No. 01-651

IN THE
Supreme Court of the United States

THE CHASE MANHATTAN BANK, as Indenture Trustee, under the Indenture, dated as of May 6, 1998,

Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondent Traffic Stream (BVI) Infrastructure Limited states that its parent corporation is Traffic Stream (China) Infrastructure Company Limited, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

In 1998, Respondent Traffic Stream (BVI) Infrastructure Limited issued $119 million in notes, subject to an indenture under which Petitioner Chase Manhattan Bank was the trustee. (JA 25a).[1] Under the indenture, the parties agreed to jurisdiction over any disputes over payment of the notes in both the state and federal courts located in the Borough of Manhattan, in the state of New York. (JA 85a-87a).

Petitioner is a New York corporation.[2] It sued Respondent in the United States District Court for the Southern District of New York, claiming that Respondent had defaulted on its obligations under the notes and indenture. The asserted basis for subject matter jurisdiction was that Respondent was a British Virgin Islands corporation with its "principal office" in the British Virgin Islands (Complaint ¶ 3, JA 8a), that the amount in controversy exceeded $75,000 (Complaint ¶ 1, JA 7a), and that there was therefore jurisdiction under 28 U.S.C. § 1332.

Respondent admitted the allegation of subject matter jurisdiction. (Answer ¶1, JA 251a). Neither party raised the issue of subject matter jurisdiction at any further stage of the proceedings below. After Respondent answered, Petitioner moved for summary judgment. The district court rejected Respondent's defenses and granted Petitioner's motion. (JA 263a-264a). Respondent appealed to the United

1 References hereinafter to "JA __" are to pages in the Joint Appendix filed with the Supreme Court.

2. Petitioner did not allege the state of its principal place of business, but instead alleged that its "Capital Markets Fiduciary Services Office" was located in New York. (Complaint ¶ 2, JA 8a).

States Court of Appeals for the Second Circuit and, at oral argument, the Court requested supplemental briefing on the issue of whether subject matter jurisdiction might be absent. (JA 265a-266a, 279a). After the supplemental briefing, the Court of Appeals determined that Respondent was not a foreign citizen or subject. It entered an order reversing the district court's judgment and directing it to dismiss the action without prejudice. (Cert. App. 7a).[3]

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit was entirely correct in its determination that there was no subject matter jurisdiction over this action. Respondent is simply not a foreign citizen or foreign subject, which are the only bases for the assertion of alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). It is incorporated in the British Virgin Islands, which is not a foreign state. The people of those islands were not regarded by their colonial power (the United Kingdom of Great Britain and Northern Ireland) at the time of the suit's commencement as citizens or subjects of the United Kingdom. The suit therefore should never have been brought in a federal court. Instead, it should have been brought in a state court (to which Petitioner had already consented) or in a court of the British Virgin Islands.

The alienage diversity statute, 28 U.S.C. § 1332(a)(2), does more than simply divide the world into the United States and everyone else. It also divides aliens into those who are foreign citizens or subjects, on the one hand, and those who are not. Only the former are welcome to litigate in federal

3. References to "Cert. App. __" are to pages in the Appendix annexed to the Petition for Writ of Certiorari.

courts on the basis of diverse citizenship. The rule stands in contrast to suits involving a federal question, in which all aliens (regardless of citizenship or subjectship) are allowed to litigate in federal courts. The rule finds its reason in the development of the law of citizenship and subjectship in our Republic's early history. Indeed, without the concept, the founders of our nation would have had no legal basis on which to claim that they were absolved of their allegiance to the same United Kingdom which today claims the allegiance of the residents of the British Virgin Islands. Congress's intentions can be discerned from the little evidence left behind in the legislative history of the statute, as well as in its creation of a parallel set of restraints on the extent of domestic diversity jurisdiction vis-à-vis United States territories, the District of Columbia and Native Americans. In addition, Congress expressed the same distinction in its 1798 enactment of the Alien Enemies Act.

The determination of whether British Virgin Islands corporations are foreign citizens or subjects depends in the first instance on how the United Kingdom of Great Britain and Northern Ireland views the natural persons of the British Virgin Islands for purposes of its own law. In that regard, the Second Circuit acted properly. The record is clear that the United Kingdom today views them only as "United Kingdom nationals" and has specifically excluded them from the categories of citizens or subjects. The matter is driven home even more forcefully by virtue of an impending amendment to United Kingdom law which will (in the future) confer United Kingdom citizenship on those colonial citizens who request it, but will withhold that citizenship from those who request it to be withheld. Until that amendment takes effect, and until colonial citizens choose to exercise their power to elect citizenship status, they are not citizens or subjects of a foreign state.

None of the policies that were thought by the Framers of the Constitution to justify the creation of alienage diversity jurisdiction is implicated by this case. There is no domestic bias against an innocent foreigner, because the party seeking to invoke alienage diversity jurisdiction is a domestic plaintiff. There is no adverse impact on foreign commerce because colonial trade has always been outside the ordinary stream of international commerce. Weighed against these considerations, though, are an important set of domestic policies which are promoted by limiting the scope of alienage diversity jurisdiction. The policy encourages colonial residents to immigrate to the United States, rather than to other nations. The policy discourages American firms from expatriating their businesses to foreign tax and bank havens. The policy discourages the use of jurisdictions that have been associated with criminal enterprises such as narcotics trafficking and money laundering.

The rule advocated by the Petitioner is not justified on the ground that the colonial entities are being treated differently in the United States from the way in which United States entities would be treated in the colonies. Each is subject to the local courts of the other. A United States entity could ask for nothing more in the British Virgin Islands because there is no dual system of federal courts in that jurisdiction.

Finally, there exists an international norm that would be subverted by adoption of the rule proposed by Petitioner. The international community has firmly expressed its opposition to the continuation of colonial status. To adopt a rule that eliminates one of the costs associated with maintaining colonies can only serve to lengthen the time in which it takes to bring about full decolonization and self-determination, as required under the resolutions of the United Nations.

ARGUMENT

I.

THE ALIENAGE DIVERSITY STATUTE DOES NOT CREATE JURISDICTION OVER SUITS BY AND AGAINST FOREIGN NATIONALS WHO ARE NEITHER CITIZENS NOR SUBJECTS OF FOREIGN STATES

A. Congress's Statutory Mechanism Distinguishes Colonial Residents from Foreign Citizens and Subjects.

Both in its creation and in its modern form, the statute that created alienage diversity jurisdiction was flexible, adapting to accommodate ever-changing notions of the relation between person and state. Today, the statute operates to exclude the people and corporations of the British Virgin Islands from federal courts because (as discussed in Point II below) they are simply not citizens or subjects of a foreign state under the relevant United Kingdom law. The basis for excluding them, though, is a function of the political choices that Congress had to make in 1789 when fashioning a new type of jurisdiction (diverse citizenship) for a new type of court (federal), and the recognition that outside social and political forces would necessarily have an effect on Congress's choice.

True to the theory embraced by this nation's early judges and political theorists, the relationship between England and its colonial people did evolve, and the alienage diversity statute has accommodated that evolution. The common law notion that everyone born within the King of England's dominions was a full British subject gave way, by statute, to

a variety of subclasses of relations between person and nation, only a few of which rose to the level of citizen or subject. The remainder — including those having the status of the Respondent in this case — are not amenable to alienage diversity jurisdiction. Today, the people of the British Virgin Islands[4] are "United Kingdom nationals" who were not born or naturalized in the British Isles and do not pretend to enjoy the full measure of civil and political rights afforded to those born in England, Scotland, Wales or Northern Ireland. They therefore cannot sue or be sued in the federal courts on the basis of alienage diversity jurisdiction. Instead, those suits must be heard in a state court or in a British Virgin Islands court with jurisdiction over both the person and the subject matter.

