Nos. 19-416 & 19-453

IN THE

Supreme Court of the United States

NESTLÉ, USA, INC.,
Petitioner,
v.

JOHN DOE I, et al.,
Respondents.

CARGILL, INC.,
Petitioner,
v.

JOHN DOE I, et al.,
Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
CORBIN K. BARTHOLD
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

Whether a federal court may imply a cause of action for aiding and abetting a violation of international law under the Alien Tort Statute, 28 U.S.C. § 1350.

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INTERESTS OF *AMICI CURIAE*[*]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears here as an *amicus curiae* to oppose newly recognized private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). To that end, WLF has twice filed in support of certiorari in this case.

Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF promotes education in diverse areas of study, including law and public policy. It has appeared many times as an *amicus curiae* in this Court.

SUMMARY OF ARGUMENT

Enacted in 1789, the ATS grants a district court "jurisdiction" over "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." 28 U.S.C. § 1350. The Ninth Circuit held below that a U.S. corporation alleged to have aided and abetted a human-rights

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* and their counsel, helped pay for the brief's preparation or submission. Each party's counsel of record has consented in writing to the filing of this brief.

violation overseas may be found liable in federal court under an implied cause of action in the ATS.

As the petitioners convincingly show—and as WLF argued below—the panel's decision not only improperly subjects a domestic corporation to potential liability under the ATS, but it ignores this Court's well-established bar on extraterritoriality. Yet another failing of the decision below, and the focus of this brief, is that it skirts the crucial limits that both the Constitution and this Court impose on a federal court's ability to imply a new cause of action under the ATS.

Above all, whether the ATS should supply a remedy for aiding and abetting is a decision best left to Congress. This Court has never decided whether the ATS permits a cause of action for aiding and abetting; nor has it held that a federal court may imply one. Yet those questions are closely tied to the questions of corporate liability and extraterritoriality presented here. The Court should use this case as a vehicle for holding, unequivocally, that no such cause of action exists.

Although the ATS is a "jurisdictional statute creating no new causes of action," this Court held in *Sosa v. Alvarez-Machain* that Congress enacted the statute "on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time." *Sosa*, 542 U.S. at 724. All the same, "separation-of-powers concerns * * * apply with particular force" to the ATS, and "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new caus-

es of action under the ATS." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (plurality opinion). At the very least, *Sosa* requires a federal court to exercise "great caution" before recognizing new forms of liability under the ATS. 542 U.S. at 728.

The Ninth Circuit's decision throws caution to the wind. First, the Ninth Circuit recognized aiding-and-abetting liability under the ATS based solely on a norm of international law against child labor. But *Sosa* makes clear that courts, before they may imply a new cause of action under the ATS, must identify a universally recognized norm that not only prohibits the underlying conduct, but that extends liability "to the perpetrator being sued." *Id.* at 733 n.20. Simply put, there is no universal standard for civil aiding and abetting liability, much less one that is "accepted by the civilized world" and defined with the specificity *Sosa* requires. *Id.* at 725.

Second, there are "sound reasons to think Congress might doubt the efficacy or necessity" of aiding-and-abetting liability under the ATS. *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)). Even when Congress expressly creates a statutory cause of action, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994). And given the ATS's potential for generating unintended consequences, including the upending of U.S. foreign policy, "Congress, not the Judiciary, must decide whether to expand the scope of liability." *Jesner*, 138 S. Ct. at 1406 (plurality opinion).

If this Court's crucial limits on judicially created causes of action are to continue to hold sway, the Ninth Circuit's decision cannot stand.

ARGUMENT

THE ATS SUPPLIES NO CAUSE OF ACTION FOR AIDING AND ABETTING.

Although the era of federal common law is over, *Sosa* held that federal courts may, in narrow cases, recognize a private cause of action under the ATS to remedy a violation of an international norm that is "specific, universal, and obligatory." *Sosa*, 542 U.S. at 724. The Ninth Circuit's holding cannot satisfy those demanding criteria. Nor can the panel's decision be squared with *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, which confirms that a cause of action for aiding and abetting will not lie without clear "congressional direction." 511 U.S. at 183.

A. Congress, not the Judiciary, creates causes of action.

The "U.S. Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 59 (2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

Judges do not wield the statutes they want; they must faithfully apply the statutes they get. "The duty of the court," Chief Justice Marshall explained, is "to effect the intention of the legislature," which must "be searched for in the words which the legislature has employed to convey it." *The Paulina*, 1 U.S. (7 Cranch) 52, 60 (1812).

