Nos. 19-416 & 19-453

IN THE

Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioners,
v.
JOHN DOE I, *et al.*,
Respondents.

CARGILL, INCORPORATED,
Petitioner,
v.
JOHN DOE I, *et al*.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether an "aiding and abetting" claim against a U.S. corporation brought under the Alien Tort Statute may overcome the bar on liability for actions taken abroad where the claim is based on allegations of general corporate activity in the United States and where the plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity; and

2. Whether the judiciary has the authority under the Alien Tort Statute to impose liability on U.S. corporations.

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual Cato Supreme Court Review, conducts conferences, and files amicus briefs. This case concerns Cato because it raises vital questions about the role of federal judges in defining the scope of federal jurisdiction and the manner in which they interpret international law to define that scope.[1]

SUMMARY OF ARGUMENT

This Court has made clear that the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), must be interpreted with rigor and care. Under *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), to recognize a cause of action under the ATS, courts must find not only (i) that the norms at issue are specific, universal, and obligatory under the law of nations, but also (ii) that proceeding with the case under the ATS is a

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of amicus briefs through letters filed with the Clerk of the Court.

proper exercise of judicial discretion, as opposed to deferring to Congress to grant specific authority.

Two types of conduct under international law are at issue here: (1) corporate conduct and (2) aiding and abetting conduct. There is no norm under international law as to either. A survey of major jurisdictions shows a broad array of state practice relating to corporate liability (both criminal and civil), particularly as to whether and how a corporation takes the requisite *actus reus* and acts with the requisite *mens rea*. Significantly, state practice then also varies widely with respect to when and how corporate conduct can give rise to conduct punished as aiding and abetting.

Beyond the absence of an international normative consensus, congressional actions both at the time of the ATS and now confirm that the Court should defer to Congress to decide whether and according to what standards of conduct to hold corporations liable under international law, in general and *specifically* for aiding and abetting violations. The First Congress, which enacted the ATS, knew how to write a statute covering aiding and abetting a violation of the law of nations when it wanted to. That same Congress criminalized not only piracy (and violations of safe conduct and infringement of the rights of ambassadors), but also aiding and abetting piracy. If it had intended for the ATS to grant jurisdiction over tort suits for aiding and abetting violations of the law of nations, it knew how to do so. This legislative distinction drawn by the First Congress parallels the more recent action by Congress in *not* extending to corporate conduct *or* aiding and abetting conduct the

Torture Victim Protection Act ("TVPA") (28 U.S.C. § 1350 (note)), the only cause of action created by Congress under the ATS.

Finally, the different ways that countries have addressed corporate conduct relating to violations of international law, including global supply chain legislation pending in Congress, highlights that this is an area for legislation, not judicial decision-making. This is particularly true where the principal conduct occurred far away, and would require U.S. courts to seek the cooperation of parties and governments accused of wrongdoing and yet beyond the reach of U.S. jurisdiction.

ARGUMENT

The starting point for assessing any ATS claim is *Sosa*, 542 U.S. 692. *Sosa* mandates a two-part test to determine whether a cause of action is sufficiently well defined under the law of nations to be within the jurisdictional grant of the ATS absent further action by Congress. This case highlights both the absence of international consensus relating to the conduct at issue, and the need to defer to the legislature to grant specific authority before a claim based on that conduct may proceed under the ATS.

I. THERE IS NO BINDING CUSTOMARY NORM REGARDING CORPORATE CONDUCT THAT VIOLATES INTERNATIONAL LAW—PARTICULARLY AS TO AIDING AND ABETTING THOSE VIOLATIONS

Under *Sosa*, a claim under international law must have as "definite content and acceptance among civilized nations" as the three "historical paradigms familiar when § 1350 was enacted" in 1789, *Sosa*, 542 U.S. at 732: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724, 737. This first step of the *Sosa* test must be applied rigorously because the ATS is "strictly jurisdictional." *Id.* at 713. Every time a court recognizes a new international law norm under the ATS, it expands the original jurisdictional mandate. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1412 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Accordingly, this Court has cautioned that ATS claims must be "subject to vigilant doorkeeping." *Sosa*, 542 U.S. at 729.