1. Eighteenth Century American Political Theory Recognized the Fluidity of the Labels of Citizen and Subject.

When Congress first enacted a statute to create diversity jurisdiction (and its subset of alienage diversity jurisdiction[5]) in 1789, it described the group allowed into the newly-created federal courts as "aliens", even though the constitutional grant

4. The formerly-designated "British Crown Colonies" in the Caribbean include the British Virgin Islands, the Cayman Islands, Montserrat and Turks and Caicos. They are now classed as Overseas Territories along with Bermuda, Anguilla, Gibraltar, the Falkland Islands, Pitcairn Island, St. Helena and dependencies, South Georgia and the South Sandwich Islands, as well as the British Antarctic Territory, the British Indian Ocean Territory and a military area on Cyprus.

5. Respondent refers here to "alienage diversity jurisdiction" only because the name has been commonly used for many years. As the argument makes plain, though, the name is not descriptive because this form of diversity jurisdiction does not extend to all aliens.

of authority extended to "foreign . . . Citizens or Subjects." *Compare* U.S. Const. Art. III, § 2, Cl. 1 *with* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. That choice of language masked a then-unresolved debate over who was an alien, and what obligations flowed between a nation and its people. The constitutional provision was flexible enough so that, as the political relationship between nations and people abroad evolved, the changing relationship could be reflected in the United States' treatment of those persons in federal courts. Regardless of the labels used, though, the outer limit of federal jurisdiction was set at foreign citizens and subjects, and the statute therefore excluded those persons who, while foreign nationals, are neither citizens nor subjects of foreign states.

At first, Congress's use of the word "aliens" in the Judiciary Act of 1789, § 11, 1 Stat. 78, did not limit in any way the number of foreigners who had access to federal courts because the term "aliens" was indeed coextensive with the combination of "foreign citizens" and "foreign subjects." Nevertheless, the delegates to the Constitutional Convention and the members of the early Congresses recognized that the terms were fluid. They were certainly aware of the traditional view that many of their number were "natural-born subjects" because their "parents, at the time of their birth, were under the actual obedience of our king, and whose place of birth was within his dominions." *See* 1 Matthew Bacon, A New Abridgment of the Law 125 (6th ed. 1807). They were also aware that many others were "natural subjects" because they were born within the king's ligeance "in Ireland, Scotland, or Wales, or any of the king's plantations." *See id.* at 126.

The colonists' status was not on a par with subjects in England though, for as they knew, the colonies in which they

lived were not part of the United Kingdom of Great Britain and Ireland. 1 William Blackstone, Commentaries on the Laws of England 123-24 (1813 ed.).[6] They also knew that the United Kingdom's laws and treaties offer no benefit or protection to residents of colonies unless the law or treaty specifically provided so. *See* 6 Halsbury's Laws of England ¶ 1105 at 554-55 (4th ed. 1991). Colonial residents were therefore in the unenviable position of being subject to the King's command, yet lacking the ordinary recourse of any natural-born subject residing in England.

Petitioner's argument for reversal is inconsistent with the political reality faced by the men who drafted the Constitution and the Judiciary Act of 1789. In contrast with the reality that the relationship between person and nation was evolving, Petitioner's argument for reversal depends on the assumption that the terms "citizen" and "subject" are static terms whose meaning was fixed in 1789 and cannot evolve. (Petitioner Br. at 14; US Amicus Br. at 15).[7] Without

6. The colonists also knew that there were other persons who, while denominated "subjects" nevertheless occupied a second-class legal status. These were the "denizens," people who became subjects by a Royal charter rather than by naturalization under an act of Parliament. 1 Matthew Bacon, A New Abridgment of the Law 129 (6th ed. 1807). Denizens were a step above aliens in that they could own land, but below full subjects in that they could not inherit, or hold office. *Id*. Thus, while they were technically "subjects" in 1789 in that they owed obedience to the King, their status was unlike (and inferior to) every natural-born British subject. *See* James H. Kettner, The Development of American Citizenship, 1608-1870 at 5 (1978) (tracing degrees of subjectship under English law).

7. References to "Petitioner Br. __" are to pages in the Brief of Petitioner. References to "US Amicus Br. __" are to pages in the Brief for the United States as Amicus Curiae Supporting Petitioner.

that assumption of stagnation, Petitioner cannot advance the argument that a colonist occupied exactly the place in 1789 British law as a British Dependent Territories Citizen occupies in 2002. That assumption has no basis in the law. Instead, the constitutional and statutory provisions at issue were drafted when the political and legal theorists knew that the concepts of citizenship and allegiance were in a state of flux, and that a static definition would be useless.

Petitioner's proposed interpretation of the critical terms in the alienage diversity statute can be supported only by an outdated application of England's medieval common law. That early view is documented in the authorities so ably collected by the United States. (US Amicus Br. at 15). Under that early view, the nation to which the American colonists were subordinate — the United Kingdom of Great Britain and Ireland — had many overseas possessions, dominions, colonies, territories and plantations, each of which had been settled in a variety of ways by British subjects. Each separate entity had to account for the status of the natives who had been born there both before and after British rule and the English view was that each person born within the King's dominions was indeed a subject.

Unfortunately for Petitioner's argument, the medieval perspective only marks a starting point of the inquiry as to what Congress created in 1789. To complete the inquiry, one must necessarily refer to the subsequent development of the law of subjectship and citizenship in both the United States and the United Kingdom.

In fact, the medieval view that underlies the Petitioner's argument did not enjoy American support, and its theoretical underpinnings evaporated in the United Kingdom during the

late eighteenth century.[8] For example, despite the common law's teaching with respect to ligeance, the American colonists were painfully aware of their inferior political status. Lord Blackstone had already explained the attenuated connection between the American colonies and plantations, on the one hand, and England on the other, as follows:

> [O]ur most distant plantations in America, and elsewhere, are in some respect subject to the English laws. Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only by finding them desart and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. . . . But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he actually does change them, the ancient laws of the country remain, unless such as are against the law of God, as in an infidel

8 The history of the development of both American and English views of subjectship and citizenship is traced in James H. Kettner, The Development of American Citizenship, 1608-1870 (1978). *See also* Clive Parry, British Nationality 5-7 (1951) (tracing the development of subjectship, citizenship and nationality after *Calvin's Case*, 77 Eng. Rep. 377 (1608)). Notable among Professor Kettner's findings are the early abandonment in England of the strictest view of subjectship as reflected originally by Lord Coke in *Calvin's Case*, and relaxed in the writings of John Locke. *See* Kettner, *supra*, at 53-61. He explains in great detail the historical basis for the plain conclusion that the medieval English view was inapposite to life in the colonies. *Id*. at 153-71.

> country. Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives, with what natural justice I shall not at present inquire, or by treaties. And therefore the common law of England, as such, has no allowance or authority there; *they being no part of the mother country, but distinct, though dependent, dominions. They are subject, however, to the control of parliament; though, like Ireland, Man, and the rest, not bound by any acts of parliament, unless particularly named.*

1 William Blackstone, Commentaries on the Laws of England 123-24 (1813 ed.) (emphasis added). It was clear, therefore, that these distant colonies simply were not a component part of the United Kingdom. In the view of the Americans, the land and its products, and by extension the people who lived there, were treated by England as part of its property, but not its polity.

