Supreme Court of the United States
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April 30, 2015

Clerk
United States Court of Appeals for the Ninth
Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Sea Shepherd Conservation Society
v. Institute of Cetacean Research, et al.
No. 14-1300
(Your No. 12-35266)

Dear Clerk:

The petition for a writ of certiorari in the above entitled case was filed on April 28, 2015 and placed on the docket April 30, 2015 as No. 14-1300.

Sincerely,

Scott S. Harris, Clerk

by

Michael Duggan
Case Analyst

No. _____

In the Supreme Court of the United States

SEA SHEPHERD CONSERVATION SOCIETY,
an Oregon nonprofit corporation
Petitioner,

v.

THE INSTITUTE OF CETACEAN RESEARCH, a Japanese foundation, KYODO SENPAKU KAISHA, LTD., a Japanese corporation, TOMOYUKI OGAWA, and TOSHIYUKI MIURA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented in this petition are:

1. Whether the Alien Tort Statute provides jurisdiction for an extraterritorial injunction regulating otherwise legal behavior on the high seas and in waters claimed by another sovereign, based on a norm of customary international law whose meaning is disputed within the international community.

2. Whether a U.S. federal court may use its contempt power to sanction conduct that violates the "spirit," but not the express terms, of an injunction.

PARTIES TO THE PROCEEDINGS

Paul Watson is a defendant in the proceedings below, in addition to Petitioner Sea Shepherd Conservation Society. Several non-parties were also named as alleged contemnors in the Ninth Circuit contempt proceedings: Lani Blazier, Marnie Gaede, Susan Hartland, Peter Rieman, Bob Talbot, Robert Wintner, and Ben Zuckerman.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Sea Shepherd Conservation Society, an Oregon nonprofit corporation, discloses that it does not have a parent corporation, and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Sea Shepherd Conservation Society ("SSCS") seeks review of two opinions by the Ninth Circuit Court of Appeals,[1] which invoke jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to find SSCS in contempt of an extraterritorial injunction protecting Japanese whaling entities from interference with their illegal whale hunt.

In an opinion released prior to this Court's holding in *Kiobel v. Royal Dutch Petroleum Co.*, the Ninth Circuit used the ATS to support an extraterritorial injunction on a claim of "piracy." App. D. Interpreting a treaty's definition of piracy containing ambiguous and contested terms, the Ninth Circuit resorted to *Webster's Dictionary*, "commonsense understanding," and a Belgian court opinion to conclude that piracy encompasses "malicious acts against inanimate objects," committed at sea for "personal, moral or philosophical" goals, such as to protect the environment. App. 63a-66a.

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[1] Although earlier opinions by the Ninth Circuit are implicated, this petition is timely as it seeks review of the two December 19, 2014 decisions finding SSCS in contempt and considering challenges to the underlying injunction, for which rehearing was denied on January 28, 2015. Challenges to a court's subject-matter jurisdiction to issue, maintain, and enforce an injunction cannot be waived or forfeited, are a complete defense to civil contempt, and may be raised at any point in the litigation. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77, 79 (1988); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999).

Based on this novel definition, the Ninth Circuit branded SSCS activists "pirates," and issued an injunction banning SSCS vessels from coming within 500 yards of the whaling fleet in the Southern Ocean (the "Injunction"). Following the Injunction, SSCS withdrew from the Southern Ocean whale-protection campaigns, which continued under the leadership of autonomous foreign "Sea Shepherd" entities. By doing so, as the Ninth Circuit conceded, SSCS obeyed the terms of the Injunction. *See* App. 26a, 37a. Nevertheless, the court held SSCS, its founder Paul Watson, and its volunteer board of directors in contempt for "aiding and abetting" an independent Australian entity that, on its own volition, infringed upon the Injunction's 500-yard perimeter. The Ninth Circuit insisted, notwithstanding *Kiobel*, that it retained jurisdiction to enforce the extraterritorial Injunction because Respondents had alleged "piracy." App. 54a-55a.

But this case is not about piracy. It is about whether the federal courts may create new law and enforce it extraterritorially, without authorization by Congress, and in defiance of the mandates of this Court. *See Kiobel*, 133 S.Ct. 1659, 1669 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Indeed, this case involves the intersection of three spheres of judicial power where this Court has urged caution and restraint: the use of the ATS to create new "norms" of international law enforceable through federal common law; the exercise of jurisdiction over extraterritorial conduct without

authorization by Congress; and the deployment of the potent weapon of judicial contempt to punish conduct not specifically enjoined. As to each, the Ninth Circuit has disregarded the bounds this Court has placed on its authority—creating a split among the circuits, and setting an alarming precedent that would sanction a "vast expansion of the power of federal courts, unauthorized by Rule or statute." *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 60 (1991) (Kennedy, J., dissenting).

Ironically, while the Ninth Circuit's decision targets environmentalists, the precedent it establishes poses the greatest threat to corporations—the entities most likely to be targeted by broadened ATS actions alleging the violation of new international "norms," subjected to sweeping extraterritorial jurisdiction, and constrained by expanded injunctive authority and contempt power. Intervention by this Court is necessary to restore the judicial restraint it sought to impose in *Kiobel*, *Sosa*, and a long line of contempt cases, and to bring the Ninth Circuit back in line with the practices of other circuit courts.

OPINIONS BELOW

One of the Ninth Circuit's opinions of December 19, 2014 is reported at 774 F.3d 935 (9th Cir. 2014), and is reprinted in the Appendix ("App.") at A. It was accompanied by an unreported memorandum (App. B) and order (App. C). An order denying SSCS's timely petition for rehearing *en banc*

(App. H) was entered January 28, 2015. The report and recommendation of the Appellate Commissioner (App. F) was filed January 31, 2014.

The Ninth Circuit entered the Injunction on December 17, 2012 (App. E). The opinion supporting the Injunction (App. D) was filed February 25, 2013, and amended May 24, 2013, and is reported at 725 F.3d 940 (9th Cir. 2013). The district court's opinion of March 19, 2012 (App. G) is reported at 860 F. Supp. 2d 1216 (W.D. Wash. 2012).