The required rigor mandates that normative practice under international law *cannot* arise from a handful of decisions drawn from a variety of international tribunals, the jurisdictions of which are set forth in an array of charters to which the United States and other major states may not have been parties. *Sosa*, 542 U.S. at 734-35 (concluding "two well-known international agreements . . . have little

utility under the [*Sosa*] standard").[2] International law is not like common law and is not revealed by examining different international tribunal rulings. Absent a claim arising specifically under a treaty to which the United States is party (as explicitly provided in § 1350, and where, by necessity, there has been executive and legislative branch action), "resort must be had to the *customs and usages of civilized nations*." *Id.* at 734 (emphasis added) (citation omitted). Here, the variations among those customs and usages confirms the absence of a normative consensus. As the Court also has made clear, a "high level of generality" is not enough. *See, e.g.*, *id.* at 736 n.27 (holding no norm as to "arbitrary detention," despite survey "show[ing] that many nations recognize a norm against arbitrary detention," because "that consensus is at a high level of generality").

A. The Claims Here Implicate Norms of Corporate and Accessorial Conduct.

In this case, there are *two forms of conduct* to be assessed under international law. First, the conduct of corporations as artificial persons, and second, the

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[2] To the extent discrete international tribunals have chosen to recognize corporate liability, even those tribunals have acknowledged the lack of international consensus. *See* In the Case Against *Al Jadeed* [Co.] S.A.L./New T.V. S.A.L. (N.T.V.) and al Khayat, STL-14-05/A/AP, Public Redacted Version of Judgment on Appeal, ¶ 191 (Special Trib. Leb. Mar. 8, 2016) (vacated on other grounds) ("'[T]here is no relevant international convention with respect to the elements of corporate liability, nor international custom or general principles of law' upon which to rely.") (internal quotations and citation omitted).

conduct of an artificial person that can give rise to accessorial liability, as opposed to direct liability.

Liability for corporate conduct is "a substantive principle that must be supported by a universal and obligatory norm if it is to be implemented under the ATS," *Jesner*, 138 S. Ct. at 1402—specifically, "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Sosa*, 542 U.S. at 732 & n.20; *see id.* at 760 (Breyer, J., concurring); *Jesner*, 138 S. Ct. at 1400; *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 82 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). That international law focuses on the nature of the entity being held answerable is evidenced by the historical development of international law itself: Before Nuremberg, it was not typical for individuals to be tried for violations of international law committed by their states. But at no point were companies arraigned for crimes at Nuremberg. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 136 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013); Brief *Amicus Curiae* of Nuremburg Historians and International Lawyers in Support of Neither Party at 7-13, *Kiobel*, 569 U.S. 108 (No. 10-1491).

The artificial nature of the corporate person also highlights why this is an issue of substantive conduct—what specific conduct, as taken by whom, is required to support a claim—and not "a remedial consideration." *Compare Jesner*, 138 S. Ct. at 1402 (Kennedy, J.), *with id.* at 1420-21 (Sotomayor, J., dissenting). Unlike an individual, corporate persons may be owned or controlled by individuals other than

those committing an alleged crime. Moreover, given the nature of corporate structures, some individuals may or may not bind a given corporation by their actions, *and* as to any given crime multiple individuals, who may or may not act in concert or with knowledge of each other, might commit acts relevant to a claim. Thus, under national laws, how courts assess and ascribe liability to individual conduct varies significantly from how they do so as to corporate conduct.

In *Jesner*, a plurality of this Court extensively examined whether there is a norm under international law imposing liability for the conduct of a corporation. *See* 138 S. Ct. at 1399-1402. It recognized that no such norm existed as to corporate conduct, referencing both Nuremberg (which were proceedings limited to natural persons) and the Rome Statute, the treaty delineating the International Criminal Court and limiting that tribunal's jurisdiction to natural persons, including by *expressly* rejecting a proposal that would have granted the tribunal jurisdiction over corporate conduct. *Id.* at 1400-01. Nowhere does the Rome Statute apply liability under international law to the conduct of an artificial person.