The actual conflict between the English view of allegiance and the American view was joined in the Revolution. The English common law view of perpetual allegiance was starkly at odds with the American view of volitional allegiance, which held instead that the King had an affirmative obligation to provide protection, and that if the King violated his obligation, then his people would no longer owe him allegiance. The dichotomy between the medieval English and the modern (Revolutionary-era) American views has been summarized by the leading scholar of the historical development of American citizenship:

> The central purpose of American polemicists and pamphleteers in the years before independence

> was to defend the rights of the colonial communities against the encroaching power of the imperial authorities in London. As colonial spokesmen developed their arguments they steadily moved away from the traditional ideas of allegiance that still permeated British legal and constitutional thought. By 1776 American theorists had rejected the concept that the colonists were perpetually bound by their subjectship. Philosophy, law, and common sense had convinced them that subjects owed obedience only in return for protection of their fundamental rights. Allegiance was contractual, and contracts could be broken or annulled.

James H. Kettner, The Development of American Citizenship, 1608-1870 at 173 (1978).

There are numerous examples, especially in the early reported cases involving pleas in abatement, of the changing American view. *See, e.g.*, *Inglis v. Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 156-64 (1830) (Story, J., concurring in part and dissenting in part); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 211 (1808) (Mem.). Indeed, *Inglis* is especially apposite, for the United States relies upon the case for its citation to the traditional definition of subjectship, while omitting Justice Story's extensive discussion of how the concept has changed since the traditional view was expressed.[9] *See Inglis v. Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) at 156-57.

9. There is clear documentary evidence of the break in political theory in the Declaration of Independence. The litany of offenses that the Continental Congress set forth constituted the reasons why the King no longer protected the colonies. The conclusion marked the assertion that allegiance was not perpetual: "these United Colonies are . . . Absolved from all Allegiance to the British Crown. . . ."

The scant documentary record relied upon by Petitioner in support of its English common law medieval view reflects the wholesale absence of any discussion at all of the critical distinctions between different classes of foreigners. Those distinctions are important because they support the notion that "aliens" and "foreign citizens and subjects" would not always be synonymous. Petitioner's argument is that the dearth of discussion and the seemingly interchangeable use of the terms "aliens" and "foreigners" reflects a conscious decision on the part of Congress and the delegates to the Constitutional Convention to extend diversity jurisdiction to everyone born in a foreign land. (Petitioner Br. at 13). That argument, though, is a weak one because it fails to account for the questions that permeated the minds of the colonial lawyers who learned the English common law, including whether subjects could shed their allegiance and associate to form a new government. The mechanism that the Constitutional Convention chose allowed the jurisdiction of federal courts to adapt to the then-evolving notions of citizenship. Subsequent political developments abroad made the wisdom of that choice apparent.[10]

2. The Judiciary Act of 1789 Extended Alienage Jurisdiction to Its Constitutional Limit.

When Congress inserted the word "alien" into four separate sections of the Judiciary Act of 1789, ch. 20, §§ 9, 11, 12, 13, 1 Stat. 78, it did so knowing that (at that time) all aliens were either foreign subjects or citizens.[11] It does not follow, however,

10. One immediate application of the theory of volitional allegiance justified the French Revolution of 1789.

11. There is no dispute as to the reasons why the Constitution includes a provision authorizing the Congress to create federal courts (Cont'd)

that either the Constitutional Convention or the First Congress decided that foreign citizens and subjects would always exhaust the class the aliens, nor that all aliens needed perpetual access to the federal courts in order to promote the nation's policies.

Petitioner appears to attribute, without any support whatsoever, the choice of words to mere happenstance. (Petitioner Br. at 13). While the documentary records of the deliberations leading to the Judiciary Act of 1789 are cryptic and incomplete,[12] there are nevertheless some clues that

(Cont'd)
with jurisdiction over suits between United States citizens and "foreign . . . Citizens or Subjects". The foreign entanglements justification and the commerce justification are old and familiar. In this regard, both Petitioner and *amicus* United States rely on Hamilton's writing in the Federalist No. 80 to support the idea. (Petitioner Br. at 11; US Amicus Br. at 14). A critical reading of the last sentence of that passage, though, reveals that it is an argument for exclusive federal jurisdiction over claims by and against foreigners involving a federal question and is therefore better suited to a case arising under 28 U.S.C. § 1331 than under 28 U.S.C. § 1332(a). *See* The Federalist No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. Since there is no verbatim transcript of the Senate's proceedings of that era, and the reports of the House proceedings are both unofficial and spotty (*see* 1 Annals of Congress 922 (Joseph Gales ed., 1834) (reporting "some time being spent" on the Judiciary bill without reporting the substance of the debate)), it is quite difficult to infer precisely what the intention of the legislature was in this case where no record was ever kept. Charles Warren's seminal article on the Judiciary Act's history was based on archival materials that he had found in the attic and basement of the Capitol, as well as in newspapers of 1789, but his article offers no insight into the reasons for the choice of words describing alienage diversity jurisdiction that
(Cont'd)

members knew that the definitions of the day were fluid. For example, one supporter of the Judiciary Act argued that

> [h]e wished . . . to see justice so equally distributed, as that every citizen of the United States should be fairly dealt by, and so impartially administered, that every *subject or citizen* of the world, *whether foreigner or alien*, friend or foe, should be alike satisfied; by this means, the doors of justice would be thrown wide open, emigration would be encouraged from all countries into your own, and, in short, the United States of America would be made not only an asylum of liberty, but a sanctuary of Justice.

1 Annals of Congress 853 (Joseph Gales ed., 1834) (remarks of Rep. Vining) (emphasis added). His comments evidence an understanding that there was a difference between the term "foreigner" and that of "alien", and further that the terms "citizen" and "subject" themselves had separate meaning. Another representative asked whether the jurisdiction over alienage diversity claims ought to be expanded and made exclusive, stating that

> [i]f it is the right of an alien or foreigner to sue or be sued only in the courts of the United States, then they have a right to that jurisdiction complete,

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(Cont'd)

Congress made in section 11. Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). Either Professor Warren could not find anything on the subject in the hodgepodge of materials to which he had access, or he found it and decided that it was not significant enough to include in his article.

> and then Congress must institute courts for taking exclusive cognizance of all cases pointed out in the constitution; but this would be contrary to the principle of the bill, which proposes to establish the inferior courts with concurrent jurisdiction with the State courts.

1 Annals of Congress 841 (Joseph Gales ed., 1834) (remarks of Rep. Stone).

Shortly after the Judiciary Act was enacted, the House of Representatives delegated to the Attorney General the task of reporting on the judiciary system and to propose a plan of revisions. Among the revisions proposed was to eliminate the reference to "aliens" and adopt the constitutional language of "foreign . . . citizens, or subjects." 37 American State Papers Miscellaneous 29. He viewed the needed revisions as "merely temporary; because he trusts that the necessity of a federal code is too striking to escape the attention of the House."[13] *Id*. at 36. It cannot be argued, then, that the choice of words was irrelevant. Instead, the choice had consequences whose import was simply not felt immediately.

3. Congress's Intention to Deny Alienage Diversity Jurisdiction to Foreign Nationals Who Are Not Foreign Citizens or Subjects Can Be Inferred From a Parallel Domestic Policy.

