* corporations are not subject to ATS liability. In *Estate of Alvarez*, 373 F. Supp. 3d at 649, the district court correctly stated that *Jesner* was limited to foreign corporations. And yet, Appellants criticize the district court for dismissing the actual holding in *Jesner* and not relying instead on the reasoning of the three-Justice plurality. Opening Brief of Defendants-Appellants at 13-14, *Estate of Alvarez v. Johns Hopkins University*, No. 19-1530 (4th Cir. July 29, 2019) ("Opening Brief").

Appellants further assert that the *Jesner* decision supports their arguments that domestic corporations cannot be sued under the ATS. *Id*. at 16, 29. But these arguments overstate the Supreme Court's opinion by repeatedly referencing language from the three-Justice plurality. For example, only three Justices believed the Torture Victim Protection Act offered a meaningful comparison for understanding the scope of ATS litigation. *Id*. at 11 (quoting *Jesner*, 138 S. Ct. at 1404). Only three Justices believed that ATS litigation discourages American

investment abroad. *Id*. at 12 (quoting *Jesner*, 138 S. Ct. at 1406). And, only three Justices in *Jesner* suggested that international practice counseled against recognizing corporate liability. *Id*. at 10-11 (quoting *Jesner*, 138 S. Ct. at 1401). In fact, not even the three-Justice plurality concluded that international law precludes corporate liability. As Justice Kennedy clearly stated in *Jesner*, 138 S. Ct. at 1402 "[t]he Court need not resolve . . . whether international law imposes liability on corporations." *See generally* William S. Dodge, Jesner v. Arab Bank: *The Supreme Court Preserves the Possibility of Human Rights Suits against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/.

Appellants' *amicus* makes similar assertions that rely on the three-Justice plurality in *Jesner* over the majority opinion and its more limited reasoning. Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America Supporting Appellants at 9, 10, 13, 23, *Estate of Alvarez v. Johns Hopkins University*, No. 19-1530 (4th Cir. Aug. 5, 2019)

In *Jesner*, the Supreme Court had an opportunity to categorically foreclose corporate liability under the ATS. It declined to do so. Accordingly, the district court's decision is consistent with *Jesner*. Indeed, its reasoning is shared by other courts. *See, e.g.*, *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 929 F.3d 623 (9th Cir. 2019) ("*Jesner*

did not eliminate all corporate liability under the ATS . . . ."); *see also Al Shimari v. CACI Premier Tech.*, Inc., 320 F. Supp. 3d 781, 788 (E.D. Va. 2018) (jurisdiction over domestic corporation is consistent with the purposes of the ATS and does not conflict with the holding or reasoning of *Jesner*).

II. APPELLANTS' ARGUMENTS THAT A FEDERAL CAUSE OF ACTION FOR CORPORATE LIABILITY IS REQUIRED UNDER THE ALIEN TORT STATUTE AND THEIR RELIANCE ON THE TORTURE VICTIM PROTECTION ACT AS A GUIDE FOR INTERPRETING THE ALIEN TORT STATUTE ARE EQUALLY MISPLACED.

Appellants argue that the district court's interpretation of *Jesner* "flouts Congress's express choice *not* to impose corporate liability in the Torture Victim Protection Act, a provision enacted as part of the Alien Tort Statute; . . ." Opening Brief, *supra*, at 3 (emphasis in original); *see also id*. at 17 ("Creating a cause of action against domestic corporations would require disagreeing with the judgment Congress itself made in a statute enacted under the Alien Tort Statute, . . ."). Appellants also reference the plurality's language in *Jesner* that "Congress, in the Torture Victim Protection Act of 1991—'the only cause of action under the ATS created by Congress rather than the courts'—chose to impose liability only on natural persons." *Id*. at 11 (quoting *Jesner*, 138 S. Ct. at 1403-04); *see also id*. at 41 (quoting *Jesner*, 138 S. Ct. at 1403) (Congress passed the TVPA to provide "an unambiguous and modern basis for a cause of action under the ATS."). To be clear,

the Appellants' references to *Jesner* merely reflect the three-Justice plurality in *Jesner*.

The Appellants thus suggest that Congress must adopt an express cause of action in order for claims to be brought under the ATS. The Appellants rely on the TVPA in support of this argument.

Appellants' *amicus* makes similar arguments. It notes, for example, that the TVPA is "the only cause of action Congress *has* created relating to the ATS." Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America, et al., *supra*, at 9 (emphasis in original). In contrast, it points out that "Congress has not created a cause of action permitting plaintiffs to sue corporations under the ATS." *Id*.

The district court engaged in a similar approach when it certified this interlocutory appeal on "whether domestic corporate liability is available *under* the Alien Tort Statute." *Estate of Alvarez v. Johns Hopkins University*, 2019 WL 1779339, at *3 (D. Md. 2019) (emphasis added). According to the district court, "it is undisputed that Congress has not codified a cause of action under the ATS against domestic corporations." *Id.* at *2. Because of this, the district court acknowledged that there "is 'substantial ground' for difference of opinion" on the

question of corporate liability under the ATS.[4] *Id*. (quoting 28 U.S.C. § 1292(b)). For this reason, the district court concluded that an interlocutory appeal would be appropriate.