Yet for a few decades in the last century, this Court assumed it was "a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). As "a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself." *Id.*

This marked departure from the Court's traditional, constitutional role did not survive. The high-water mark for implied causes of action occurred in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which held that Congress intended to provide a private remedy for Title IX of the Civil Rights Act, even though the statute itself manifests no such intention. *Cannon* is perhaps best known for Justice Powell's robust dissent, grounded in concern for the properly limited role of the Judiciary in a democratic society.

Whether to create a cause of action, Justice Powell insisted, cannot "properly be decided by relatively uninformed federal judges who are isolated from the political process." 441 U.S. at 731 (Powell, J., dissenting). Rather, "respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress af-

ter public hearings, debate, and legislative decision." *Id.* By departing from that approach, Justice Powell warned, the *Cannon* majority had crossed the line into "independent judicial lawmaking." *Id.* at 740.

Justice Powell's view eventually became the Court's view. In a string of decisions culminating in *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), the Court "abandoned" its older understanding of implied causes of action and "ha[s] not returned to it since." So now when a party "seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 S. Ct. at 1857. In the mine-run case, therefore, the "decision to create a private right of action is one better left to legislative judgment." *Jesner*, 138 S. Ct. at 1402.

B. *Sosa* cabins a federal court's ability to create a cause of action under the ATS.

Ordinarily, if Congress desires to "create new rights enforceable under an implied private right of action," it "must do so in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). The judicial "task is limited solely to determining whether Congress intended to create the private right of action asserted." *Abbasi*, 137 S. Ct. at 1856. And "as with any case involving the interpretation of a statute, [that] analysis must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

But the ATS is a special case. While it creates federal-court jurisdiction to hear a tort claim by an

alien alleging a violation of the law of nations, it creates no cause of action. Yet it is unlikely, in the Court's view, that "Congress would have enacted the ATS only to leave it lying fallow indefinitely." *Sosa*, 542 U.S. at 719. The First Congress surely "assumed that federal courts could properly identify some international norms as enforceable" under the ATS. *Id.* at 730.

Although Congress still bears primary responsibility for deciding which causes of action an alien may bring under the ATS, federal courts may, in very narrow instances, "recognize private causes of action [under the ATS] for certain torts in violation of the law of nations." *Sosa*, 542 U.S. at 724. But before a court may do so, it must exercise "great caution" by undertaking a two-step process. *Id.* at 728. First, it must ensure that the proposed cause of action reflects an international norm that is "specific, universal, and obligatory." *Id.* at 732. Second, if that threshold is met, the court must decide whether there is any reason to limit "the availability of relief." *Id.* at 733 n.21.

Not only must ATS plaintiffs identify a violation of an international norm that is "specific, universal, and obligatory," but they must show that the "scope of liability" for violating that norm extends "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, 733 n.20.

Generally, the "decision to create a private right of action is one better left to legislative judgment." *Id.* at 727. *Sosa* stresses the need for "judicial caution," especially given the "possible consequences of

making international rules privately actionable." *Id.* Only a "very limited" subset of all potential law-of-nations violations may be actionable. *Sosa* identifies just three: "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724.

C. Federal courts may not extend ATS liability to aiders and abettors.

Pressing a new cause of action under the ATS, the respondents ask the Court to go far "beyond any residual common law discretion" the federal courts may enjoy. *Sosa*, 542 U.S. at 738. Whatever residual common law discretion the ATS may impart to the Judiciary, it does not include the ability to impose secondary liability on alleged aiders and abettors.

1. "International law is not silent on the question of the *subjects* of international law"—*i.e.*, those who "have legal status, personality, rights, and duties under international law and whose acts and relationships are the principal concerns of international law." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013). "Nor does international law leave to individual States the responsibility of defining those subjects." *Id.*

Aiding and abetting is an ancient concept in the *criminal* law. *See* 1 Matthew Hale, *History of Pleas of the Crown* 615 (1736) (discussing the distinction in Roman law between "manifest" and "non-manifest" theft, which turned on the thief's proximity, when caught, to the scene of the crime). And while the concept finds some support in international criminal tribunals, *see, e.g.*, Rome Stat. of the Int'l Criminal

Court, art. 25, 37 I.L.M. 1002, 1016 (July 17, 1998) (not ratified by U.S.); Stat. of the Int'l Criminal Trib. for Rwanda, S.C. Res. 955, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994), even these sources cannot agree on the *mens rea* and *actus reus* required for a conviction, *see Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1080-87 (C.D. Cal. 2010).