There was nothing odd or incongruous in Congress's decision to divide prospectively foreigners into two classes, only one of which would have access to the newly-created federal courts. Congress did exactly the same thing with a

13. Unfortunately, though, the Congress did not address the problem for another eighty-five years, when the Revised Statutes were compiled.

large class of domestic residents, excluding them from the domestic diversity jurisdiction it created in the same section 11 of the Judiciary Act of 1789.

Residents of the District of Columbia were, from the earliest times, held not to be citizens of a "State" and therefore not amenable to diversity jurisdiction. *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805); *Barney v. Baltimore City*, 73 U.S. 280, 287-88 (1867). Residents of American territories were not citizens of a "State" and therefore not amenable to diversity jurisdiction. *Corp. of New-Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816). And, finally, Native Americans were not citizens of a State, and therefore were not amenable to diversity jurisdiction. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (dictum) (relying on Indians' status as non-State citizens nor citizens of foreign state under *Cherokee Nation v. Georgia*, 5 Pet. 1, 15-18 (1831) and *Elk v. Wilkins*, 112 U.S. 94, 102-103 (1884)). Yet, notwithstanding the fact that they were not State citizens (and, in the case of many Native Americans and territorial residents, not United States citizens either) each of these classes plainly was not foreign. They each occupied a unique sphere, with rights below that of an American citizen and above that of an alien. Congress has long known the difference between what we would today call "nationals" and its subset of "citizens".

In response to each of the well-established limitations on domestic diversity jurisdiction, the course of action was exactly the same. After over a century of acquiescence in the Court's determinations, Congress decided to extend, by statute, the jurisdiction of the federal courts in diversity cases involving residents of the District of Columbia and of the territories. *See National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (plurality

opinion) (upholding constitutionality of statute creating diversity jurisdiction over suits between District of Columbia citizens and citizens of states).

Since Congress recognized the domestic difference between its citizens and its nationals, and it permitted only the former to have access to the new federal courts on the ground of diversity of citizenship, what reason is there to surmise that Congress created a broader right of access to federal courts for non-citizen nationals of other countries than it created for non-citizen nationals of our own country? There is nothing in the legislative record to suggest that Congress ever intended to draw such a distinction. A far more reasonable construction would be to interpret the two diversity provisions (alienage and domestic) in tandem with one another, and infer that if Congress intended to exclude non-citizen American nationals, then it intended the same treatment for non-citizen foreign nationals as well.[14]

Once again, the near-contemporaneous documentary record supports the view that Congress took a consistent approach, standing in stark opposition to the Petitioner's contention. In 1805, a group of British merchants petitioned the Congress to eliminate the "amount in controversy" limit on alienage diversity actions. The committee to which the petition was referred issued a negative report. It noted first that there was no justification for treating foreign claims differently from domestic claims ("Every consideration, opposed to such a measure in relation to the former

14. Strictly speaking, the distinction was drawn by this Court, and Congress acquiesced in the Court's determination. Residents of the District of Columbia and United States territories did not gain access to federal courts for diversity suits until 1940. Act of April 20, 1940, c. 117, 54 Stat. 143.

[domestic] cases, must resist the idea with at least equal force, when applied to the cases last mentioned [regarding aliens].") 37 American State Papers Miscellaneous 420. It noted second that it would convey to foreigners a superior right to that enjoyed by domestic litigants, which would disfavor domestic litigants.

> To grant the prayer of the petitioners merely on this ground of complaint, would be to oppress a considerable number of citizens, for the accommodation of a much smaller number who are not citizens. A principle which would justify this step is a sort of principle totally inadmissible by this committee as a rule by which to decide on what is just and proper.

Id.

Congress declined the invitation of the British merchants to give them greater access to the federal courts in diversity actions than it afforded to American citizens. In light of that action, it defies logic to assume that Congress nevertheless decided silently to grant the residents of Britain's colonial territories greater access to the federal courts in diversity actions than it afforded to the residents of the United States' territories.

B. Congress's Subsequent Enactment of the Alien Enemies Act Confirms Its Intention To Maintain A Class Distinction In The Judiciary Act.

A scant nine years after the adoption of the Judiciary Act, Congress again addressed the problem of classifying foreigners. It did so in a way that rebuts the Petitioner's

contention in this case because its choice of words demonstrates that it knew how to denominate foreign nationals who were neither foreign citizens nor foreign subjects.

Congress needed to group all foreign nationals together in order to promote a domestic policy in the Republic's early history when it enacted the Alien Enemies Act in 1798. In that statute, Congress identified the relevant enemy as "foreign nation or government" and then identified four classes of males over the age of fourteen who could (in the event of a Presidential proclamation) be "apprehended, restrained, secured and removed, as alien enemies." They were "natives, citizens, denizens or subjects of the hostile nation or government." Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798). Congress provided further that such aliens (using the description of "natives, citizens, denizens or subjects") who were not charged with "actual hostility, or other crime against the public safety" would be permitted time to accumulate their property and leave the country, in accordance either with a treaty or (in the absence of a treaty) "according to the dictates of humanity and national hospitality." *Id*. That distinction continues to this day, having been substantially re-enacted in the Revised Statutes, R.S. § 4067, amended to exclude enemy females as well as males in 1918 (Act of April 16, 1918, c. 55, 40 Stat. 531), and is now codified at 50 U.S.C. § 21.[15]

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15. The Alien Enemy Act has been relatively uncontroversial, in distinction with the Alien Act adopted less than two weeks earlier. *Compare Ludecke v. Watkins*, 335 U.S. 160, 162 (1948) (Alien Enemy Act has been re-enacted without substantial change) *with Johnson v. Eisentrager*, 339 U.S. 763, 774 n.6 (1950) (Alien Act faced substantial opposition).

Congress's designation of subclasses of foreign nationals was important both in its description of the domestic view of foreigners and in its recognition of the United States' treaty obligations. By conceding that the United States would abide by its treaty obligations with respect to non-hostile foreign "natives, citizens, denizens or subjects", Congress recognized that our treaty obligations might distinguish between and among those subclasses, and that foreign nations might wish (for their own purposes) to distinguish among those subclasses. In fact, treaties of that era did distinguish between the property rights of combatants and non-combatants. *See, e.g.*, Treaty of Friendship (Pinckney's Treaty), Oct. 27, 1795, U.S. Spain, art XIII, 8 Stat. 138; Convention between the French Republic and the United States of America, Sept. 30, 1800, art. VIII, 8 Stat. 178; Treaty Of Peace, Friendship, Limits, And Settlement Between The United States Of America And The United Mexican States (Treaty of Guadalupe Hidalgo), Feb. 2, 1848, art XXII(1), 9 Stat. 922.

Congress's choice of words in the Alien Enemies Act was especially important in that it reflected the new nation's collective view of the status of persons both under British law and under the evolving American law. The medieval English view — that the world was divided into subjects and aliens, and that any person born within the King's dominions was a subject — found two bases for allegiance: connection to the land and the ties of blood. Those who lacked either were aliens, and they could become subjects through either naturalization or denization. The American view was more subtle, though, for it recognized that since denizens had no inheritable blood, they should be accounted for separately, and that natives whose tie was to the land rather than to the person of the King might also have a different set of incentives for loyalty. *See generally* Kettner, *supra,* at 173-

209 (tracing the history of the concept of volitional allegiance through development of colonial and early state statutes and cases.)