This approach to the ATS is wholly misplaced. Requiring Congress to adopt legislation authorizing a cause of action under the ATS is contrary to the text of the statute and the Supreme Court's holding in *Sosa*. Reliance on the TVPA has compounded this error.

In enacting the TVPA, Congress's intent was to supplement and expand the ATS in two respects: (1) to provide an express cause of action for torture and extrajudicial killing; and (2) to expand the remedy for those violations to U.S. citizens. Introducing the bill in the Senate in 1986, Senator Arlen Spector explained that the TVPA "clarifies and expands existing law by clearly establishing a Federal right of action against violators of human rights and authorizing suits by both aliens and U.S. citizens." Cong. Rec. S12949 (June 6, 1986) (Senator Arlen Spector). By providing an express cause of action against individuals for certain violations of the law of nations, Congress clearly did not intend to constrain the jurisdiction of the district courts under the ATS. The House Report states expressly that "Section 1350 has other important uses and should not

[4] *But see Estate of Alvarez*, 373 F. Supp. 3d at 649 ("Defendants' analogy to the TVPA, which does not permit claims against corporate defendants, does not persuade this Court that domestic corporate liability is precluded by *Jesner*.").

be replaced," H.R. Rep. No. 102-367, at 3, while the Senate Report notes that the ATS "should remain intact." S. Rep. No. 102-249, at 5.

The ATS and TVPA are complementary statutes. And, as the Supreme Court noted in *Sosa*, Congress has taken no action to rescind or even revise the ATS. "It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such." *Sosa*, 542 U.S. at 731.

Moreover, the TVPA is a separate statute. It is true that the TVPA appears as a statutory note at 28 U.S.C. § 1350. But, the TVPA's placement within the federal code was not made by Congress but rather by the Office of Law Revision Counsel ("OLRC"). When federal laws are enacted, OLRC is responsible for their placement in the U.S. Code. *See generally* Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2d 283 (2007). On some occasions, Congress indicates where new legislation should be placed within the Code. On other occasions, Congress is silent, and placement of new legislation in the Code is left to OLRC. Because Congress did not indicate where the TVPA should be placed in the federal code, OLRC was responsible for its placement. When OLRC makes these decisions, they are not meant to have any substantive impact on the law's meaning, interpretation, or application. *See generally* U.S. House of

Representatives, *Detailed Guide to the United States Code Content and Features, Office of the Law Revision Counsel*, http://uscode.house.gov/detailed_guide.xhtml. Accordingly, courts cannot attach any legal significance to the specific placement of these laws in the Code. *See, e.g.*, *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964) ("Certainly where, as here, the 'change of arrangement' was made by a codifier without the approval of Congress, it should be given no weight."); *cf. Washington-Dulles Transp., Ltd. v. Metro. Washington Airports Auth.*, 263 F.3d 371, 378 (4th Cir 2001).

To attach any significance to the TVPA's specific placement in Title 28 of the U.S. Code is, therefore, contrary to basic principles of statutory construction. When judges have acknowledged OLRC's role in the codification process, they have rejected the significance of the TVPA's statutory placement for purposes of interpreting the ATS. *See, e.g.*, *Belhas v. Ya'alon*, 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring) ("[A] further inference of congressional intent from the placement of the statute within the United States Code is dubious, at least absent some indication—lacking here (see TVPA, Pub. L. 102-256, 106 Stat. 73 (1992))—that Congress itself, rather than simply the Office of Law Revision Counsel, 2 U.S.C. §§ 285-285g, directed that placement.").

The logic of requiring Congress to adopt legislation authorizing a cause of action under the ATS becomes even more tenuous when considered in light of the

Supreme Court's decision in *Sosa v. Alvarez-Machain*. In *Sosa*, 542 U.S. at 724, the Court made clear the ATS functioned on its own and did not require further implementing legislation. To hold otherwise would have left the ATS a dead letter. According to the Court, "[t]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners." *Id*. at 719. The statute was meant "to have a practical effect" because "[t]here is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely." *Id*.

If the ATS requires that Congress adopt an express cause of action for claims, it would lead to puzzling outcomes. By its terms, the ATS only requires a "violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Requiring a separate cause of action to effectuate a remedy for these violations of international law would effectively make the statutory language superfluous. There would be no need to reference "the law of nations or treaty of the United States" because the cause of action would already be codified in an extant federal statute.

In sum, Appellants' arguments would leave the ATS a nullity and would elevate the three-Justice plurality opinion in *Jesner* over the majority opinion in *Sosa*.

CONCLUSION

The district court properly interpreted *Jesner* in support of its finding that domestic corporations may be subject to ATS claims. For these reasons, *Amici* respectfully urge this Court to affirm the lower court ruling.