Even so, citing its en banc opinion in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 765-66 (9th Cir. 2011) (en banc), *judgment vacated*, 569 U.S. 945 (2013), the Ninth Circuit declared that "[c]ustomary international law" permits "aiding and abetting ATS claims," *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014). Yet *Sarei*'s analysis of that question is virtually nonexistent. True, "[t]he ATS itself does not bar aiding and abetting liability." 671 F.3d at 749. But that's awfully thin gruel. The mere absence of a prohibition cannot confer a statutory cause of action. *See Gonzaga Univ.*, 536 U.S. at 290. And even if "customary international law gives rise to a cause of action for aiding and abetting a war crime under the ATS," *Sarei*, 671 F.3d at 765, the respondents allege no war crime here.

Of course, the ATS is not a criminal statute. *See* 28 U.S.C. § 1350 (granting jurisdiction over "civil action[s] by an alien for a tort only"). More to the point, *Sarei* identifies no source of international law that provides a *civil* remedy for any international crime, much less one that permits secondary civil liability for that crime. And no nation has, to *amici*'s knowledge, adopted a general aiding-and-abetting statute for remedying "a tort only." 28 U.S.C. § 1350. The Ninth Circuit's holding thus transforms the ATS into an anomaly in the law.

In short, the Ninth Circuit identifies no source of international law for *civil* aiding-and-abetting liability, much less one defined with the universality and precision that *Sosa* demands. *See In re S. African Apartheid Litigation*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004) (refusing to recognize aiding-and-abetting liability under the ATS because it "would not be consistent with the 'restrained conception' of new international law violations that [*Sosa*] mandated for the lower federal courts").

2. Even if it were an open question whether civil aiding-and-abetting liability is a universal norm of international law, there are "sound reasons to think Congress might doubt the efficacy or necessity" of allowing aiding-and-abetting liability under the ATS. *Jesner*, 138 S. Ct. at 1402 (plurality opinion).

Consistent with the Constitution's separation of powers, whether aiders and abettors "should be subject to suit" is for Congress, not the Judiciary, to decide. *Id.* at 1403. Although it has enacted a general aiding-and-abetting statute for all federal criminal offenses, 18 U.S.C. § 2, Congress has never adopted a general aiding-and-abetting statute for *civil* actions.

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (TVPA), is "the only cause of action under the ATS created by Congress rather than the Courts." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). Yet while it provides a right of action against any "individual," who, under color of foreign law, subjects another to "torture" or "extrajudicial killing," *id.*, the TVPA does not provide for

aiding-and-abetting liability. *See* 28 U.S.C. § 1350 *note*.

Given Congress's refusal to create civil aiding-and-abetting liability under the ATS in the TVPA, *Sosa*'s caution—that the decision to create a private cause of action for law-of-nations violations is "one better left to legislative judgment," 542 U.S. at 727—applies with special force here. "Absent a compelling justification, courts should not deviate from that model." *Jesner*, 138 S. Ct. at 1403 (plurality opinion).

True, Congress authorized a form of secondary liability in the Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 *et seq*., but that statute is not analogous to the ATS. At all events, the fact "that Congress chose to impose some forms of secondary liability, but not others" simply reflects "a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184.

3. Aiding-and-abetting liability is the exception, not the rule. When Congress enacts a statute allowing a plaintiff to sue and recover damages "for the defendant's violation of some statutory norm," there is "no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank*, 511 U.S. at 182. Several sound reasons commend this approach.

Aiding-and-abetting liability "exacts costs that may disserve the goals" of federal law. *Id.* at 188. Litigation under the ATS, for example, "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 189 (quotation and citation omitted). What's more, smuggling concepts of secondary cul-

pability from the criminal law into the ATS would allow private plaintiffs and their attorneys to threaten secondary liability "without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727.