The consequence of the American view of British status is that it recognizes the inherent class distinctions in foreign countries' treatment of their nationals, and then applies those distinctions in interpreting domestic law. The distinction is both important and not accidental. In *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943), for example, the issue was whether the United States could deport, as a German citizen, an Austrian Jew living in the United States solely by virtue of the fact that the United States' enemy, Germany, had annexed Austria and therefore claimed Austrians as its citizens.[16] By relying upon the subclass distinctions set forth in the statute, the court ignored the label applied to the prospective deportee in that case and therefore advanced a domestic interest in preserving human rights against a genocidal regime.

C. Subsequent Revisions of the Diversity Statute Have Emphasized The Distinctions Between Foreign Nationals and Foreign Citizens or Subjects.

Petitioner's search for support in the sequence of amendments to the Judiciary Act of 1789 is fruitless, for the record actually undercuts the Petitioner's claim. (Petitioner Br. at 14). Petitioner's argument is that Congress intended

16. The Second Circuit observed that the term "natives" means those who were born on the soil of the foreign enemy. 137 F.2d at 903 n.3. That definition therefore permits detention of those who might have a natural affinity for the enemy by virtue of their connection to the land, even if they were not citizens, subjects or denizens.

no substantive change when it removed the word "aliens" from the statute, and that the Court should therefore fashion a rule extending diversity jurisdiction to all aliens, despite the plain language of both the Constitution and 28 U.S.C. § 1332(a)(2).

The slim reed of legislative history does not support the weight of the Petitioner's argument. There is no mention of any reason for the change in language in any of the legislative debates of the day. Yet, there is nothing remarkable in this dearth of legislative history because the provision at issue affected only the modest number of colonial residents. It would not likely be the subject of debate in Congress when more important matters (such as the revision and compilation of the entire existing body of American statutes) needed to be discussed. Nevertheless, when the Revised Statutes were adopted the Congress did substitute the narrower "foreign citizens or subjects" language for the broader "aliens" language, just as the Attorney General had suggested some eighty-three years earlier.

Petitioner dismisses the significance of the amendment by suggesting that Congress was addressing a different problem: to clarify that federal courts lack jurisdiction over suits between aliens. (Petitioner Br. at 14). That argument makes little sense, for there was no confusion on the point in 1873. The issue had been settled seventy-five years earlier, in *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800). One might expect that if Congress had taken the time to codify a rule attendant to diversity jurisdiction, then the natural choice would have been the complete diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). We should be entitled to take Congress at its word, and

therefore assume that changing the language to conform to the constitution was designed to have a real effect.[17]

D. The Historical Record Makes Clear That The Second Circuit Acted Properly.

It is indeed surprising to see Petitioner suggest that the Second Circuit's course of decisions beginning with *Matimak Trading Co. v. Khalily,* 118 F.3d 76 (2d Cir. 1997) represented a departure from over two centuries of jurisprudence. (Petitioner Br. at 15). The argument suggests that the Second Circuit somehow disturbed a long-standing line of cases in which the residents of British colonies had routinely sued and been sued in federal courts on the basis of alienage diversity jurisdiction. Nothing could be further from the truth.

If the law were as Petitioner suggests it should be, then one would expect that 213 years of reported federal decisions would include a wealth of cases involving alienage diversity jurisdiction over colonial residents. Such a search would be futile, although there are many cases reported in the state courts where alienage is offered as a plea in abatement. *See, e.g., Scanlan v. Wright,* 30 Mass. 523 (1833); *Coxe v. Gulick,* 10 N.J.L. 328 (1829); *Clarke v. Morey,* 10 Johns R. 70 (N.Y. 1813). The reality is that either colonial residents have sued and been sued in state courts of general jurisdiction, where subject matter jurisdiction is not generally subject to question, that the cases have not been removed to federal courts, or that the problem is truly insignificant.

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17. In this instance, where Congress changed the language to that contained in the Constitution, the change would appear to be immune from the charge of error or surplusage. *See United States v. Auffmordt,* 122 U.S. 197, 210 (1887) (1875 revision corrected errors and omissions in the 1873 Revised Statutes).

II.

UNITED KINGDOM LAW CREATES A DISTINCTION BETWEEN ITS NATIONALS AND ITS CITIZENS WHICH IS DISPOSITIVE FOR PURPOSES OF DETERMINING ALIENAGE DIVERSITY

The law of the United Kingdom today marks a clear distinction between "nationals", on the one hand, and "citizens" or "subjects" on the other.[18] Petitioner asks this Court to ignore the plain language of the United Kingdom's statute (the British Nationality Act 1981), to ignore the reason behind that statute, and instead to expand the jurisdiction of federal courts beyond that intended by Congress. There is no basis for granting Petitioner's request.

The Petitioner's argument is that the United Kingdom of Great Britain and Northern Ireland today has a group of persons (both natural and juridical) under its "protection" beyond the British Isles, that these persons are United Kingdom "nationals" and that these persons should therefore be deemed "citizens or subjects" for purposes of the diversity alienage statute.[19] (Petitioner Br. at 20-24). That argument in turn relies upon the analysis of United Kingdom law

18. Indeed, the evolution of the United Kingdom's treatment of its colonial residents makes clear that the colonial residents have lost any claim they may have once had to proceed as parties in federal courts under alienage diversity.

19. A British Protected Person cannot in any sense be deemed a subject because that status belongs to those "people who had placed themselves under the protection of the British Crown, without becoming the subject of the Sovereign." Ian A. MacDonald & Nicholas J. Blake, MacDonald's Immigration Law and Practice in the United Kingdom 107 (3d ed. 1991).

offered in the *amicus* brief of the United Kingdom. (UK Amicus Br. at 9-30).[20] Even accepting the United Kingdom's own interpretation of its law, though, the argument does not support the conclusion.

First, as to natural persons, the term "United Kingdom national" includes the two groups who are amenable to 28 U.S.C. § 1332(a)(2): "British citizens" and "British subjects under Part IV of the [British Nationality Act of 1981]". (Lodging at L-31).[21] But the term also includes four groups of United Kingdom nationals who do not fall within the statute's reach: British Dependent Territories citizens, British Nationals (Overseas), British Overseas citizens and British protected persons. *Id.* British Dependent Territories Citizenship (which is applicable to the British Virgin Islands) is, under the statute, entirely separate from British Citizenship. British Nationality Act 1981, cl. 15-25.

Second, corporations were never entitled to citizenship or subjectship, so they fell under the broader term of "United Kingdom nationals." *Id*.; *see* Clive Parry, British Nationality 5 (1951). Under that doctrine, there could and should be no alienage diversity jurisdiction over suits by and against corporations chartered in one of the British Dependent Territories because the assumptions underlying the fiction of domestic diversity jurisdiction for corporations are inapposite. The domestic theory, espoused in *Louisville C. & C.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 553-55 (1844)

20. References to "UK Amicus Br. __" are to pages in the Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner.

21. References to "Lodging __" are to pages in the Lodging submitted jointly to the Supreme Court by the parties.

(Mem.), is that shareholders opt to charter their corporation in a state to take advantage of the laws of that state, and it should therefore be presumed conclusively that all of the corporation's shareholders are citizens of that chosen state. Applying that same presumption to a corporation chartered in a British Dependent Territory means that the shareholders (regardless of where they actually resided) opted to incorporate in a jurisdiction whose people were *not* citizens of the United Kingdom. The conclusive presumption should therefore be that the corporation is not a United Kingdom citizen, but merely a national, just like its people.

We therefore need look no further than the British statute. The United Kingdom has decided under the British Nationality Act 1981 that certain of its people are neither citizens nor subjects, but instead fall into a class called "nationals" whom it protects and for whom it is internationally responsible. Under the plain language of the British statute, Petitioner's argument fails.

