Nos. 09-7125 (lead case), 09-7127, 09-7134, 09-7135
ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, ET AL.,
Plaintiffs – Appellants – Cross-Appellees,
v.
EXXON MOBIL CORPORATION, ET AL.,
Defendants – Appellees – Cross-Appellants.

JOHN DOE I, ET AL.,
Plaintiffs – Appellants - Cross-Appellees,
v.
EXXON MOBIL CORPORATION, ET AL.,
Defendants – Appellees – Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* OF ARTHUR MILLER, ERWIN CHEMERINSKY, AND PROFESSORS OF FEDERAL JURISDICTION AND LEGAL HISTORY IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES AND REVERSAL

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September 13, 2010

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1, Amici certify the following:

A. Parties Appearing Before the District Court

All parties, intervenors and amici appearing before the district court and this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review

The issues that are the subject of this amicus curiae brief are those in the September 30, 2009 ruling of the District Court of the District of Columbia. *John Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp.2d 131 (D.D.C. 2009). All other rulings under review in these consolidated appeals are listed in the Certificate of Parties, Rulings, and Related Cases filed by Plaintiffs-Appellants.

C. Related Cases

Counsel for *Amici* is unaware of any related cases currently pending before this Court or any other court outside of those cases already consolidated in this action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the Amici is a publicly held entity. None of the Amici is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the Amici.

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INTEREST OF AMICI CURIAE

Amici curiae are professors with expertise in federal jurisdiction and/or legal history who have an interest in the proper interpretation of the law of standing. The rule adopted by the district court in the opinion below is, in *Amici*'s view, inconsistent with the historical understanding that federal courts are open to nonresident aliens, and it runs counter to nearly a century of scholarly consensus about the origins of alienage jurisdiction. *Amici* respectfully submit this brief in order to clarify the history of alienage jurisdiction in this country, as well as the state of current prudential standing doctrine. *Amici* take no position on any of the other questions presented in this case.[1]

SUMMARY OF ARGUMENT

In the opinion below, the district court relied upon "the general rule that non-resident aliens have no standing to sue in United States courts." *John Doe VIII v. Exxon Mobil Corp.*, 658 F. Supp.2d 131, 134 (D.D.C. 2009). Such a rule does not exist. The district court's ruling is inconsistent with statutory commitments and

[1] The parties have consented to the filing of this amicus brief, and Professor Erwin Chemerinsky was granted leave to file this brief in this Court's Order of June 8, 2010. A notice of supplemental *amici curiae* was filed September 13, 2010, and a list of *amici* is attached in the appendix to this brief. *Amici* have no personal, financial, or other professional interest, and take no position respecting any other issues raised in the case below. This brief was not written in whole or in part by any party, and no person or entity other than *amici* or their counsel made any monetary contribution towards the preparation or submission of this brief.

historical practice dating back to our nation's founding. The Founders recognized that maintaining a federal forum for suits brought by foreign plaintiffs was crucial to ensuring the economic and political standing of the newborn nation in the global community. This recognition is reflected in the language of Article III and in the alienage provisions of the Judiciary Act of 1789. The interests that necessitated the creation of a federal forum for foreign plaintiffs remain highly pertinent, as borne out by the courts' continuing practice of adjudicating suits brought by nonresident aliens when Article III requirements are met.

ARGUMENT

I. There Is No Prudential Bar to Nonresident Alien Standing.

A. The Supreme Court and the D.C. Circuit have repeatedly affirmed their jurisdiction to decide cases brought by non-citizens.

It is clear that "United States courts have traditionally been open to nonresident aliens." *Rasul v. Bush*, 542 U.S. 466, 484 (2004); *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights"). The Supreme Court and the D.C. Circuit have long held that federal courts have jurisdiction in cases where one party is an alien and the other a citizen. In the seminal decision

Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809), the Court made clear that alienage jurisdiction is properly exercised so long as a U.S. citizen or state is one party to the action. *See also Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829) (holding "judicial power . . . extend[s] to private suits in which an alien is a party" so long as "a citizen be the adverse party"); *Eze v. Yellow Cab Co.*, 782 F.2d 1064 (D.C. Cir. 1986) (per curiam) (same).