To be clear, that the conduct of domestic U.S. companies is routinely subjected to liability under state and federal law does not bear on the proper result as to the ATS, because the jurisdictional grant here relates only to violations of the law of nations—not U.S. domestic law. As shown in *Jesner*, Congress has not routinely ascribed liability under international law to the conduct of domestic U.S.

companies. There, the plurality considered whether any analogous statutes supported extending ATS jurisdiction to companies. *Id.* at 1403-05. The plurality found the obvious analog, the TVPA, all but dispositive. *Id.* at 1404. The TVPA is the only cause of action created by Congress under the ATS. In creating a remedy for torture in violation of international law, Congress "took care" to *exclude* liability for corporate conduct. *Id.* at 1403-04. A survey of other major jurisdictions confirms that the caution shown by the U.S. Congress is not unusual.

Like corporate liability, aiding and abetting liability relates to specific *conduct*, and accordingly cannot be recognized under the ATS absent universal consensus on its specific contours. Here too, there is none. Although, under the Rome Statute, individuals (but not corporations) generally may be prosecuted for certain forms of accessorial conduct, the treaty does not delineate the substance of that standard to anywhere near the level of specificity required by *Sosa*. Indeed, different courts of appeals searching for an international norm as to even a single element of aiding and abetting—the *mens rea* element—including by reference to the Rome Statute, have reached different conclusions. *Compare, e.g.*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d at 254, 275-77 & n.12 (2d Cir. 2007) (Katzmann, J., concurring) ("purpose"), *with Doe I v. Unocal Corp.*, 395 F.3d 932, 950-53 & nn.26-27 (9th Cir. 2002) ("knowledge"). A survey of major jurisdictions confirms that the conduct required to support accessorial liability is highly varied and unsettled, including as applied to corporate conduct.

B. Nations Diverge Widely on Their Recognition of Corporate Liability and the Circumstances Under Which It Will Arise.

A survey of major jurisdictions confirms that there is no consensus for ascribing criminal liability to corporate conduct for offenses under *domestic* laws—let alone violations of *international* law. Rather, nations vary dramatically and fundamentally on these issues. The absence of consensus goes beyond the nature of corporate personality to fundamental differences relating to corporate conduct and how corporate culpability is assessed, corporate *mens rea* determined, and when the conduct of employees and agents can bind the corporation.

This survey also shows that there is no universal, specific, and obligatory norm of corporate *aiding and abetting* conduct, which is sufficient to resolve this case. A number of major jurisdictions have not extended aiding and abetting liability to corporate conduct within their domestic systems, and even those that have done so differ substantially as to how the elements of an offense are established. Indeed, again, Congress in the TVPA did not provide for aiding and abetting liability—after not providing for corporate liability. Here, Count III of the operative complaint is for aiding and abetting "torture," precisely a cause of action that Congress excluded from U.S. law. *See* Pet. J. App. 341-342.

1. Major Jurisdictions Take Fundamentally Distinct Approaches to Corporate Liability.

a. *Criminal Liability Generally.* Nations differ on whether corporations may be criminally liable at all. Germany, Italy, Russia, and Sweden currently do not ascribe criminal liability to corporate conduct. Grundgesetz [GG] [Basic Law], Art. 20 par. 3 (Ger.); *id.* Art. 103 par. 2 (the principle *nulla poena sine culpa* excludes corporations); Costituzione [Cost.] (It.), Art. 27 (criminal responsibility is personal); Ugolovnyĭ Kodeks Rossiĭskoĭ Federatsii [UK RF] [Criminal Code] art. 19 (Russ.) ("Only a sane natural person . . . shall be subject to criminal liability"). Instead, countries impose administrative penalties or fines on corporations for corporate crimes committed by natural persons associated with companies. *See* Gesetz über Ordnungswidrigkeiten [Administrative Offenses Act], Sec. 30 (Ger.) (corporation may be fined for criminal offenses committed by directors, officers, or senior managers that violated the corporation's duties or enriched it); Decreto Legislativo 8 giugno 2001, n. 231 [Legislative Decree no. 231], G.U. Giu. 19, 2001 (It.) (corporation may be administratively liable for criminal offenses committed by directors, executives, and other persons acting on behalf of the corporation); Brottsbalken [BrB] [Penal Code] 36:7 (Swed.) (limiting to a fine corporate liability for a crime committed in the exercise of business activities).