If the plain language of the British law were not compelling enough, then the evolution of that law provides irrefutable proof that the United Kingdom has, over time, reduced the status of its colonial residents to the point where they no longer are amenable to diversity jurisdiction. The United Kingdom has made clear in its *amicus* brief that it maintains today a set of internal distinctions between its nationals, just as it did over two centuries ago, but that the residents of its colonies are no longer citizens or subjects, even if they once had that status.

Before 1983, all Commonwealth Citizens were also British subjects. The British Nationality Act 1948 had created a status known as "British subject without citizenship", so that British subjects could be either citizens or non-citizens. *See* Immigration & Nationality Directorate, BN3: Information

About British Subject Status <http://www.ind.homeoffice.gov.uk/default.asp?PageId=147>. Under the 1948 statute, all Commonwealth Citizens (including the residents of colonies) would have been subject to alienage diversity jurisdiction because they were subjects, even though they lacked citizenship and therefore had no right of abode in the United Kingdom. Ian A. MacDonald & Nicholas J. Blake, MacDonald's Immigration Law and Practice in the United Kingdom 107 (3d ed. 1991). The British Nationality Act 1981 changed the legal landscape. It eliminated the general status of "British subject" and applied it instead to a limited class of persons, and also created new classes who were neither subjects nor citizens. Such is the status of Respondent. As explained in a leading treatise on British nationality law,

> The purpose of dividing up CUKCs [Citizens of the United Kingdom and Colonies in the British Nationality Act 1981] into what are in fact quite complicated sub-divisions is all to do with immigration and the attempt to create a British citizenship which automatically gives the right of abode in the UK. This, however, has only been achieved by separating off into different citizenships those former CUKCs who were not partial under the Immigration Act 1971.
>
> . . .
>
> On paper the category of British Dependent Territories citizen sounds like the creation of a new national unit parallel to that represented by British citizens. It is not. There is no common travel area matching what appears to be a common citizenship. Whereas British citizens have more

> or less free access to come and go to the UK, the 1981 Act gives no such right to British Dependent Territory citizens in Dependent Territory.

Id.

The United Kingdom's argument that it stands poised, in the near future, to change the status of colonial residents yet again to full citizens only lends weight to the argument that there is no alienage diversity jurisdiction over Petitioner's claims today. (UK Amicus Br. at 28). It also establishes that the United Kingdom, by its unilateral legislative act, can create a right of access to federal courts in the future.[22]

22. After the Petitioner's brief and the *amici* briefs were served, the bill to which it appears the United Kingdom refers indeed received the Royal Assent. The new law, entitled the British Overseas Territories Act 2002 makes it clear that, in the future, the United Kingdom will offer British citizenship to the current British Dependent Territories citizens. However, the day for that offer has not arrived, as the new law only becomes effective once the Secretary of State for the Foreign and Commonwealth Affairs declares a date of commencement. British Overseas Territories Act 2002, cl. 8(2) (available at <http://www.legislation.hmso.gov.uk/acts/acts2002/20020008.htm>). That date may not come soon, for it will only come about "once [Her Majesty's Government] are satisfied that the practicalities for implementation of the citizenship provisions are in place. For instance, we need to ensure that arrangements for passport issue are agreed and that the staff who will deal with passport and nationality questions are properly trained." 375 Parl. Deb., H.C. (5th ser.) 478-80 (2001) (remarks of Parliamentary Under-Secretary Of State For Foreign & Commonwealth Affairs Ben Bradshaw) <http://www.publications.parliament.uk/pa/cm200102/cmhansrd/cm011122/debtext/11122-10.htm>). Thus, the law is neither self-executing, nor does it mean that every British Virgin Islands citizen is automatically a citizen of the United Kingdom. Once the law commences, future diversity cases will need to be decided on a case-by-case basis, depending on whether the alien party has decided whether to accept or to renounce British citizenship. *Id*.

The United Kingdom further concedes that its citizenship statutes do not apply to corporations. (UK Amicus Br. at 12-13). Instead, that government refers again to the overall group of "nationals" and seeks to apply the law of nationality, rather than the law of citizenship or subjectship. For purposes of determining whether diversity exists, the fact that a British Virgin Islands corporation is a "United Kingdom national" (just as an English corporation would be a United Kingdom national) is merely the first step in the inquiry. If there were any analogy to the proceedings in the case of domestic corporations (and there is not, as explained in this Point above), then the next step would be to apply the conclusive presumption, contained in 28 U.S.C. § 1332(c)(1), that a corporation is deemed a citizen both of the jurisdiction of its place of incorporation and of its principal place of business. Under that rule, then, Respondent is deemed to be a "British Dependent Territories citizen" and would not be a British citizen for purposes of alienage diversity jurisdiction.

Finally, the second class status of United Kingdom colonials is amply shown by reference to the examples that the United Kingdom itself has offered to this Court. Each of the examples of a bilateral treaty cited by the United Kingdom is an instance in which the treaty would have been inapplicable to the colony at issue had the obligation merely been one between the United Kingdom and the United States. Instead, when the United States seeks to bind one of the United Kingdom colonies, it must negotiate with the United Kingdom for a separate agreement extending the treaty to the colony in question. One such example is the Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987). Treaties offer a mechanism whereby, through bilateral action, the United Kingdom can assure its colonial residents

access to the federal courts. There is no need to rewrite the alienage diversity statute by overruling the Second Circuit.

In sum, there is nothing novel or surprising about the need or desire of nations to decide who among their number "have the rights and privileges of citizenship", *see Schwarzkopf*, 137 F.2d at 903, and those who do not. The choices that those nations make, though, have consequences for the treatment of those persons under the statutes and treaties of the United States. In the case of the United Kingdom, its choices lead inexorably to the conclusion that its nationals who are neither British citizens nor subjects simply do not have access to the federal courts on the basis of alienage diversity jurisdiction.[23]

III.

THE POLICIES THAT LED CONGRESS TO CREATE ALIENAGE DIVERSITY JURISDICTION ARE NOT THWARTED BY A RULE REQUIRING COLONIAL RESIDENTS TO SUE AND BE SUED IN STATE COURTS

A. Domestic Policies Are Advanced By The Second Circuit's Rule.

The two policies identified by Petitioner as underlying diversity jurisdiction and alienage diversity jurisdiction are not implicated at all by this case. (Petitioner Br. at 25, 31).

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23. We have no quarrel here with the idea that there would be jurisdiction over a suit against any foreign national (assuming personal jurisdiction exists) involving a federal question under 28 U.S.C. § 1331. That issue is not presented in this case.