Beyond this, an alien, just like a citizen, has standing if she meets Article III standing requirements by demonstrating injury-in-fact that is redressable by a favorable judicial decision. Status as a nonresident alien does not bear on the determination of Article III standing. Rather, "it is the injury and not the party that determines Article III standing." *Cardenas v. Smith*, 733 F.2d 909, 913 (D.C. Cir. 1984) (citing *Warth v. Seldin*, 422 U.S. 490 (1975)). Where there is an appropriate grant of jurisdiction to the federal courts, Article III permits suits by foreign plaintiffs. *Id.* (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). The alienage provision codified at 28 U.S.C. §1332(a)(2) is such a grant of jurisdiction.

The settled recognition that federal courts have jurisdiction over suits in which an alien is a party is also distinct from the question of whether nonresident aliens are entitled to invoke the protection of any specific constitutional provisions. The decision in *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C.

1976), relied on by the district court, held only that a nonresident alien was not entitled to invoke the protections of the First, Fourth, Fifth, Sixth and Ninth Amendments. Similarly, the decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), centered on the availability of habeas corpus under Article I, § 9, cl. 2, rather than the basic alienage jurisdiction of the federal courts under Article III and 28 U.S.C. § 1332. As the Supreme Court stated in *Rasul*, "nothing in *Eisentrager* or in any of [its] other cases categorically excludes aliens . . . from the 'privilege of litigation' " in U.S. courts." 542 U.S. at 484 (internal quotes omitted).

B. The district court's proposed bar to standing is ungrounded in established prudential considerations.

The district court's prudential bar against cases brought by nonresident aliens derives no support from the animating principles of prudential standing limitations. To deny Plaintiffs standing here on the basis of the district court's reasoning would not further the objectives at the core of prudential standing doctrine. *Cf. Craig v. Boren*, 429 U.S. 190, 193–194 (1976).

The principles of prudential standing have aimed to limit judicial intervention into "abstract questions of wide public significance [where] other governmental institutions may be more competent to address the questions and [where] judicial intervention [is] unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The courts have applied prudential standing limitations to

"avoid deciding questions of broad social import where no individual rights would be vindicated, and . . . limit access to federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). The Court has also stated that prudential limitations on standing are meant to "free[] the Court . . . from unnecessary pronouncement on constitutional issues [and] premature interpretations of statutes in areas where their constitutional application might be cloudy . . . and to assure the court that the issues before it will be concrete and sharply presented." *Secretary of State of Md. v. Joseph H. Munson Co., Inc*., 467 U.S. 947 (1984) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960); *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Thus, there are prudential limitations on the standing of plaintiffs whose claims (1) rest on the legal rights of third parties, (2) present "generalized grievances" that are pervasively shared, and (3) fall outside the zone of interests regulated by the particular statute or constitutional guarantee invoked. *See Valley Forge Christian College v. Amer. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). A prudential rule that categorically precludes suits by nonresident aliens is wholly unlike these limitations and does not serve the concerns they are meant to address. Here, there has been no assertion that the individual plaintiffs in this case are unable to demonstrate particular injury to their rights, nor that their status impedes the court's ability to address their claims in a

concrete manner. Neither are there grounds to assert that the plaintiffs fall outside the "zone of interests" protected by a statute; further, the plaintiffs cannot be said to fall outside of any particular constitutional guarantee since their claims are not constitutional ones.[2] Indeed, the district court did not question – and the parties do not dispute – that plaintiffs have Article III standing.[3]

A judge-made rule that precludes individuals from suit on the basis of alienage is entirely unrelated to the principles of judicial self-restraint captured by the prudential standing doctrine. Further, this judge-made rule is contrary to statutory commitments and historical practice dating back to our nation's founding.