Even amongst countries that hold corporations criminally liable, the framework for doing so varies. The United Kingdom, Canada, and the Netherlands

recognize a general principle of corporate criminal liability, such that a corporation could potentially be liable for any crime for which an individual could be liable. *See* Interpretation Act 1978, c. 30, § 5, sch. 1 (UK) ("'Person' includes a body of persons corporate or unincorporated."); *id.* at §§ 22-23, sch. 2(4)(5) ("The definition of 'person', so far as it includes bodies corporate, applies to any provision of an Act whenever passed relating to an offence punishable on indictment or on summary conviction."); Criminal Code (R.S.C., 1985, c. C-46), § 2 (Can.) (businesses are included within the definition of "every one, person and owner"); Wetboek van Strafrecht [Sr] [Penal Code] Art. 5:51 (Neth.) (no distinction between criminal liability of natural and legal persons). Other countries, such as Japan, recognize corporate criminal liability only where a statute explicitly provides for it. *Compare* Keihō (Penal Code) (Japan) (no provisions to punish legal persons), *with* Companies Act, Act No. 86 of 2005, art. 975 (Japan) (imposing criminal penalties on corporations). France historically held companies liable only for specific offenses, but since 2004 recognizes general corporate criminal liability. Loi 2004-204 du 9 mars 2004, portant adaptation de la justice aux évolutions de la criminalité [Law 2004-204 of 9 March 2004, Adapting Justice to Developments in Crime] art. 54, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 10, 2004, p. 4567 (Fr.). Brazil generally does not hold corporations criminally liable, except for certain environmental crimes. *See* Luz & Spagnolo, *Leniency, Collusion, Corruption, and Whistleblowing*, 13 J. of Competition L. & Econ. 729, 745 (2017). Instead, Brazil imposes civil and

administrative liability on corporations, with the opportunity for leniency if the corporation implements compliance models. *See id.* at 744-745 & nn.70, 75 & 77.

b. *Whose Conduct is Ascribed to the Company?* Under the "identification" or "attribution" model, followed by the United Kingdom, Canada, and France, the acts of certain corporate officers or senior managers may be treated as the acts of the corporation itself, even if not authorized. *See Lennard's Carrying Co., Ltd. v Asiatic Petroleum Co., Ltd.* [1915] AC 705 (HL) (UK);[3] Code pénal [C. pén] [Penal Code] art. 121-2 (Fr.);[4] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 (S.C.C.)

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[3] The United Kingdom generally imposes criminal liability based on the acts of senior corporate leaders who form the "directing mind" of the corporation, but in limited circumstances may also hold corporations vicariously liable for acts of lower-level employees. *Compare Tesco Supermarkets, Ltd. v. Nattrass*, [1972] A.C. 153 (corporation not liable for acts of store manager who was not the directing mind of the company), *with Tesco v. Brent London Borough Council* [1994] 2 All ER 99 (HL) (corporation liable for the acts of a store clerk based on vicarious liability).

[4] France holds corporations criminally liable only for the wrongful acts of "organs or representatives," meaning persons to whom the articles of incorporation grant powers of direction, management, or administration, or who act in the name of and on behalf of the corporation. Code pénal [C. pén.] [Penal Code] art. 121-2 (Fr.); *see* Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Apr. 21, 2020, Bull. crim., No. 19-84.506 (Fr.) (discussing identity of representatives whose acts may give rise to corporate liability); Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., Dec. 17, 2003, Bull. crim., No. 00-87872 (Fr.) (same).