First, with respect to policy of preventing bias by domestic courts against foreigners, the argument is simply irrelevant. That policy is designed to protect the foreigner against the possible bias that the foreigner might suffer if forced to litigate in a state court. That is not an issue here because Petitioner, a New York corporation with its principal place of business in New York, is the party that opted for a federal forum. Respondent was the foreign defendant, so it would be the only party with cause to complain of anti-foreigner bias. Petitioner simply has no basis to invoke a claim of bias that Respondent does not advance.[24] Petitioner ignored the option of suing Respondent in Petitioner's home court and in the courts of the British Virgin Islands, opting

24. The policy argument of home-court bias would only be persuasive (if at all) in a case where a foreign plaintiff sued a domestic defendant in the defendant's home state. Such is not the case here. The bias argument is even weaker in the case of alienage diversity jurisdiction than it is in the case of domestic diversity jurisdiction because under alienage diversity jurisdiction the foreign party litigates in a United States courtroom against a domestic party. The argument of national bias (as opposed to home state bias) would apply with equal force regardless of whether the United States court were state or federal. Even if the Framers might have been thinking of a bias problem with respect to foreigners, then, their concern was plainly unfounded. A far more persuasive argument — which holds no vitality today — is that the newly-established federal courts could be relied upon to decide a critical subclass of cases (those concerning the collection of pre-Revolution debts owed to British loyalists) in favor of the foreigners, while state courts had demonstrated that they could not be relied upon to do so. Thus, two critical aspect of the 1783 Treaty of Paris (Article 4, relating to the recovery of bona fide debts, and Article 5, relating to restitution of property) depended for their success upon the availability of a forum to resolve legal issues. Indeed, Article 5 draws precisely the distinction at issue here, elevating the interests of "real British subjects" over those of "persons resident in districts in the possession on his Majesty's arms."

inexplicably to proceed in federal court despite plain Second Circuit authority that there was no subject matter jurisdiction.

Second, with respect to the policy of promoting the development of foreign commerce, the argument is inapposite because Britain, like every other colonial power, maintained a degree of exclusivity over trade with its colonies, taking them out of the usual stream of foreign commerce. (Petitioner Br. at 31). During the Revolution, for example, Congress included the West Indies colonies in their effort to restrain the trade in British goods. *See, e.g.*, 3 Journals of the Continental Congress 1774-1789 at 475-80 (G.P.O. 1905). After the War of 1812, the United Kingdom's act of closing its West Indies colonies to American trade vessels constituted a bitter point of contention between the two nations. *See, e.g.*, 5 American State Papers Foreign Relations 2-11, 12-13, 81-90, 226-240, 510; 6 American State Papers Foreign Relations 294-95, 963-85.

The Second Circuit's decision in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997) did nothing whatsoever to undercut the policies associated with alienage diversity jurisdiction. The Second Circuit's rule was a practical one. As an initial matter, the complaint itself must assert a basis for the exercise of subject matter jurisdiction. In *Matimak Trading*, as in this case, the plaintiff charged that the defendant was a citizen of something that, by any account, is not a "foreign State". Hong Kong was not a foreign state in 1996, nor is the British Virgin Islands a foreign state today. *Cf. Stuart v. City of Easton*, 156 U.S. 46 (1895) (Mem.) (dismissing, as insufficient to invoke alienage diversity jurisdiction, a complaint alleging that the defendant was a "citizen of London, England").

If there is to be any quarrel at all with the Second Circuit's opinion in *Matimak Trading*, it is surely one of style rather than substance. When it characterized the corporate and natural residents of the British Virgin Islands as "stateless", and thereby not entitled to invoke alienage diversity jurisdiction, it mischaracterized their status. Those persons are under the paternalistic protection of a state (the United Kingdom), but their state does not extend to them the full measure of rights of a citizen or subject. Since their rights are derivative of the British Crown, and dispensed by the Crown as a matter of grace, they are not automatically entitled to invoke the jurisdiction of federal courts, and they are instead required to have their claims heard in any of the fifty state courts with jurisdiction over both the person and the subject matter. The Court's conclusion, though — that the residents of Hong Kong occupied a nether region that simply did not rise to the level of being a "citizen" or "subject" — was exactly correct. It was in accord with principles of this nation's jurisprudence that stretch back to the earliest times.

Far from creating a category of statelessness which would (in Petitioner's words) "have been incomprehensible to the Framers" (Petitioner Br. at 14), the Second Circuit gave voice to a status with which the Framers were intimately familiar: colonial government in which political, economic and diplomatic power is wielded from afar, and a corresponding inability of the colonists to treaty with other nations for reciprocal advantage in trade and access to courts. The fact that the Framers had managed to fight for and win their own freedom did not change in any way the status of those West Indies colonists who chose not to fight the Crown, nor did it

change the political reality that only the Crown could treaty on behalf of its West Indies colonists.[25]

There is an additional set of policy implications to the alienage diversity rule that are promoted by a rule excluding foreign nationals who are neither citizens nor subjects.

First, the policy encourages immigration to the United States. The difference between American and British immigration policy was a consideration in the Congress that drafted the Alien Enemies Act. Albert Gallatin, who was a both a delegate to the Constitutional Convention and a Representative from Pennsylvania in the Fifth Congress, noted in his criticism of the bill that one of the Colonies' complaints against the King as expressed in the Declaration of Independence was that Britain had endeavored to suppress the population of the colonies, prevented foreigners from being naturalized and discouraged foreign migration to the American Colonies. 5 Annals of Congress 1983 (1798).

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25. Certainly with respect to the West Indies colonies, the Framers' experience was both unpleasant and different from the experience with the settlement colony in Canada. Our Continental Congress courted the favor of the Canadian colonists while pushing away those in the West Indies. *See* 2 Journals of the Continental Congress 1774-1789 at 68-70 (G.P.O. 1905) (entreating Canadians to resist British overtures and warning of risk of West Indies conflict). The Articles of Confederation therefore drew a plain distinction between the United States' policy toward Canada and that toward other colonies. Articles of Confederation, Art. XI ("Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.") To assume that Congress immediately decided to reverse its policy without receiving anything in return simply defies reason.

The Second Circuit's rule promotes the national policy because it confers an advantage on those colonial residents who would immigrate and thereby become citizens of the United States.

Second, the policy discourages the expatriation of United States businesses to offshore tax and bank havens. In this regard, the arguments of Petitioner and *amici* provide cogent evidence. United States corporations that surrender their domestic charters to reincorporate in tax havens such as the British Dependent Territories do so at no cost if they retain their ability to litigate in the federal courts.[26] Indeed, reincorporation abroad would actually increase the burden on the federal courts of diversity cases because it would be easier for the reincorporated entity to satisfy the complete diversity requirement in litigation against American citizens if the corporation were deemed to be a foreign citizen, rather than a citizen of one or two of the American states.

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26. The phenomenon of American corporations using the British Dependent Territories as havens to reincorporate and avoid United States taxes has recently become an important issue. *See, e.g.*, Susan Pulliam, Heard on the Street: Reincorporating Companies Find Bermuda A Place to Shed Some of Those Extra Taxes, Wall St. J. February 19, 2002, at A1 (citing examples of 20 U.S. publicly-held corporations which have reincorporated in Bermuda to avoid U.S. tax on foreign-source income); John D. McKinnon, Questioning the Books: Congressional Probe to Examine Enron's Tax-Avoidance Strategies, Wall St. J., February 19, 2002, at A6 (citing example of Enron's use of tax haven subsidiaries in Cayman Islands and Bermuda); Organization for Economic Cooperation and Development, Towards Global Tax Cooperation 16-17 (2001) (listing British Virgin Islands as among those jurisdictions meeting criteria for harmful tax practices amounting to status as tax haven) <http://www.oecd.org/pdf/M000014000/M00014130.pdf>.