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[2] Where a statute is at issue, the D.C. Circuit acknowledged, "a person may be just as 'affected or aggrieved' by agency action within the terms of the Administrative Procedure Act if he is a non-resident alien as if he were a resident alien." *Constructores Civiles de Centroamerica, S. A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972).

[3] While prudential standing and Article III standing are distinct "strands" of jurisprudence, the Supreme Court has stated that prudential standing limitations are "closely related to Art. III concerns." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *see also Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Amer. United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) ("Merely to articulate these principles [of prudential standing] is to demonstrate their close relationship to the policies reflected in the Art. III requirement of actual or threatened injury amenable to judicial remedy."); *Barrows v. Jackson*, 346 U.S. 249, 255 **(**1953) ("The common thread underlying both [prudential and Article III] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation.").

II. The Founders Recognized a Need to Permit National Courts to Hear Cases and Controversies Involving Foreign Plaintiffs.

At the time of the Constitution's enactment, the Founders envisioned a federal judiciary that would take "cognizance of *all* causes in which the citizens of other countries are concerned." THE FEDERALIST NO. 80 (A. Hamilton) (C. Rossiter ed., 1961) (emphasis added). It was essential to the Founders that the federal judiciary have authority to adjudicate "cases between a State and the citizens thereof, and foreign States, citizens, or subjects," as such cases were "peculiar[ly] . . . proper subjects of the national judicature." *Id.* The Founders considered federal jurisdiction over disputes between aliens and citizens essential to the execution of the country's obligations to foreign nations and to the facilitation of commerce.

The proceedings of the Constitutional Convention demonstrate that the Founders deliberately gave the federal courts jurisdiction to hear cases involving foreign parties in order to advance the economic and commercial interests of the nation. As James Madison remarked at the Constitutional Convention: "[F]oreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 1836) ("ELLIOT'S DEBATES"). James Wilson, one

of the Committee members responsible for drafting Article III, shared Madison's sentiments. He stated in his remarks at Pennsylvania's ratification convention:

> Is it not an important object to extend our manufactures and our commerce? This cannot be done unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained unless we give the power of deciding upon those contracts to the general government. Merchants of eminence will tell you that they can trust their correspondents without law; but they cannot trust the laws of the state in which their correspondents live.

2 ELLIOT'S DEBATES 492-493. As Alexander Hamilton reasoned, "[s]o great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." THE FEDERALIST NO. 80 (A. Hamilton). "[T]he proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary." *J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 95 (2002) (quoting Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1473 (1990)).

The reliable availability of a judicial forum for foreign citizens was crucial to ensure nation's economic standing as well as its political security. As legal

scholars have long recognized, the Founders established federal jurisdiction to avoid the blow to the new nation's legitimacy that would be incurred in the event of "a failure of [a] state to provide judicial remedies to an alien on whom physical or economic injury has been inflicted by a resident of the state." L. Henkin, et al., INTERNATIONAL LAW 685-87 (1980). Alexander Hamilton observed that "an unjust sentence against a foreigner . . . would . . . if unredressed, be an aggression upon his sovereign," even if "the subject of controversy was wholly relative to the lex loci." THE FEDERALIST NO. 80. Hamilton recognized the specific need to establish federal jurisdiction over controversies involving foreign citizens, even "those which may stand merely on the footing of the municipal law." *Id.* Alienage jurisdiction was fundamental in order for the United States to fulfill its responsibilities to other nations and their citizens:

> The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other matter, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of *all causes* in which citizens of other countries are concerned.

THE FEDERALIST No. 80 (A. Hamilton) (emphasis added).