(Can.) (adopting "directing mind and will" standard for ascribing the acts of officers to a corporation). Some, but not all, countries that follow the identification approach require the act to be committed in the interests of the corporation for corporate liability to attach. *See, e.g.*, *Canadian Dredge & Dock Co.*, [1985] 1 S.C.R. 662 (S.C.C.) (Can.). In most countries following the "identification" approach, *all* elements of an offense must be proven as to a specific individual or group of individuals. *See, e.g.* Cour de cassation [Cass.] [Supreme Court for Judicial Matters], crim., June 7, 2017, Bull. crim., No. 15-87.214 (Fr.); *see also* Jennifer Zerk, Office of the UN High Commissioner for Human Rights, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* 33 (2013) (hereinafter "UNHCHR Report"). Yet in the Netherlands, a legal person may be criminally liable based on the collective acts and knowledge of multiple individuals within the corporation, UNHCHR Report at 34, and in Canada the knowledge and acts of multiple principal officers may be aggregated to determine whether the corporation behaved negligently, even if those individuals' acts do not on their own reach the level of negligence, *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*, [1985] 22 D.L.R. (4th) 410 at 430-31 (Can. Ont. C.A.).

Countries using an "organizational" approach may find a corporation criminally responsible for a wrongful act without determining that *any* natural person, acting individually or collectively as an agent for the corporation, has committed the elements of

the offense. Under this approach, the focus often is on organizational failures, such as lack of control or poor corporate culture. *See Criminal Code Act 1995*, pt 2.5, div 12, s 12.3 (Austl.). Japan and Italy go so far as to presume a company criminally or administratively liable, respectively, when their agents commit certain wrongful acts, though in Italy the presumption applies only to acts by high-level employees or officers. In both countries, this shifts the burden to the corporation to show it instituted adequate safeguards against wrongdoing, such as by following certain organizational and management models and demonstrating efforts at diligence and control. *See, e.g.*, Labor Standards Act, Act No. 49 of 1947, art. 121 (Japan); Decreto Legislativo 8 giugno 2001, n. 231, art. 6, G.U. Giu. 19, 2001 (It.).

Still other countries use a *combination* of attribution and organizational models. Germany may attribute intentional misconduct by a senior officer to a corporation to establish a corporation's civil liability, but German case law simultaneously obliges a corporation to appoint board members to ensure third parties are not harmed by the corporation's activities, and the corporation may be liable for failing to meet these organizational duties if injury results. Bürgerliches Gesetzbuch [BGB] [Civil Code], Secs. 31, 823 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 20, 1971, file no. VI ZR 232/69 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] May 13, 1995, judgment of 13.05.1955, file no. I ZR 137/53 (Ger.).

In the civil context, Germany holds corporations liable only for the acts of directors, corporate officers,

or senior managers. Bürgerliches Gesetzbuch [BGB] [Civil Code], Sec. 31 (Ger.) ("[T]he association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business . . . ."). France and Japan may hold a corporation civilly liable for the acts of directors and senior managers, as well as ordinary employees. Cour de cassation [Cass.] [Supreme Court for Judicial Matters], civ., September 25, 2012, Bull. civ., No. 10-82.938 (Fr.) (corporation civilly liable based on conduct of representative); Code civil [C. civ.] [Civil Code] art. 1242 (Fr.) (masters may be liable for damage caused by their servants in the functions for which they have employed them); Companies Act, Act No. 86 of 2005, arts. 349, 350, 354 (Japan) (company may be liable for torts of a representative director); Minpō [Civ. C.] [Civil Code] Act No. 89 of 1896, art. 715 (Japan) (company may be civilly liable for wrongful acts of employees). The United Kingdom also holds companies liable for the torts of representatives and employees at varying levels of seniority, but acts of employees must be authorized by individuals who form the "directing mind" of the corporation to give rise to corporate liability. *See Lennard's Carrying Co., Ltd. v Asiatic Petroleum Co., Ltd.* [1915] AC 705 (HL) (UK).

c. *Corporate Mens Rea.* There also is no consensus on whose mental state is ascribed to corporate conduct. In the United Kingdom and Canada, the mental states of top officers or managers are imputed to the company itself for criminal liability. *See Tesco Supermarkets, Ltd. v. Nattrass*,