Expanding the scope of liability would also inject "an element of uncertainty into an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). Indeed, the "rules for determining aiding and abetting liability are unclear." *Cent. Bank*, 511 U.S. at 188. "The issues would be hazy, their litigation protracted, and their resolution unreliable." *Id.* at 189 (quotation and citation omitted). That is why this Court has refused to import concepts of criminal aiding and abetting into a federal civil statute silent on that matter. *See id.* at 181-82.

If anything, the need to respect Congress's prerogatives in creating statutory rights and remedies is "magnified" when, as here, "the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116. Implying a cause of action for aiding and abetting where Congress has not provided one would work "a vast expansion of federal law." *Cent. Bank*, 511 U.S. at 183.

4. Finally, the Ninth Circuit ignored "the practical consequences" of its decision to recognize a cause of action for aiding and abetting under the ATS. *Sosa*, 542 U.S. at 732-33. Apart from the disruption ATS suits pose to U.S. foreign policy, *see Jesner*, 138 S. Ct. at 1406, the real-world consequences of recognizing ATS aiding-and-abetting liability against multinational corporations would be calamitous.

The global economy offers the developing world "enormous opportunities for economic growth and sustainable development with potential benefits on a scale that is difficult to imagine." United Nations Conference on Trade and Development, *World Investment Report 2018* iv <https://tinyurl.com/yd5z84op>. Yet multinational firms cannot undertake major industrial or commercial investment in a developing country without cooperating with that country's government and business sectors.

It is a regrettable but undeniable fact that the governments and large employers of many nations do not always respect the human rights of their citizens and employees. *See, e.g.*, Human Rights Watch, *World Report 2020* 151-55 <https://tinyurl.com/yy99uj48> (documenting human rights abuses in more than 90 countries). If multinational companies find themselves liable for aiding and abetting under the ATS simply for doing business with a foreign government or go-between that violates international norms, they may well decide that such a risk is not worth the candle. They would not be the first. Talisman Energy, for example, decided to abandon energy exploration in South Sudan following adverse publicity from an ATS suit for which Talisman obtained summary judgment. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 262 (2d Cir. 2009).

As this case shows, a court that creates an extra-statutory cause of action to address a global problem acts in defiance of many blind spots. There are more than 600,000 cocoa farmers in the Ivory Coast, most of whom operate small family-owned farms. Some six million people in the region rely on cocoa production

for their livelihoods. *See* Erica Yock, *Cocoa Industry in the Côte d'Ivoire: The Farming and Production of Cocoa Beans in the West African Country of Côte d'Ivoire* <https://tinyurl.com/y3tq93es>. Unfortunately, underage labor has been an intractable feature of Ivory Coast cocoa farming for decades. *Id*.

The Ninth Circuit thinks it has figured out how to solve this endemic problem: hold multinational companies secondarily liable for "reducing their production costs" by doing business there. *Nestle USA*, 766 F.3d at 1025. But it is hard to see how litigation-induced boycotts of the Ivory Coast's cocoa market, which can only decrease cocoa demand in the region and reduce the supply of agricultural jobs there, will improve the plight of Ivory Coast agricultural workers and their families.

The "omnipresence of unintended consequences" can often be attributed to "the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86. In contrast, Congress is better able to "collect dispersed knowledge" and "bring it to bear on official choices." *Id.* at 88.

* * *

Whether a cause of action for aiding and abetting may be implied under the ATS is squarely presented here. Deciding that question offers the Court an independent ground for reversal. The petitioners fully briefed and argued below that no such cause of action exists. *See* D. Ct. Doc. 19, at 7-18 (Dec. 5, 2005); D. Ct. Doc. 90, at 7-13 (Feb. 9, 2009). The dis-

trict court considered but rejected that argument, s*ee* 748 F. Supp. 2d at 1078, as did the Ninth Circuit, s*ee* 766 F.3d at 1023. And this Court may consider any question "determined in earlier stages of the litigation," including "questions raised in the first appeal." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964).

"Having sworn off the habit of venturing beyond Congress's intent," this Court should "not accept respondents' invitation to have one last drink." *Sandoval*, 532 U.S. at 287. Rather than keep playing whack-a-mole with enterprising plaintiffs' lawyers who prevail in the lower courts, the Court should decide, once and for all, that the ATS permits no liability for aiding-and-abetting.

CONCLUSION

The Ninth Circuit's judgment should be reversed.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
CORBIN K. BARTHOLD
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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