JURISDICTION

Petitioner seeks review of the Ninth Circuit's reported opinion and unreported memorandum entered December 19, 2014. A timely petition for rehearing *en banc* was denied on January 28, 2015. This Court has jurisdiction through 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

Respondent The Institute for Cetacean Research ("ICR") is a Japanese organization that kills whales and sells their meat, under permits issued by the Government of Japan. App. 160a-161a. Japan is a member of the International Whaling Commission ("IWC"), an 88-member body established by treaty in 1946 to regulate whaling. App. 160a. Since 1986, the IWC has maintained a global moratorium on commercial whaling. *Ibid.* In 1994, the IWC established the Southern Ocean Sanctuary, to protect whales in their crucial feeding grounds in the waters around Antarctica. App. 161a. Japan has repeatedly tried, but failed, to persuade the IWC to abolish the sanctuary. ANNUAL REPORT OF THE INT'L WHALING COMM'N 2003: COVERING THE FIFTY FIFTH FINANCIAL YEAR 2002-2003 (Cambridge 2004), at 72-73.

Since 1987, while purporting to abide by the commercial whaling moratorium, Japan has exploited a loophole allowing whales to be killed for the "purposes of scientific research," issuing permits that in recent years authorized ICR to kill over 1,000 minke, humpback, and endangered fin whales annually in and around the Southern Ocean Sanctuary. App. 161a. The IWC has repeatedly criticized these activities. *See, e.g.*, IWC Res. Nos. 1989-3, 1994-10, 2001-7, 2003-1&2, 2005-1, 2007-1, 2014-5. President Reagan responded to Japan's defiance of the moratorium by ordering the

suspension of Japan's fishing privileges in U.S. waters,[2] and the United States has joined other countries in condemning Japan's whaling. App. 162a-163a.

Australia has taken the most active role in opposing Japan's whaling. App. 163a-164a. In 1999, the Australian legislature established the Australian Whale Sanctuary ("AWS"), to protect whales in seas surrounding the Australian Antarctic Territory. *Humane Soc'y Int'l, Inc. v. Kyodo Senpaku Kaisha Ltd.*, FCA 3, ¶¶ 5-8 (FCR 2008) (Austl.). In 2008, the Federal Court of Australia permanently enjoined respondent Kyodo Senpaku Kaisha Ltd. ("KSK"), the corporate entity that owns and operates ICR's whaling vessels, from killing whales in the AWS. *Id.* ¶ 55. ICR and KSK have defied the Australian injunction, continuing to kill whales in the AWS. App. 163a-164a. In 2010, Australia, joined by New Zealand, sued Japan in the International Court of Justice ("ICJ") over its misuse of research permits and its violation of the commercial whaling moratorium and the Southern Ocean Sanctuary. *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), 2014 I.C.J. 148 (March 31), ¶¶ 1, 8, 23-24, 26.

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[2] *See* Letter from Ronald Reagan to Jim Wright, Speaker of the House (Apr. 6, 1988) (on file at Reagan Presidential Library), *available at* www.reagan.utexas.edu/archives/speeches/1988/040688e.htm.

On March 31, 2014, the ICJ ruled that Japan's "research" whaling program lacked a legitimate scientific basis, and that whaling in accordance with that program violated international law. *Id.* ¶¶ 227, 231-33. The ICJ ordered Japan to revoke existing permits under this program and refrain from granting more. *Id.* ¶ 245. It remains uncertain whether Japan will continue to authorize ICR to kill whales in the Southern Ocean.[3]

SSCS is an Oregon nonprofit corporation whose mission is to "defend, conserve, and protect" marine wildlife and ocean ecosystems. App. 84a. A number of other independent entities throughout the world also use some form of the Sea Shepherd name, and together they comprise a loosely organized conservation movement (referred to collectively as "Sea Shepherd"). App. 84a-85a. These entities, which include Sea Shepherd Australia Limited ("SSAL") and Sea Shepherd Netherlands ("SSNL"), are organized and governed under the laws of their respective home nations and directed by their own boards and officers. App. 84a-85a, 88a-89a.

From 2005 until December 2012, SSCS collaborated with other Sea Shepherd organizations

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[3] Japan suspended hunts during the 2014-2015 season while it developed a revised lethal "research" program. In February 2015, a 10-person expert panel selected by the IWC's Scientific Committee found Japan's proposed new program also lacks a legitimate scientific basis. INT'L WHALING COMM'N: REPORT OF THE EXPERT PANEL TO REVIEW THE PROPOSAL BY JAPAN FOR NEWREP-A, (Feb. 2015).

on campaigns aimed at impeding ICR's killing of whales in the Southern Ocean Sanctuary—the precise activity the ICJ has now declared to have been a violation of international law. App. 82a-83a, 164a-165a. Sea Shepherd used various tactics over the years, including throwing bottles of a foul-smelling but benign substance called butyric acid on the decks of ICR's ships, towing lines across the bows of ICR's ships in an attempt to entangle their propellers and slow them, and piloting its vessels near the ICR ships to impede whaling, in a way that rendered collision likely. App. 166a-170a.

Meanwhile, ICR targeted the Sea Shepherd ships with concussion grenades and high-powered water cannons, used long-range acoustic devices to produce disabling and potentially injurious sound levels, and also navigated in a manner that risked collision. App. 170a-171a. In January 2010, one of ICR's ships collided with a SSCS vessel, tearing the SSCS ship in two and necessitating the rescue of its crew. App. 170a. The district court found Sea Shepherd's tactics were the equivalent of "malicious mischief," and that there was no evidence Sea Shepherd had ever targeted or harmed any people. App. 192a, 215a. While the governments of the United States, Australia, New Zealand, and the Netherlands have criticized the "dangerous or violent activities" of all participants in the standoff, none have taken any action to interfere with Sea Shepherd's activities. App. 172a, 211a.

In 2011, Respondents filed suit against SSCS and founder Paul Watson, who was then SSCS's Executive Director and Board President. App. 87a. On March 19, 2012, the district court denied Respondents' motion for a preliminary injunction with a carefully reasoned 44-page opinion. App. G. Respondents appealed. Meanwhile, SSCS prepared for the whale-protection campaign scheduled to begin in December 2012, dubbed Operation Zero Tolerance ("OZT"). On December 17, 2012, the Ninth Circuit entered a *sua sponte* Injunction pending appeal, prohibiting SSCS, Watson, "and any party acting in concert with them" from: (1) approaching Respondents' vessels closer than 500 yards in the Southern Ocean; (2) endangering the safe navigation of those vessels; or (3) attacking them. App. 81a.