Third, the policy tends to discourage the development of criminal enterprises that affect the United States. The commerce-based argument offered by the Petitioners and *amici* amounts to an assertion that, because the British Dependent Territories are now important financial centers, their corporations should not be denied access to the federal courts for lack of diversity. (Petitioner Br. at 31; US Amicus Br. at 24; UK Amicus Br. at 3). That argument ignores the reason for why those territories became important financial centers in the first place. Each of them attracted a substantial number of banks in the early 1990s following the colonies' adoption of bank secrecy and tax laws that rendered the islands impervious to scrutiny by American taxing authorities, criminal enforcement authorities and civil litigants. The problem was highlighted by the United Kingdom's government in the White Paper that formed the basis for the policy in the new British Overseas Territories Act 2002:

> We shall also press Overseas Territory governments to introduce legislation to improve regulation of company formation and management because, for example, in the absence of proper regulation, complex company structures can be used to disguise the proceeds of crime and other regulatory abuse as well as providing limited liability. There is increasing evidence that companies, incorporated in an Overseas Territory but based elsewhere, have been used as vehicles to disguise money laundering and financial fraud. Company formation agents and company managers need to be required by law to hold key information about the companies for which they have responsibility and to disclose that information to a regulator on request. This will help

> ensure a properly documented paper trail for criminal and regulatory investigations.

Secretary of State for Foreign and Commonwealth Affairs, Partnership for Progress and Prosperity: Britain and the Overseas Territories 72 (1999); *see also* Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples for 2000, U.N. GAOR, 55th Sess., Supp. No. 23, at 96-97, U.N. Doc. A/55/23 (2001) (noting need for cooperation to combat drug trafficking and money laundering in British Virgin Islands and Cayman Islands).

Since laws passed by the United Kingdom Parliament have no effect in those territories unless specifically provided, and since the treaty obligations of the United Kingdom do not automatically bind the territories, the United Kingdom's bilateral relationship with the United States has not improved the ability of the United States to root out financial fraud and narcotics trafficking in those territories. In the case of the British Virgin Islands, for example, the United States did not obtain a treaty on mutual legal assistance until 1990, *see* Treaty Relating to Mutual Legal Assistance Between the U.S. and the United Kingdom concerning the Cayman Islands, July 3, 1986, 26 I.L.M. 536 (entered into force as to British Virgin Islands November 9, 1990), it had to negotiate for that treaty separately from its treaties with the United Kingdom. By depriving the territories of automatic access to the federal courts, the United States retains an important incentive that can be traded by treaty with the United Kingdom (after the Senate consents) for closer scrutiny by the United States of transactions in the British Dependent Territories.

The argument advanced by Petitioner and *amici* that the Second Circuit's rule has an adverse impact on foreign trade is odd. (Petitioner Br. at 31). There is no trade at issue, except on paper. As Petitioner explains in the case of the British Virgin Islands, for example, each of the more than half million international business companies incorporated there (over 24 corporations for each man, woman and child[27]) is "required to conduct its business outside the British Virgin Islands." (Petitioner Br. at 31). The substantive transactions therefore occur either in other nations or in the United States. If a British Virgin Islands corporation were to reincorporate in the place of its principal place of business, then it could typically avail itself of either traditional alienage diversity jurisdiction or (in most instances) domestic alienage diversity.

B. There Is No Discriminatory Treatment of United Kingdom Citizens In This Policy.

The United Kingdom's argument that it suffers some discriminatory treatment without automatic access to federal courts rings hollow because the United Kingdom offers only a local court system to American litigants who have disputes with United Kingdom nationals. (UK Br. at 2). The United Kingdom lacks a federal system, so local courts — be they in the British Virgin Islands or in England — afford the only mechanism whereby a United States citizen can adjudicate claims against a United Kingdom national. The access to federal courts has no basis in a reciprocal advantage conferred on United States citizens by the United Kingdom, and therefore provides no equitable reason to fashion a rule of access.

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27. The British Virgin Islands has an estimated population of 20,812 as of July 2001. CIA World Factbook 2001 <http://www.cia.gov/cia/publications/factbook/geos/vi.html>.

In particular, the basis for the United Kingdom's objection appears to be based upon a fundamental misunderstanding of our dual system of state and federal courts. The United Kingdom's two "Diplomatic Notes" appear to ignore the fact that British Dependent Territories citizens have recourse to our state courts. (UK Amicus Br. at 3-4). Those state courts, which have concurrent jurisdiction with the federal courts over civil actions with an appropriate amount in controversy, are certainly adept to resolve any disputes in which British Dependent Territories citizens become involved. If the dispute involves a federal question, then the federal courts are available as well.

In any event, it is insufficient for Petitioner that the statute should be interpreted so as to suit the desires of the United Kingdom when the text of both the United States law and the United Kingdom law command a different result. Thus, the State Department's plea to the Judiciary to extend jurisdiction in cases such as this is simply directed to the wrong forum, for the President, the United Kingdom government and the Congress hold the key to the relief that the State Department seeks. The United Kingdom holds the key to its fate in that it could unilaterally extend full British citizenship to all residents of Overseas Territories.[28] The President holds a key because he could agree with the United Kingdom, by treaty, to extend jurisdiction to those persons, subject to the advice and consent of the Senate. Finally, Congress holds a key in that it could amend the legislation in question, just as it did when issues of equity arose with respect to residents of the District of Columbia and territories. In each of those instances, though, the issue is plainly one that is committed to a co-ordinate branch of government, and should therefore not be addressed by this Court.

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28. As noted above, that key now sits in the hand of the United Kingdom's Secretary of State for Foreign and Commonwealth Affairs.

IV.

ADOPTION OF THE RULE PROPOSED BY THE PETITIONERS UNDERMINES THE INTERNATIONAL POLICY OF DECOLONIZATION

The United Nations Charter, to which both the United States and the United Kingdom are parties, has established a reporting requirement with respect to the treatment of non-self-governing territories (UN Charter, Article 73) in aid of a worldwide policy to eliminate the vestiges of colonialism and to provide for self-government.[29] In large measure, the efforts of Western nations to bring about self-government and decolonization have been successful, but there are exceptions. The two remaining nations with any substantial colonial power remain the United Kingdom and the United States. Without minimizing at all the supreme effort that the United Kingdom has made in the post-World War II era to decolonize, that nation's status as the leader among remaining colonial powers is beyond dispute.[30]

Regrettably, though, the vestiges of colonialism have been difficult to eradicate, primarily because two nations — the United States and the United Kingdom — have clung steadfastly to colonial possessions. Thus, in the most recently concluded session of the General Assembly, three resolutions

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29. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15th Sess., 947th mtg.<http://www.un.org/Depts/dpi/decolonization/docs/res1514.htm>.

30. Of the world's seventeen remaining colonies, the United Nations credits the United Kingdom with responsibility for ten non-self-governing territories, and the United States with three, as of 1999. <http://www.un.org/Depts/dpi/decolonization/trust3.htm>.

carrying out the work of the United Nations' Fourth Committee[31] on colonization were carried overwhelmingly, over the negative votes of only the United Kingdom and the United States.[32]

While we do not quarrel with the power of the governments of the United States and the United Kingdom to declare their resistance to the international norm favoring decolonization, those governments cannot hide from the consequences of the policies which maintain a small number of people — the residents of their colonies — in a condition that lacks both internal and international political power. To the extent that the United Kingdom extends the offer of citizenship to its colonial people without giving them the opportunity to choose self-determination instead, then the alienage diversity puzzle will be solved, but to the detriment of the right of those people to determine their political destiny.

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31. The "Fourth Committee" is the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

32. Dissemination of Information on Decolonization, 55/145; Second International Decade for the Eradication of Colonialism, 55/146; Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 55/147; Press Release GA/9488 (Dec. 8, 2000) (reporting vote totals).

CONCLUSION

For all of the reasons set forth herein, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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