[1972] A.C. 153, 169-71 ("[The living person] speaks through the *persona* of the company, with his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then the guilt is the guilt of the company."); Criminal Code (R.S.C., 1985), c. C-46, § 22.2 (Can.) (mental state of senior officers who commit criminal acts with the intent to benefit the corporation may give rise to corporate criminal liability). In France, corporate criminal liability depends on establishing *mens rea* as to an organ or representative of the corporation who is a natural person, but this is not treated as the corporation's own mental state. *See* Code pénal [C. pén.] [Penal Code] art. 121-3 (Fr.). In the civil context, France will impose liability on corporations for the conduct of employees, including low-level employees, without imputing a mental state to the corporation. *See* Code civil [C. civ.] [Civil Code] arts. 1240-1241 (Fr.) (providing for civil liability when fault causes damage). In Australia, the Criminal Code, in addition to ascribing the mental states of directors or high managerial agents to the corporation, determines "fault" as to criminal liability through an analysis of the corporation's organization and culture. *See Criminal Code Act 1995*, pt 2.5, div 12, s 12.3 (Austl.) (corporate *mens rea* may be established by showing a corporation "expressly, tacitly or impliedly authorised or permitted the commission" of an offense, including through "a corporate culture . . . that directed, encouraged, tolerated or led to non-compliance").

d. Further evidencing the absence of international consensus are nations' differing legislative approaches to holding corporations liable for violations of international human rights law. In

France, companies are required to implement due diligence plans to prevent human rights abuses resulting from their activities, and the activities of companies they directly or indirectly control and subcontractors or suppliers with whom they have relationships. Failing to implement a plan can lead to civil liability. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law no. 2017-399 of 27 March 2017, on the Duty of Vigilance for Parent and Instructing Companies], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 28, 2017 (Fr.); Code de commerce [C. com.] [Commercial Code] art. L. 225-102-5 (Fr.). Germany, by contrast, has announced that corporations are "expected" to implement a corporate due diligence plan, but currently does not impose legally enforceable obligations to do so. Federal Republic of Germany, Foreign Office, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights* (2017). Italy subjects companies to administrative liability for offenses listed in Legislative Decree No. 231/2001, including human rights violations, committed in the company's interest and related to an "organizational fault" within the company. But rather than imposing a legal obligation to conduct diligence, Italian law offers corporations immunity from administrative liability in exchange for adopting organizational "models" that identify and protect against the listed offenses. *See* FIDH, *Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation?* 5 (2019). Countries such as Australia have given effect to international human rights

agreements broadly through their domestic criminal codes (*see, e.g.*, *Criminal Code Act 1995*, divs 268, 270, 271 (Austl.)), while other countries, including Canada and Japan, prohibit certain human rights violations as a matter of domestic law, but have not developed frameworks imposing obligations on corporations directly.

The absence of a consensus approach to corporate conduct relating to international law crimes is well recognized. For example, in 2016, the European Parliament passed a motion on corporate liability for serious human rights abuses in third countries precisely because "a global holistic approach to corporate liability for human rights abuses is still lacking." Corporate Liability for Serious Human Rights Abuses in Third Countries, Eur. Parl. (DOC. INI 2015/2315) (2016).

2. Corporate Conduct Relating to Aiding and Abetting Liability Is Even More Fraught and Unsettled.

a. *Generally.* Aiding and abetting liability as a general matter, whether for natural persons or corporations, is even more unsettled.[5] Jurisdictions

[5] Indeed, civil aiding and abetting liability is "at best uncertain in application" even within the United States itself. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181-82 (1994) (noting that state courts, legislatures, treatises, and the Restatement (Second) of Torts take different approaches). If the jurisdictions of a single country cannot reach "definite content and acceptance" on civil accessorial liability, then, *a fortiori*, respondents cannot reach the showing

take varied approaches to whether, and how, to regulate conduct relating to aiding and abetting activity, such as through "blanket" aiding and abetting statutes or instead a situational approach. The United Kingdom, for example, takes the blanket approach to criminal offenses. *See* Accessories and Abettors Act 1861, 24 & 25 Vict. c. 94, § 8 (Eng.) (as amended by Criminal Law Act 1977, c. 45, § 65(4), sch. 12 (UK)). French law expressly provides a similar, universal aiding and abetting approach, though with separate provisions expressly tailored to corporations. *See* Code pénal [C. pén.] [Penal Code] arts. 121-2, 121-6, and 121-7 (Fr.)). Germany's blanket approach, by contrast, covers only natural persons and not corporations. *See* Strafgesetzbuch [StGB] [Penal Code] § 27 (Ger.)). As to civil liability, some nations, like Canada, do not recognize civil aiding and abetting liability at all. *See Lee v. Transamerica Life Canada*, [2017] BCSC 84 (B.C.).