When the Injunction issued, OZT was already under way: it was almost fully funded, and its four foreign-flagged ships were under the command of their captains and either already at sea, or ready to depart from Australia and New Zealand. App. 90a-92a. SSCS's board of directors believed "it could not control the actions of the foreign-flagged ships, captained and crewed by environmental activists dedicated to proceeding with the whale defense campaign." App. 99a. Because the board was unable to either halt OZT, or exert sufficient control over it to prevent violations of the Injunction, the board acted on the advice of counsel to sever SSCS's ties with the campaign. App. 98a-100a.

SSCS had an ownership interest in one of the OZT vessels, the *Bob Barker*, and certain equipment aboard it and two other vessels, the *Brigitte Bardot* and *Steve Irwin*. App. 105a, 143a n.185. Also on the advice of counsel, SSCS granted the *Bob Barker* and this equipment to the "respective legal owners" of those vessels, SSNL and SSAL. App. 99a, 105a-106a, 143a. Within a month of the Injunction, SSCS had cut "all financial ties to OZT," and halted administrative assistance and publicity. App. 105a-109a. Since then, SSCS has had no involvement with any Southern Ocean whale-protection campaign, and its donations have plummeted by 66 percent as a result. App. 119a.

On January 29, 2013, an OZT vessel approached an ICR vessel closer than 500 yards. App. 111a. Although Respondents knew SSCS was no longer involved with OZT, they moved for contempt against SSCS and Watson, and the Ninth Circuit referred the motion to its Appellate Commissioner. App. 112a, 113a, 119a-120a. Respondents alleged additional acts of contempt in subsequent motions, naming six of SSCS's volunteer directors and Administrative Director Susan Hartland as additional contemnors. App. 120a.

On February 25, 2013, toward the end of OZT, the Ninth Circuit issued an opinion reversing the district court. App. D ("Injunction Opinion"). Rather than remand the case for further action in accordance with its decision, the Ninth Circuit

removed the district judge from the matter,[4] and ordered the Injunction it had issued pending appeal to "remain in effect until further order of this court." App. 74a. The Injunction Opinion invoked the ATS as the sole jurisdictional basis for the Injunction, finding Respondents had alleged behavior constituting "piracy" under international law. App. 62a-66a. The Ninth Circuit held the district court's deference to Australia was an abuse of discretion, on the grounds that the U.S. does not recognize Australia's claim to Antarctica. App. 71a-73a.

Following the issuance of the Injunction Opinion, this Court decided *Kiobel*. Hartland moved to dismiss the contempt action on the basis that *Kiobel* does not allow an extraterritorial injunction under the ATS. *See* App. N. The Ninth Circuit denied Hartland's motion, holding that "[e]ven assuming Hartland's interpretation of *Kiobel* is correct," it could maintain the Injunction through diversity jurisdiction. App. 390a. Hartland thereafter filed a motion for rehearing or rehearing *en banc*, contending that the Injunction, which is based on international law, could not be maintained

[4] The Ninth Circuit indicated in its amended opinion that it removed District Judge Richard A. Jones because he had "expressed strong and erroneous views on the merits of this high profile case." App. 61a. Respondents had not requested Judge Jones's removal, and one of the judges on the panel objected that there was "absolutely no evidence . . . to suggest [Judge Jones ruled] for an improper purpose, such as bias or prejudice." App. 79a (Smith, J., concurring in part, dissenting in part).

under diversity jurisdiction, which requires the application of state law. App. L. This motion was also denied. App. 363a.

In October 2013, the Appellate Commissioner, acting as a special master, presided over an eight-day trial on the contempt allegations. The parties stipulated that Sea Shepherd vessels had approached ICR's vessels closer than 500 yards, so the trial focused on whether the alleged contemnors were responsible for these actions. App. 12a, 120a-121a, 335a-345a. Following trial, the Commissioner submitted a 79-page report recommending that none of the defendants or non-parties be found in contempt. App. F. The Commissioner found that SSCS had acted in "good faith" and taken "reasonable steps" to comply with the Injunction. App. 133a-134a, 137a, 148a. The Commissioner found SSCS did not have "control" over either OZT or the OZT vessels when the Injunction issued, and had reasonably followed counsel's advice in severing all financial and other support for OZT within a short time period. App. 98a-100a, 103a-111a, 126a-127a, 135a-136a & n.179, 144a, 148a-149a. According to the Commissioner, SSAL "would have taken charge of OZT regardless of any action by Watson or anyone else with SSCS." App. 146a.

On December 19, 2014, the Ninth Circuit issued the two opinions now under review ("Contempt Opinions"). In a published opinion, the court rejected the Commissioner's recommendation

and found all alleged contemnors in contempt except Hartland. App. A. The court did not reverse the Commissioner's findings of fact as clearly erroneous, but concluded, citing select emails by Watson and a statement by counsel during oral argument, that SSCS had "ceded control" of OZT to SSAL knowing it was "highly likely" SSAL would commit acts prohibited by the Injunction. App. 16a-19a. The Ninth Circuit held that: (1) SSCS, Watson, and the SSCS board had "aided and abetted" SSAL to come within 500 yards of ICR's vessels; and (2) although SSCS and its directors had *not* violated the express terms of the Injunction, they were nonetheless in contempt for violating its unstated "spirit." App. 16a, 26a-29a.

In a brief unpublished memorandum, the Ninth Circuit held it did not need to reconsider whether it had jurisdiction in light of *Kiobel*. App. 52a-55a.[5] Rather, the court found it had extraterritorial jurisdiction simply because Respondents' "piracy claims fall within the ambit of the Alien Tort Statute because piracy is a violation of the law of nations." App. 55a.

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[5] The court asserted this issue had not been "adequately briefed," although it had already considered the issue after briefing on Hartland's motion to dismiss, motion for reconsideration, and petition for rehearing, and defendants incorporated that briefing into their response to the Commissioner's report. App. 55a; *see* App. 322a & n.249, L, N.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary Because the Ninth Circuit's Opinions Conflict with This Court's Decisions, and Present a Question of National Importance Regarding the Scope of ATS Jurisdiction.

If the Ninth Circuit did not have jurisdiction to issue the Injunction, then the Injunction is void, and no one can be in civil contempt for violating it. *See U.S. Catholic Conference*, 487 U.S. at 76. The Ninth Circuit asserts jurisdiction under the ATS (*see* App. 55a), which provides jurisdiction over civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. This Court has held that the ATS only allows actions for a "modest number of international law violations," *Sosa*, 542 U.S. at 724, without any extraterritorial reach, *Kiobel*, 133 S. Ct. at 1664-65.