September 18, 2019

Respectfully submitted,
s/Paul L. Hoffman

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ADDENDUM:

LIST OF *AMICI CURIAE*

Institutional affiliations are only provided for identification purposes.

Connie de la Vega is the Marshall P. Madison Professor of Law, Academic Director of International Law Programs, and Dean's Circle Professor at the University of San Francisco School of Law. Professor de la Vega writes extensively in the field of human rights and is the co–author of THE AMERICAN LEGAL SYSTEM FOR FOREIGN LAWYERS (2011) and INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION (2007). Her most recent book is A PRACTICAL GUIDE TO USING INTERNATIONAL HUMAN RIGHTS AND CRIMINAL LAW PROCEDURES (2019).

William S. Dodge is Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law at the UC Davis School of Law. He served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and as Co-Reporter for the American Law Institute's RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW from 2012 to 2018. He is currently a member of the State Department's Advisory Committee on International Law and an Adviser to the American Law Institute's RESTATEMENT (THIRD) OF THE CONFLICT OF LAWS. Professor Dodge is the co-author of

TRANSNATIONAL BUSINESS PROBLEMS (2019) and INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (2011).

Jennifer M. Green is an Associate Clinical Professor at the University of Minnesota where she directs and teaches the Law School's Human Rights Litigation and International Legal Advocacy Clinic. She has two decades of experience working on questions of accountability and remedies for human rights violations both in U.S. courts and in international fora. She managed the Alien Tort Litigation docket at the Center for Constitutional Rights between 1996-2009. She authored or co-authored numerous publications on the Alien Tort Statute, including INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

Bert Lockwood is the Distinguished Service Professor at the University of Cincinnati College of Law, where he also serves as the Director of the Urban Morgan Institute for Human Rights. Professor Lockwood is the Editor-in-Chief of Human Rights Quarterly and the Series Editor for the Pennsylvania Studies in Human Rights with the University of Pennsylvania Press.

Naomi Roht-Arriaza is the Albert Abramson Distinguished Professor of Law at the University of California, Hastings College of Law. She has published several books, including THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005), IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (1995), and edited TRANSITIONAL JUSTICE IN THE TWENTY-

FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (2006) and THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS (6th ed. 2010).

Gabor Rona is a Visiting Professor of Law at Cardozo Law School. He previously served as the International Legal Director of Human Rights First and as a Legal Advisor in the Legal Division of the International Committee of the Red Cross ("ICRC") in Geneva. He also served from 2011 through 2018 as a member of the U.N. Working Group on the Use of Mercenaries. Professor Rona represented the ICRC in connection with the establishment of the International Criminal Court.

Ambassador David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law at Northwestern University Pritzker School of Law. From January 2012 through October 2018, Ambassador Scheffer was the U.N. Secretary-General's Special Expert on United Nations Assistance to the Khmer Rouge Trials. He previously served as the U.S. Ambassador at Large for War Crimes Issues from 1997 to 2001 and led the U.S. delegation in connection with the establishment of the International Criminal Court. Professor Scheffer's publications include THE SIT ROOM: IN THE THEATER OF WAR AND PEACE (2018) and ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (2011).

Ralph Steinhardt is the Lobingier Professor of Comparative Law and Jurisprudence at George Washington University Law School. He is co-director of the Oxford-GW Program in International Human Rights Law at New College,

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Beth Stephens is a Distinguished Professor of Law at Rutgers Law School. She was previously in charge of the human rights docket at the Center for Constitutional Rights. Professor Stephens has written extensively on the Alien Tort Statute and co-authored INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

Beth Van Schaack is the Leah Kaplan Visiting Professor of Human Rights and Acting Director of the Human Rights & Conflict Resolution Clinic at Stanford Law School. Professor Van Schaack previously served as Deputy to the Ambassador at Large for War Crimes Issues in the U.S. Department of State. She also served as a member of the U.S. Department of State's Advisory Council on International Law and served on the United States inter-agency delegation to the International Criminal Court Review Conference in Kampala, Uganda in 2010. Professor Van Schaack has published extensively in the field of international law and she has edited several books, including INTERNATIONAL CRIMINAL LAW AND

ITS ENFORCEMENT (3d ed. 2014) and CAMBODIA'S INVISIBLE SCARS: TRAUMA PSYCHOLOGY IN THE WAKE OF THE KHMER ROUGE (2011).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-1530 **Caption:** Estate of Alvarez v. The Johns Hopkins University et al.

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(s) Paul Hoffman

Party Name Amici Curiae Int'l Law Scholars

Dated: 9/18/2019

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, the foregoing **Brief of International Law Scholars as *Amici Curiae* in Support of Plaintiffs-Appellees** was filed with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users for whom service will be accomplished by the CM/ECF system.

Date: September 18, 2019

Paul L. Hoffman
Counsel for *Amici Curiae*