b. *Actus Reus and Causation.* Even when nations do ascribe aiding and abetting liability to corporate conduct, they vary as to the required *actus reus* and its causal connection to the principal harm. *See* UNHCHR Report at 37. Some nations require the *actus reus* to be "indispensable" to the commission of the crime. *See* Thompson, Ramasastry, & Taylor, *Translating* Unocal*: The Expanding Web Of Liability For Business Entities Implicated In International Crimes*, 40 Geo. Wash. Int'l L. Rev. 841, 864 & n.108 (2009) (hereinafter, "*Translating* Unocal"); UNHCHR

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demanded by *Sosa* under international law. *See Sosa*, 542 U.S. at 732.

Report at 36-37. Others provide for liability where the acts "merely contribute in some manner to the crime," *id.*, and still others require a showing of "substantial" assistance. *See id.* at 860, 864 & n.108. Countries further disagree as to whether affirmative acts are necessary or failure to act will suffice. *Id.* at 863 & nn.105-107; UNHCHR Report at 38.

c. *Mens Rea.* The approaches to *mens rea* also substantially differ among nations. Countries broadly adopt one or more of three standards: "intent," or providing assistance with the intent to complete the principal crime; "knowledge," or providing assistance with the knowledge that the assistance could aid in completing the principal crime; and/or "*dolus eventualis*," or providing assistance with awareness of the risk that the perpetrator will complete the principal crime. *See Translating* Unocal, 40 Geo. Wash. Int'l L. Rev. at 860-61 & nn.87-92, 864-65 & nn.113-116; UNHCHR Report at 38 (comparing 11 countries' approaches to *mens rea*; summarizing three primary formulations). A single jurisdiction will even apply different standards in different contexts. *See id.* at 864-65 & n.116; UNHCHR Report at 38.

Under *Sosa*, these varied approaches to how corporate conduct is assessed, and when and how certain conduct supports aiding and abetting, ends the analysis in this case because it establishes that there is no universal and obligatory approach. *See also* UNHCHR Report 108-09 (observing that "[a]chieving a high level of convergence" in practice across states "would either mean, for many States, creating separate rules for aiding and abetting in relation to gross human rights abuses specifically, or

making reforms to the general law to bring this in line with the consensus concerning liability for gross human rights abuses").

II. CAUTION REQUIRES CONGRESS TO GRANT SPECIFIC AUTHORITY FOR CORPORATE CONDUCT LIABILITY—PARTICULARLY FOR AIDING AND ABETTING CRIMES UNDER INTERNATIONAL LAW

Under *Sosa*, identifying "international law norms that are 'specific, universal, and obligatory' . . . is only the beginning of defining a cause of action" under the ATS. *Kiobel*, 569 U.S. at 117. Even if corporate aiding and abetting liability for crimes under international law were sufficiently normative, "it must be determined further whether allowing th[e] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority" before corporate conduct liability—and at a minimum, corporate conduct for aiding and abetting liability—"can be imposed." *Jesner*, 138 S. Ct. at 1399.

Here, it is the latter for two reasons: (i) the nature of aiding and abetting liability generally has required legislative action, even within the confines of U.S. law, and particularly for *corporate* aiding and abetting; and (ii) given the significant disparities in how corporate conduct is assessed under the laws of major nations and the remote nature of the claims being asserted, this is particularly an area where Congressional action is required.

A. The Actions of the First Congress Confirm that the ATS Does Not Grant Jurisdiction Over Causes of Action for Aiding and Abetting Violations of International Law.