The Ninth Circuit ignored the jurisdictional predicates for an ATS action in two significant ways that will expand the reach of the ATS in that circuit. First, the Ninth Circuit created a blueprint for the lower courts to follow in designing new federal common law based on their interpretation of international norms—without observing *Sosa*'s instruction that the ATS only allows for the recognition of those very few international norms that are "defined with . . . specificity" and "accepted by the civilized world[.]" *See Sosa*, 542 U.S. at 725.

Second, the Ninth Circuit set the groundwork for the continued exercise of extraterritorial jurisdiction without a mandate from Congress, by issuing an order to regulate entirely extraterritorial activity, and sanctioning SSCS for "aiding and abetting" such extraterritorial activity—without even *considering* this Court's finding in *Kiobel* that the ATS does not allow courts to reach beyond U.S. borders. *See Kiobel*, 133 S.Ct. at 1669.

A. The Ninth Circuit's Opinions Allow an ATS Claim Not Based on a Universal and Specific Norm of International Law.

This Court has made clear in both *Kiobel* and *Sosa* that the ATS does not give courts authority to craft new norms of international law and then apply them as U.S. law. *Sosa*, 542 U.S. at 727-28; *id.* at 748-50 (Scalia, J., dissenting); *Kiobel*, 133 S. Ct. at 1664-65. Rather, the courts may entertain ATS claims only for alleged violations of international norms that are "specific, universal, and obligatory." *Kiobel*, 133 S. Ct. at 1665; *Sosa*, 542 U.S. at 725 (claims must "rest on a norm of international character accepted by the civilized world and defined with . . . specificity"). *Sosa* further charged the courts with "vigilant doorkeeping" to limit ATS claims to a "narrow class of international norms," emphasizing that courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations[.]" *Id.* at 728-29.

The identification of a general universal norm is "only the beginning" of an ATS analysis. *Kiobel*, 133 S. Ct. at 1665. In *Sosa,* for example, the Court recognized there may be an international norm against arbitrary detention, but found that, even if so, the international consensus was at a "high level of generality" that did not support an action based on plaintiff's allegations. *Sosa*, 542 U.S. at 736 & n.27. In defining the specific contours of an international norm, *Sosa* directs courts to look searchingly for evidence *not* of what " 'the law ought to be, but for trustworthy evidence of what the law really is.' " *Id.* at 734 (quoting *The Paquete Habana,* 175 U.S. 677, 700 (1900)).

Other circuit courts have taken this responsibility seriously, performing comprehensive reviews of authoritative sources to determine the contours of international norms, and finding no claim under the ATS unless "the facts alleged in a particular situation sit within [a] universal prohibition." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1288 (11th Cir. 2006) (*en banc*); *see, e.g.*, *Velez v. Sanchez*, 693 F.3d 308, 318-19 (2d Cir. 2012) (finding allegations did not clearly fall within any universally accepted definition of "forced labor" and "human trafficking"); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1023-24 (7th Cir. 2011) (finding international norm against child labor not specific enough to bar employment of children under age 13 in hazardous conditions).

The Ninth Circuit ignored that responsibility here. The court asserts jurisdiction wholly on its contention that the case deals with "piracy." App. 55a. But invocation of that magic word is not enough to confer ATS jurisdiction. While there is no question there is a universal international norm against "piracy," the relevant issue is which conduct is encompassed by the specific contours of that norm. In order to hold that SSCS engaged in piracy, the Ninth Circuit has taken an expansive view of the norm that goes far beyond any universal understanding.

In thereby elevating its view of what international law should say over what it does say, the Ninth Circuit has created a dangerous precedent for the courts of this circuit. It has split with the approach of other circuit courts, and ignored this Court's admonition that "attempts by federal courts to craft remedies for the violation of new norms of international law . . . should be undertaken, if at all, with great caution." *Sosa*, 542 U.S. at 727-28.

For centuries, piracy has had a clear meaning in international law as "robbery at sea." *Kiobel,* 133 S. Ct. at 1667 (citing 4 W. Blackstone, Commentaries on the Laws of England 72 (1769)); *see also id.* at 1672 (Breyer, J., concurring) (referring to the "robbery and murder that make up piracy"). As Justice Story concluded in 1820, "[t]here is scarcely a writer on the law of nations, who does not allude to piracy, as a crime of a settled and determinate

nature;" which "by the law of nations, is robbery upon the sea[.]" *United States v. Smith,* 18 U.S. 153, 161-62 (1820).

Respondents have not alleged, and the Ninth Circuit did not find, that SSCS has ever committed "robbery at sea." Rather, the Ninth Circuit created an expanded view of piracy, starting with the definition from two 20th-century treaties. App. 61a-62a (citing substantially identical definitions from the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; and the United Nations Convention on the Law of the Sea ("UNCLOS"), Dec. 10, 1982, 1833 U.N.T.S. 397).[6] Under these definitions, "piracy" consists of "illegal acts of *violence* or detention, or any act of depredation, committed *for private ends* by the crew or passengers of a private ship . . . ." UNCLOS, art. 101 (emphasis added); *see also* Convention on the High Seas, art. 15.

Assuming, *arguendo*, that UNCLOS reflects the modern view of piracy, there is far from universal agreement as to how to interpret its provisions—specifically, the meaning of the terms "violence" and "private ends." *See, e.g.*, Joshua Michael Goodwin, *Universal Jurisdiction and the*

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[6] The United States ratified the Convention on the High Seas, but never passed implementing legislation. *United States v. Dire*, 680 F.3d 446, 462 n.12 (4th Cir. 2012). It has not ratified UNCLOS, but has accepted that it reflects customary international law. *Ibid.*

Pirate: Time for an Old Couple to Part, 39 Vand. J. Transnat'l L. 973, 1000 (2006) (noting interpretations of UNCLOS vary widely, so "there is no longer any uniform definition" of "piracy").