The discussion at the Constitutional Convention of the "Marbois-Longchamps affair" vividly illustrates the Founders' political concerns for maintaining federal jurisdiction over cases brought by foreign nationals. In May

1784, a French citizen assaulted a secretary of the French embassy in Philadelphia. The secretary was remitted to the state court system to petition for redress. *See Respublica v. De Longchamps*, 1 DALL. 111 (O. T. Phila. 1784). Secretary of Foreign Affairs John Jay reported to Congress that the unavailability of federal jurisdiction over this case – and similar ones involving foreign nationals – had reduced confidence in the United States among the community of nations. *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. CONT. CONG. 109, 111 (1788). He noted, for example, that the Dutch Ambassador had protested that "the [American] federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." *Id.* The Founders thus found it necessary to "give the citizens of foreign states full opportunity of obtaining justice in the [federal] courts . . . in order to restore credit with those foreign states [and] to preserve peace with foreign nations." 2 ELLIOT'S DEBATES 492-493 (J. Wilson).

The failures of the national government under the Articles of Confederation informed the Founders' concerns. The Articles gave the national courts jurisdiction over violations of the law of nations on the high seas, but not on land. *See* Articles of Confederation, art. 9, § 1, 1 Stat. 4, 6 (1778). The result was that the courts of the separate states had leeway to provide disparate judgments regarding injuries to foreign citizens under the law of nations. Further, the Articles made no provision

for national court jurisdiction over cases involving foreigners injured in violation of municipal law. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986). James Madison observed with distress that the Articles of Confederation "contain[ed] no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST No. 42.

To remedy the shortcomings of the system under the Articles of Confederation, the Framers posited a national forum that could ensure uniform and just disposition of all cases involving foreign parties. Indeed, it was a matter of consensus at the Constitutional Convention that federal courts should have jurisdiction over suits involving foreign persons. Of the five initial proposals for a federal judiciary considered by the Committee of Detail that drafted Article III, four specifically granted the courts jurisdiction over suits involving foreign citizens. *See Holt,* at 1460-61 (citing 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 169-70 (M. Farrand rev. ed 1937).[4] The Founders' concern that the absence of a federal forum would "disrupt international relations and

[4] In comparison, three of the proposals gave the federal courts jurisdiction over cases arising under treaties, and only one provided for domestic diversity jurisdiction. *Id.*

discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution." *J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94-95 (2002).

"The anxieties of the pre-constitutional period cannot be ignored easily." *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004). Yet that is precisely what the district court did when it proclaimed that nonresident aliens have no standing to sue in United States courts as a general rule. The concerns undergirding the Founders' determination that aliens had to be granted standing to sue were not specific to resident or nonresident aliens. Neither does the Constitution enacted by the Founders make such a distinction when it vests the federal courts with the jurisdiction to hear "controversies . . . between a state, or the citizens thereof, and foreign states, citizens or subjects." U.S. CONST. ART. III, sec. 2. Rather, both the Constitution's Framing and the proceedings of the First Congress demonstrate our nation's commitment to a judicial system generally open to claims brought by citizens of other countries.

III. The First Congress Intended to Give Federal Courts Jurisdiction Over Cases and Controversies Involving Nonresident Aliens.

The Founders' commitment to a federal forum for disputes involving aliens found expression in the First Congress. From the very first Judiciary Act, Congress authorized the federal courts to hear cases involving aliens. *See* Wythe

Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 548 (1989) (describing alienage jurisdiction as the "single most important grant of national court jurisdiction embodied in the [Judiciary] Act"). The history of the 1789 Judiciary Act indicates that the First Congress intended for federal courts to be open to foreign nationals bringing suit against citizens of the United States.

All proposed versions of the draft Judiciary Act provided for alienage jurisdiction. Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INTL. L. 1, 17 (1996). The First Congress rejected an early proposal for the Act that would have limited alienage jurisdiction to suits brought only against, rather than by, noncitizens. *See* Charles Warren, *New Light on the History of the Judiciary Act of 1789,* 37 HARV. L. REV. 49, 78 n.67 (1923) (examining early proposals preserved in Senate files). Later drafts of the Judiciary Act all broadened the grant of jurisdiction to include cases in which a noncitizen was *either* a plaintiff or defendant. Id. at 77-78. Ultimately, the First Congress adopted section 11 of the Judiciary Act, which provided for federal jurisdiction over all cases in which "an alien is a party," without differentiating between resident and nonresident aliens. Judiciary Act of 1789, §11, 1 Stat. 78 (1789) (providing for jurisdiction where "an alien is a party" and more than $500 is in controversy). There is no record of any challenge to the language of this

section. Dennis J. Mahoney, *A Historical Note on Hodgson v. Bowerbank*, 49 U. CHI. L. REV. 725, 732 (1982).