The definition of "violence" under UNCLOS has received little scholarly attention. However, the burden is on Respondents to show the existence of a universal norm—not on SSCS to show the absence of one. As the district court properly found, "it is not apparent that the nations of the world would agree that tactics that resemble malicious mischief amount to piratical 'violence.' " App. 192a. The Ninth Circuit disagreed, holding that the "violence" necessary to constitute piracy under UNCLOS can include minor "malicious acts" against inanimate objects, including one so benign as when "a man violently pounds a table with his fist." App. 65a. While the Ninth Circuit criticized the district court for "[c]iting no precedent" for its conclusion that the norm did not reach so far, it found none for its contrary conclusion. The only authority the Ninth Circuit cited for its expansive interpretation of "violence" in the context of the UNCLOS definition of piracy was "commonsense understanding" and its characterization of the *Webster's Dictionary* definition. *Ibid.* (citing *Webster's New Int'l Dictionary* 2846 (2d. ed. 1939)).

The Ninth Circuit thus set a perilous precedent, by indicating that consulting a U.S. dictionary, and the "commonsense understanding" of

three U.S. judges, is sufficient to make a pronouncement as to the universal understanding of "civilized nations" regarding international law. *See Sosa*, 542 U.S. at 734. This Court has held otherwise. *Ibid.* (judges should review judicial opinions and treaties and study " 'the customs and usages of civilized nations; and, as evidence of these, . . . the works of jurists and commentators, who by years of labor, research and experience, have made themselves particularly well acquainted with the subjects of which they treat' ") (quoting *The Paquete Habana,* 175 U.S. at 700).

Longstanding legal authority and common usage counsel against the Ninth Circuit's broad interpretation of "violence" in the context of piracy, and illustrates the absurdity of using a dictionary to interpret a highly contextual term loaded with historical significance. Indeed, the Ninth Circuit's minimalist definition of "violence" is directly at odds with its contention that a pirate is "an enemy of the human race." App. 55a (quoting *Smith*, 18 U.S. at 161, which defines piracy as "robbery at sea"); *see also* 18 U.S.C. § 1651 (piracy as defined by the law of nations merits an automatic life prison sentence). Such a serious label and such serious consequences connote a serious act. *See, e.g.*, *United States v. Beyle*, --- F.3d ----, 2015 WL 1500652, at *2 (4th Cir. Apr. 3, 2015) (piracy poses a threat to the free flow of global commerce and the safety of individuals; in 2011, armed Somali pirates attacked 3,863 seafarers, taking 555 hostage, and killing 35);

United States v. Said, 3 F. Supp. 3d 515, 521-23 (E.D. Va. 2014) (examining piracy conviction of defendants who attacked warship with AK-47s and a grenade launcher, noting it was "not a run-of-the-mill case of modern piracy," because defendants "caused no physical harm"); S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011) (expressing grave concern about piracy and armed robbery at sea; recognizing pirates are turning increasingly to kidnapping and hostage taking).

Thus, scholars indicate that one may not be branded a *hostis humani generis* unless one commits "an overt act of violence [on the high seas] *adequate in degree*"—and there is certainly no international consensus that the type of "malicious mischief" at issue here would constitute piratical "violence." A.S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 223 & n.27 (1918) (emphasis added) (identifying as examples of piratical violence "robbery, murder, destruction by fire, etc.," and noting that piracy does not include "such acts as petty larceny or a mere threat"); *see* 4 Blackstone, *supra*, at 72 ("piracy . . . consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"); *see also Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring) ("today's pirates include torturers and perpetrators of genocide").

In interpreting the UNCLOS requirement that piracy be committed for "private ends," the

Ninth Circuit once again resorted to *Webster's* and its own sense of "common understanding," in addition to a Belgian court case,[7] to conclude that "private" is merely an antonym for "public," and includes any act "not taken on behalf of a state." App. 64a.[8] The court thus found that under UNCLOS, " 'private ends' include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals." *Ibid.* But the court ignored a wealth of authority that indicates its interpretation of "private ends" is erroneous—and which, at the very least, leaves no doubt that the court's interpretation is *not* "universally" accepted. *See, e.g.*, *Dire*, 680 F.3d at 463 (4th Cir. 2012) (noting contemporary scholars

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[7] App. 65a (citing *Castle John v. NV Mabeco*, Dec. 19, 1986, 77 I.L.R. 537 (Belg.)). The Ninth Circuit cites to *Abbott v. Abbott*, 560 U.S. 1 (2010), for the proposition that a single foreign court opinion is entitled to "considerable weight" in the determination of a universal international norm. *Ibid.* *Abbott* held no such thing. In *Abbott*, this Court was interpreting the language of a treaty—not the content of a universal international norm—and held that court opinions from *several* countries that were signatories to that treaty were entitled to "considerable weight." 560 U.S. at 16.

[8] Even accepting its methods, the Ninth Circuit's reasoning is flawed. *Webster's* definition of "public" includes "of or relating to business or community interests as opposed to private affairs," and "devoted to the general or national welfare." *Webster's Third New Int'l Dictionary* 1836 (1961). SSCS's goal of preserving the environment, advanced on behalf of a nonprofit supported by funds from the public, would seem to be more appropriately classified as "public" than "private."

disagree about the meaning of "private ends" in UNCLOS).

For example, the court did not consult the legislative and scholarly history of the High Seas Convention and UNCLOS, which reveal a dispute over the inclusion of the "private ends" language, precisely because it would exclude politically motivated acts such as environmental activism. *See, e.g.*, MARITIME TERRORISM AND INTERNATIONAL LAW 2 (Natalino Ronzitti, ed., 1990) (during negotiations over the High Seas Convention, Czechoslovakia objected to the "private ends" clause, because it excluded "acts of piracy committed for political ends"); Lucas Bento, *The "Piratisation" of Environmental Activism*, Lloyd's Maritime & Commercial L. Q. (June 2014), 152 (surveying historic and scholarly resources and concluding that "private ends" excludes environmental activism).