Other provisions of the Judiciary Act reinforced that federal courts were open to cases involving aliens. The Act granted jurisdiction over cases involving ambassadors, other public ministers, and consuls. Judiciary Act of 1789 s 13, 1 Stat. 73, 80-81. It also provided for removal of actions against aliens from state court to federal court, subject to an amount in controversy requirement. Judiciary Act of 1789 s 11, 1 Stat. 73, 78. Section 9(b) of the Act, referred to as the Alien Tort Statute (ATS), provided for federal court jurisdiction over "cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, s 9(b), 1 Stat. 73, 78. As the Supreme Court has noted, Section 9(b), which is now codified at 28 U.S.C. § 1350, "explicitly confers the privilege of suing for an actionable tort . . . on aliens alone." *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

Like the Framers, members of the First Congress were concerned about state court bias against foreigners. The drafters of the Judiciary Act considered that alienage jurisdiction would attract foreign capital to the United States by assuring foreigners of a neutral forum to resolve commercial disputes with citizens. Holt, *To Establish Justice*, at 1453-58. "Friction between local debtors and foreign creditors greatly affected the debate over the Judiciary Act." Johnson, at 18.

"Several states had failed to give foreigners proper protection under the treaties concluded with England at the end of the Revolution," and "[l]ocal animosity was so great that only national tribunals could compel the enforcement of a national treaty." Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 n.6 (1927); *see also* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 520 (1928). William Loughton Smith, a member of the First Congress from South Carolina, commented that "[t]he Laws of nations & Treaties were too much disregarded in the several States – Juries were too apt to be biased against them, in favor of their own citizens & acquaintances." *The Letters of William Loughton Smith to Edward Rutledge*, 69 S.C. HIST. MAG. 1, 22-23 (1968) (letter dated Aug. 10, 1789). Smith concluded that "it was therefore necessary to have general Courts for causes in which foreigners were parties or citizens of different States." *Id.*

The First Congress' commitment to alienage jurisdiction has remained a fundamental attribute of federal jurisdiction since 1789. That Congress did not grant federal question jurisdiction on the federal courts until 1875, yet established alienage jurisdiction from the very beginning, indicates the critical importance that the First Congress ascribed to providing a federal forum for suits brought by aliens. *See* Act of Mar. 3, 1875 s 1, 18 Stat. 470 (1875). While Congress has amended the statute providing for alienage jurisdiction periodically since 1789, it has always

remained in force.[5] The current statutory provision granting alienage jurisdiction, 28 U.S.C. §1332(a)(2), largely replicates the wording of the original Act.

IV. The Founders' Commitment to Federal Jurisdiction Over Cases Involving Foreign Citizens Is Still Applicable.

The concerns contemplated by the Framers when they vested the federal courts with alienage jurisdiction continue to be of exceptional importance. The United States and its citizens have only increased their pursuit of international political and commercial relationships since the Constitution's founding. It is therefore still the case that "noncitizens suing United States citizens in the United States must be guaranteed a neutral forum . . . ." 1 J. MOORE, MOORE'S FEDERAL PRACTICE 800.30 TO .31 (1996).

For this reason, the federal government has filed briefs in support of maintaining an open forum for foreign citizens and corporations in federal court. *See, e.g.* Brief for the United States as Amicus Curiae, *Matimak Trading Co. Ltd. v. Khalily*, 118 F.3d 76 (2nd Cir. 1997), available at 1996 WL 33661469 ("There are significant practical reasons for holding that a Hong Kong corporation can either

[5] *See JP Morgan*, 536 U.S. at 96 ("The language of the statute was amended in 1875 to track Article III by replacing the word 'aliens' with 'citizens, or subjects,' Act of Mar. 3, 1875, 18 Stat. 470, the phrase that remains today . . . but there is no doubt that the similarity of 28 U.S.C. §1332(a)(2) to Article III bespeaks a shared purpose."). Whereas Congress modestly narrowed alienage diversity for *resident* aliens in 1988, it has never done so for non-resident aliens. *See* Debra Lyn Bassett, *Statutory Interpretation in the Context of Federal Jurisdiction*, 76 GEO. WASH. L. REV. 52, 63 (2007).

sue or be sued in federal court under the alienage diversity provision, such as the strong commercial and cultural ties between the United States and Hong Kong."). As the government has stated, "the alienage diversity statute gives foreign nations assurance that civil actions between United States citizens and their citizens or subjects will be resolved in a neutral national forum." Brief for the United States as Amicus Curiae in Support of Petitioner at 2001 WL 34092062 at *2, *JPMorgan Chase Bank v. Traffic Stream (BVI) Ltd.*, 536 U.S. 88 (2002). The district court's ruling belies that assurance, to the detriment of our country's interest in ensuring that "private international disputes between United States citizens and foreign citizens or subjects . . . may be resolved in a federal judicial forum." *Id.* at *1-*2.

Assuring that national courts are open to foreigners is critical to the United States' interest in securing reciprocal commitment from foreign countries to protect the rights of our own citizens. The United States has concluded numerous treaties that oblige it to guarantee a judicial forum to foreign citizens, including nonresident aliens. The North American Free Trade Agreement (NAFTA), for example, provides explicitly that signatories make available enforcement procedures under domestic law. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 1714-1716 (1993); *see also Hines v. Davidowitz*, 312 U.S. 52, 65 (1941) ("In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens.").

The district court's ruling would force nonresident aliens to seek vindication of rights exclusively in state courts. This result plainly contravenes the Framers' determination that state courts are too often inadequate to the task of adjudicating cases involving aliens and that a neutral *national* forum is therefore essential to the execution of the United States' responsibilities to the community of nations.

The practice of adjudicating suits brought by aliens "facilitates international commerce" and "encourages foreign nations to afford United States citizens reciprocal access to foreign courts." *Id.* at *2. These interests are no less important today than they were in 1789. The national concerns underlying federal alienage jurisdiction should not be eschewed by the district court's expansive ruling.

CONCLUSION

For these reasons, *amici* respectfully submit that the Court should reverse the district court's decision and remand for a hearing on the merits.

September 13, 2010

Respectfully submitted,

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APPENDIX[6]

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[6] Institutional affiliations are provided for identification purposes only.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 4,463 words, (which does not exceed the applicable 7,000 word limit).

Dated: September 13, 2010

Respectfully submitted,

_____/s_____

Muneer Ahmad

CERTIFICATE OF SERVICE

I, Muneer Ahmad, the undersigned, hereby certify that I am employed by Yale Law School, at 127 Wall Street, New Haven, Connecticut 06520-9090. I further declare under penalty of perjury that on September 13, 2010, I caused to be served a true copy of the foregoing BRIEF OF AMICI CURIAE OF ARTHUR MILLER, ERWIN CHEMERINSKY, AND PROFESSORS OF FEDERAL JURISDICTION AND LEGAL HISTORY IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES AND REVERSAL via the Court's CM/ECF electronic filing system upon the following persons:

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Respectfully submitted,

_____/s_____

Muneer Ahmad

ADDENDUM: STATUTES AND REGULATIONS

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STATUTES AND REGULATIONS

The statutes pertinent to this appeal are set forth below.

28 U.S.C.A. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs,

the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(i) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

> **(D)** The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1350

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.