And while the Ninth Circuit identified two academic articles to support its interpretation, numerous scholarly works conclude that the "private ends" language excludes acts in furtherance of environmental and other political goals. *See, e.g.*, ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 179 (2007) ("an act of violence on the high seas for political ends cannot be characterized as piratical, because it lacks the required private aim"); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 306 (8th ed. 2013) ("harassing operations by organized groups

deploying forces on the high seas may have political objectives . . . and [thus] the aggressors [are] not [to] be regarded as pirates"); NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 141 (2011) ("[environmental] groups may not typically be regarded as pirates, as their goals are not for 'private ends' but are related to the quest for marine environment protection").[9]

When reviewed to determine not "what the law ought to be, but for trustworthy evidence of what the law really is," *Sosa*, 542 U.S. at 734, these sources make clear there is no "universal" norm of international law that would label as "piracy" the "malicious mischief" of Sea Shepherd, undertaken to protect the environment and persuade Japan to cease its illegal whaling.[10]

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[9] *See also* Clyde Crockett, *Toward a Revision of the International Law of Piracy*, 26 DePaul L. Rev. 78, 92 (1976-1977) ("the dominant view is that such groups [organized for a political objective] can never be guilty of piracy"); H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 (3) Int'l J. Marine & Coastal L. 363, 379 (2003) (" 'private ends' criterion seems to exclude acts of violence and depredation exerted by environmentally-friendly groups or persons, in connection with their quest for marine environment protection").

[10] In this case, it is not the ATS or nothing; rather, pursuing an ATS claim is Respondents' equivalent of forum shopping. As the district court found, Respondents would likely be able to bring an action under admiralty jurisdiction. App. 177a. Although Respondents initially asserted admiralty claims, they have not pursued them, presumably because they pose barriers to the relief they seek. *See* App. 198a-201a. For example,

B. The Ninth Circuit's Opinions Ignore *Kiobel* by Using the ATS to Enforce an Injunction over Extraterritorial Activity.

Kiobel held that the presumption against extraterritoriality applies to the ATS, and that ATS claims "seeking relief for violations of the law of nations occurring outside the United States [are] barred," unless they "touch and concern the territory of the United States" with "sufficient force to displace" the presumption. 133 S. Ct. at 1669. Even if the Ninth Circuit had properly identified a universal and specific norm of international law, the ATS does not, after *Kiobel*, give it jurisdiction to impose and enforce an injunction that applies exclusively to conduct in the Southern Ocean. By blithely disregarding this issue, the Ninth Circuit has set the stage for other courts to ignore both the holding and the logic of *Kiobel*, and to find broad exceptions allowing the exertion of extraterritorial jurisdiction without authorization by Congress. Intervention by this Court is necessary to prevent such exceptions from swallowing the rule against extraterritorial application.

Ninth Circuit precedent indicates injunctions are not available under maritime law, and admiralty includes specific choice-of-law principles that would weigh strongly against the application of U.S. law—and in favor of Australian law, which would implicate the Australian injunction. App. 199a-201a, 206a-208a & n.19.

1. *Kiobel* Did Not Create an Extraterritorial Exception for Piracy.

On multiple occasions, the Ninth Circuit has declined to discuss the impact of *Kiobel* on this action and its Injunction. *E.g.*, App. 389a (claiming diversity jurisdiction for the extraterritorial Injunction "[e]ven assuming" *Kiobel* eliminates extraterritorial ATS jurisdiction). In the Contempt Opinions, the court again sidestepped the issue, holding it had extraterritorial jurisdiction because the action relates to "piracy." App. 54a-55a. The Ninth Circuit thus assumed, without discussion, that *Kiobel* establishes an exception to the presumption against extraterritoriality for all claims asserting "piracy." This assumption is wrong.

Kiobel considered piracy while examining the history of the ATS for evidence of extraterritorial intent, identifying piracy as one of "three principal offenses against the law of nations" recognized at the time of the ATS. 133 S. Ct. at 1666.[11] Reasoning that piracy typically occurred "on the high seas,

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[11] No court has previously considered an ATS claim for piracy. App. 186a. And scholars dispute whether piracy was contemplated by ATS drafters—an open question since the ATS has no legislative history. T. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 839 (2006). The Judiciary Act through which the ATS was enacted suggests the ATS was not meant to include piracy, because two other clauses explicitly grant jurisdiction over crimes on the "high seas," including piracy, while the ATS is silent regarding such jurisdiction. *Id.* at 847.

beyond the territorial jurisdiction of the United States or any other country," the Court posited that if the ATS was meant to cover piracy claims, then "pirates may well be a category unto themselves." *Id.* at 1667.

Regardless of this *dicta*, the reasoning and the rule of *Kiobel* indicate the presumption against extraterritoriality should apply with equal force to ATS claims for piracy. As this Court acknowledged, it has "generally treated the high seas the same as foreign soil for purposes of the presumption against extra-territorial application." *Id.*; *see Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) ("[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute"). And as Justice Breyer observed in his four-justice concurrence, there is no reason to consider piracy differently from an extraterritorial act on land, because piracy usually takes place within the jurisdiction of a sovereign. *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring) ("[T]he robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies.").

To the extent that *Kiobel* suggests the ATS may treat piracy differently, that exception would apply only to piracy as it was understood in 1789, as "robbery at sea." *See id.* at 1667, 1671-72 (discussing piracy as it was understood in 1789). This limit

follows from *Kiobel's* defining principle—that courts may not create extraterritorial jurisdiction, but may only exercise it as directed by Congress. *Id.* at 1664-65. If the 1789 Congress meant to create extraterritorial jurisdiction over tort claims for piracy, it could only have meant to do so in regard to piracy as it was then understood. Thus, even if the ATS could reach SSCS's conduct under some modern definition of piracy, it could not do so on an extraterritorial basis. Because Respondents have not accused SSCS of "robbery at sea," and the Ninth Circuit did not so find, they cannot overcome the presumption against extraterritoriality here.

2. Respondents Did Not Allege Violations of International Law That Touch and Concern the United States.

In the wake of *Kiobel*, other circuit courts have performed careful analysis of ATS claims with extraterritorial reach. Some have created standards for examining *Kiobel*'s suggestion that claims may "touch and concern" the United States with "sufficient force to displace the presumption[.]" *Kiobel*, 133 S.Ct. at 1669; *see, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014) (finding courts must evaluate the nature of the alleged domestic conduct, and then determine whether that *same conduct* supports a claim under *Sosa*). Indeed, the Ninth Circuit's decision stands alone in asserting extraterritorial ATS jurisdiction after *Kiobel* without any examination of whether the

action was sufficiently connected to the United States to displace the presumption.

In examining this issue, the Second and Eleventh circuits have followed *Morrison v. Nat'l Austl. Bank Ltd.*, which indicated courts examining whether the presumption against extraterritoriality has been overcome should determine whether the "territorial event" or "relationship" creating contact with the United States was the "focus" of the statute. 561 U.S. 247, 266 (2010). Following this principle, the Second Circuit concluded because the "focus" of the ATS is on conduct violating international law, in order to overcome the presumption, domestic conduct must either be a violation of international law itself, or constitute the aiding and abetting of such a violation. *Mastafa*, 770 F.3d at 183-84; *see Balaco v. Drummond Co., Inc.*, 767 F.3d 1229, 1237-38 (11th Cir. 2014) (similarly focusing on the location of violations of international law). Meanwhile, the Fourth Circuit has employed a variant of this analysis, looking at whether ATS claims "involve substantial ties to United States territory." *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 529 (4th Cir. 2014).

The Ninth Circuit here undertook no such analysis. Had it done so, it could not have concluded that such contacts exist under any test that has been articulated. Although SSCS is a U.S. corporation, "mere corporate presence" is insufficient to overcome the presumption under *Kiobel*. 133 S. Ct. at 1669;

see Mastafa, 770 F.3d at 189 (finding defendant's U.S. citizenship has no relevance to the *Kiobel* analysis). And the "focus" of the conduct here is unquestionably the Southern Ocean—where Sea Shepherd's supposed "piracy" takes place. Respondents did not allege, and the Ninth Circuit did not consider, any acts constituting a violation of international law—or acts sufficient to qualify as "aiding and abetting" such a violation—that took place within the United States.

Specifically, the activity for which the Ninth Circuit found SSCS liable is also not sufficient to displace the presumption. The court did not find that any of the conduct by foreign parties that "violated" the Injunction had violated international law, and all of this conduct took place in the Southern Ocean. SSCS was held liable for "aiding and abetting" a violation of the Injunction because it provided a small amount of financial assistance for a short period of time, and granted a vessel and ship equipment. App. 23a-25a. Even assuming such acts were domestic acts, much more significant domestic assistance, to acts that were unquestionably violations of international law, has been found insufficient to overcome the presumption against extraterritoriality. *See, e.g.*, *Mastafa*, 770 F.3d at 193-94 (finding presumption not overcome when plaintiffs alleged a U.S. corporation financed human rights abuses by Saddam Hussein from

headquarters in the U.S., because they did not do so with the "purpose" of violating international law).[12]

C. The Ninth Circuit Disregarded Crucial Considerations of International Comity.

The Ninth Circuit's use of a new "norm" of customary international law to exert extraterritorial jurisdiction is especially troubling here, given the potential foreign-policy implications of the decision. Review by this Court is necessary to prevent the potential international conflicts stemming from the Ninth Circuit's position, and to reassert that the federal courts should not interfere in matters within the sphere of sovereign nations, or best left to the discretion of the executive and legislative branches.

This Court has long urged that federal courts be circumspect when issues of international comity are implicated. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Courts must consider comity implications in all contexts, including with regard to the issuance and enforcement of injunctions. *See Republic of*

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[12] Here, the court's finding that it was sufficient for SSCS to be the "proximate cause" of a violation (App. 30a), and know it was "likely" (App. 26a-28a), would not meet the standard for aiding and abetting liability under the ATS. *See, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014) (noting widespread agreement that ATS aiding and abetting liability requires "assistance that has a substantial effect on the crimes"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 247 (2d Cir. 2009) (finding defendants must act with the purpose of facilitating a violation of international law).

Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994) (observing that comity "force[s] courts in the United States to tailor their remedies carefully").

Concerns of comity and diplomacy are even more important—and the exercise of judicial caution even more crucial—in the ATS context, because rights and remedies under the ATS are judge-made law. *See Sosa*, 542 U.S. at 725-28. When such remedies are applied extraterritorially, such concerns are "all the more pressing," as they may result in " 'unintended clashes between our laws and those of other nations which could result in international discord.' " *Kiobel*, 133 S. Ct. at 1664-65 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). Courts must avoid impinging on the discretion of the legislative and executive branches to manage foreign affairs so they do not "erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 1664.

Lower courts have heeded this Court's warnings and exercised caution accordingly. *E.g.*, *Balintulo v. Daimler AG*, 727 F.3d 174, 187 (2d Cir. 2013) (declining to exercise extraterritorial jurisdiction under the ATS given the "risk of treading into matters within the province of other branches of government"); *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009) (rejecting ATS claim and noting judicial restraint is appropriate where a

court's "reliance on supposed international law would impinge on the foreign policy prerogatives of our legislative and executive branches").

Here, however, the Ninth Circuit disregarded the many comity and diplomacy concerns implicated by this action. By asserting jurisdiction over activities related to Japanese whaling in the Southern Ocean, the Ninth Circuit waded into a matter of significant international concern. As a result of the ICJ's ruling, there is no longer any dispute that Respondents' whaling violated international law, and Respondents also exhibited flagrant disregard for the Australian injunction.

Notably, Australia has refrained from taking any enforcement action regarding Sea Shepherd's activities, despite its assertion of jurisdiction over the waters in which these activities occur, and its central role in Sea Shepherd's whale-protection campaigns. Neither has New Zealand taken any action to curb the Sea Shepherd campaigns, although it serves as a staging ground for Sea Shepherd vessels, and has exercised its authority over related events, such as the 2010 collision between an ICR ship and a Sea Shepherd vessel. *See* App. 90a, 10a, 170a-171a. Both Australia and New Zealand thus have made implicit policy decisions about how to handle the dispute between Respondents and Sea Shepherd, with which it was inappropriate for the Ninth Circuit to interfere.

Finally, the Ninth Circuit's proactive rejection of Australia's claim to the AWS intrudes into the executive branch's delicate and complex diplomatic approach to Antarctica. *See* U.S. Department of State, *Antarctic*, *available at* http://go.usa.gov/32FqW. While the United States does not officially recognize *any* country's claims to Antarctica, it supports the compromise of the 1959 Antarctic Treaty, which has avoided conflict by indefinitely deferring the resolution of such claims. *Id.*; K. Scott, *Managing Sovereignty & Jurisdictional Disputes in the Antarctic: The Next Fifty Years*, Y.B. OF INT'L & ENVTL. L. (2009) 20(1): 3-40, at 4-6. At the same time, the United States cooperates with Australia on environmental issues related to Antarctica, and has avoided challenging Australia's assertion of jurisdiction. *See, e.g.*, *United States–Australia Joint Statement on Envtl. Cooperation*, May 18, 2004, *available at* http://www.state.gov/documents/organization/131489.pdf.[13]

II. Review Is Necessary Because the Ninth Circuit's Opinions Ignore Longstanding Limits on Contempt Power.

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l*

[13] This Court has recognized the complexity of claims of sovereignty over Antarctica, and has held that the presumption against extraterritoriality applies with equal force there. *Smith v. United States*, 507 U.S. 197, 198 n.1, 204 & n.5 (1993).

Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967). The Ninth Circuit ignored this precept and brandished the weapon of contempt in unprecedented fashion—announcing a new rule that would permit federal courts to find contempt based on a violation of the unstated "spirit" of an Injunction, even where, as here, it is undisputed that SSCS strictly complied with the Injunction's terms.

Review by this Court is necessary to eliminate the conflict and uncertainty created by the Contempt Opinions, and to restore the longstanding rule that there can be no contempt unless the Injunction clearly prohibited the challenged conduct. *Id.*; s*ee also Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cnty.*, 415 U.S. 423, 444 (1974) ("those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits").

The Injunction here is limited in scope. It forbids SSCS, Watson, and parties acting in concert with them doing three specific things. App. 81a. The Ninth Circuit did not find that SSCS did any of these things—or that it acted "in concert" with the independent foreign Sea Shepherd entities that controlled the foreign-flagged vessels during OZT. *See* App. 26a-27a, 32a-33a, 144a.

Rather, the Ninth Circuit found SSCS acted in contempt when it "ceded control" over OZT and

transferred its assets to these non-parties—so-called "acts of assistance"—knowing they would "likely" take acts prohibited by the Injunction. App. 16a-17a, 19a, 26a, 29a-30a. The court conceded that the Injunction "did not specifically forbid [SSCS's] acts of assistance," but held it could find contempt based on "a violation of the spirit of the injunction, even though its strict letter may not have been disregarded." App. 26a (citation omitted). The Ninth Circuit thus found that SSCS's acts "thwarted" the Injunction's unstated "objective," which the court asserted (for the first time, in the Contempt Opinions) had been to stop *all* Sea Shepherd entities from engaging in OZT. *Ibid.*

The Ninth Circuit's finding of contempt thus violates the rule that an injunction must specifically and unambiguously prohibit the alleged acts of contempt. *See Granny Goose Foods*, 415 U.S. at 444; *Schmidt*, 414 U.S. at 476; *Int'l Longshoremen's Ass'n*, 389 U.S. at 76; *see also Terminal R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29 (1924) ("a decree will not be expanded by implication or intendment beyond the meaning of its terms"); *cf. United States v. Fleischman*, 339 U.S. 349, 370-71 (1950) (Black, J., dissenting) ("failure to take action required by an order can be punished only if the action is clearly, specifically, and unequivocally commanded by that order").

This rule has been uniformly followed by all the lower courts (including, until now, the Ninth

Circuit)—both in and outside the context of Federal Rule of Civil Procedure 65. *See, e.g., United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005) (injunction must "clearly and unambiguously forbid[] *the precise conduct on which the contempt allegation is based*" (emphasis in original)); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (injunction must "clearly describe prohibited . . . conduct"); *In re Gen. Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (injunction must set forth "in specific detail an unequivocal command which a party has violated"); *see also* FED R. CIV. P. 65(d) (injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained"); C.J.S. Contempt § 14 (2007) ("A finding of contempt should not be made unless the order violated is clear and explicit and the act complained of is clearly proscribed.").

This requirement of specificity is premised on a notion of "basic fairness," which "requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Such basic fairness is lacking where, as here, the court issues an injunction prohibiting specific conduct and the enjoined parties refrain from participating in such conduct—but are punished for contempt nonetheless. By the same token, the rule acts as a check against a contempt power that is "liable to abuse" because, as here, the same judges are responsible for "identifying, prosecuting, adjudicating, and sanctioning" the allegedly contemptuous conduct. *Int'l Union, United*

Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994).

As the Ninth Circuit noted, "[t]he *language* of the injunction itself is not ambiguous." App. 37a (emphasis in original). That language only forbade certain acts of navigation on the open sea; it did not forbid SSCS from providing assistance to independent Sea Shepherd entities already participating in OZT, or even from participating in OZT itself. And there was no way SSCS could have known the court intended a more sweeping prohibition. Respondents had not sought such broad relief in the district court and, because the Ninth Circuit issued its Injunction *sua sponte*, there was no notice, no briefing, and no opportunity for SSCS to ascertain the unexpressed "objective" of its one-page order—and the Injunction Opinion was not issued until three months after the Injunction, when OZT was nearly over. The result is even more perverse given the Commissioner's finding—which the Ninth Circuit did not hold to be in error—that SSCS's "acts of assistance" were undertaken in a good faith effort to *comply* with the Injunction. *See* App. 135a-136a.

Finally, review will give this Court an opportunity to reject the Ninth Circuit's assertion that *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), holds that a party "assume[s] the risk" of contempt if it construes its obligations "narrowly to include only refraining from acts specifically enumerated in the injunction." App. 39a. In

McComb, this Court held that contempt proceedings for violations of the Fair Labor Standards Act could be based on a decree that contained a general "obey-the-law" clause, but did not specifically list the unlawful conduct that gave rise to the contempt charge. 336 U.S. at 191-95. In other words, by way of incorporation, the injunction in *McComb* clearly prohibited the challenged conduct. *See S.E.C. v. Goble*, 682 F.3d 934, 951 (11th Cir. 2012) ("[T]he decree enjoined violations of the statute, the terms of the statute were specific, and the defendant clearly knew what conduct the injunction addressed.").

This Court's subsequent holdings confirm that *McComb* was merely a unique application of the rule that an injunction must specifically prohibit the alleged acts of contempt—not a departure from it. Ironically, however, the *McComb* dissent warned that the decision would be misconstrued to have a "far-reaching import":

> Ambiguity lurks in generality and may thus become an instrument of severity. Behind the vague inclusiveness of an injunction like the one before us is the hazard of retrospective interpretation as the basis of punishment through contempt proceedings.

McComb, 336 U.S. at 197 (Frankfurter, J., dissenting). The Ninth Circuit's "retrospective interpretation" of the Injunction has converted it

into precisely the kind of "instrument of severity" the *McComb* dissenters feared.

CONCLUSION

For the reasons discussed above, this Court should grant the Petition.

Respectfully submitted,

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