Caution is warranted before establishing jurisdiction by judicial fiat for aiding and abetting an international law violation because Congress has expressly demonstrated that it knows how to authorize such claims but did not do so under the ATS. "[S]tatutory interpretation begins with the text." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (citation and internal quotation marks omitted). The 33 words of the ATS make no mention of aiding and abetting, or anything that might include accessorial liability. Rather, for ATS jurisdiction to exist, the defendant must have "committed" a "tort" "in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. An aiding and abetting claim is not within the ambit of the jurisdictional grant made by Congress.

"[A]iding and abetting liability reaches persons *who do not engage in the proscribed activities at all*, but who give a degree of aid to those who do." *Cent. Bank*, 511 U.S. at 176 (emphasis added). In the context of the ATS, the jurisdictional grant applies only to an alien's suit against the perpetrators of a tort under international law—not persons who only assist the perpetrators. The issue "is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* at 177. By the statute's plain text, it is not. The Court "cannot amend the statute to create [jurisdiction of] acts that are not

themselves within the meaning of the statute." *Id.* at 177-78.[6]

Significantly, the First Congress, which enacted the ATS, expressly showed that it "knew how to i[nvoke] aiding and abetting liability when it chose to do so" (*Cent. Bank*, 511 U.S. at 176)—and specifically understood this as to claims based on international law. That same Congress also passed the Act for the Punishment of Certain Crimes Against the United States, making piracy a federal felony punishable by death. But that Act then *separately* criminalized acting as an "accessory to such piracies" by "knowingly and wittingly aid[ing] and assist[ing], procur[ing], command[ing], counsel[ing] or advis[ing] any person or persons, to do or commit any . . . piracy aforesaid." Act of April 30, 1790, ch. 9, §§ 8, 10, 1 Stat. 112, 114 (1790). By contrast, with respect to the other two crimes then recognized under international law and covered by the ATS (safe conduct and the safety of ministers or ambassadors), Congress *did not act as broadly*. The Act made it a federal crime to "violate any safe conduct" or "assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister." But, unlike

[6] That some treaties and international tribunals may generally recognize (individual) liability for aiding and abetting violations of the law of nations, does not mean there is an international consensus that—or when—such conduct (much less corporate aiding and abetting conduct) is itself a violation of the law of nations.

piracy, the Act did *not* then outlaw aiding and abetting those violations. *Id.*, § 28, 1 Stat. 112, 118.[7]

This shows that the First Congress expressly understood how to include aiding and abetting a crime under international law within the ambit of a statute when it intended to do so—and when it did not. Under these circumstances, it must be presumed that Congress did not intend to include aiding and abetting violations of the law of nations generally within the ambit of the ATS. *Cent. Bank*, 511 U.S. at 177; *cf. Sosa*, 542 U.S. at 711 n.9 (2004) (rejecting "[t]he Government's request that we read that phrase ['act or omission'] into the foreign country exception

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[7] In criminalizing aiding and abetting piracy, the First Congress went beyond "the widely accepted definition of the international crime of 'general piracy," which at the time covered only "'any person' who committed robbery 'upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state.'" Samuel T. Morison, *Accepting* Sosa*'s Invitation: Did Congress Expand the Subject Matter Jurisdiction of the Alien Tort Statute in the Military Commissions Act?*, 43 Geo. J. Int'l L. 1097, 1116 (2012); *see The Chapman*, 5 F. Cas. 471, 474 (N.D. Cal. 1864) (quoting then-to-be Chief Justice Marshall cautioning against "confounding general piracy," "under the law of nations," "with piracy by statute"). Further highlighting the need to allow Congress to determine the nature and scope of aiding and abetting liability is that it then took over 80 more years for Congress to extend aiding and abetting beyond a few individual offenses like piracy. *See, e.g.*, Act of July 14, 1870, ch. 254, § 2, 16 Stat. 254, 255 (1870) (accessories to false documentation in immigration cases); Act of April 6, 1869, ch. 11, 16 Stat. 7 (1869) (aiding or abetting embezzlement); Act of March 4, 1909, ch. 14, § 332, 35 Stat. 1088, 1152 (1909) (codified as amended at 18 U.S.C. § 2(a) (providing criminal accessorial liability for aiding any "offense defined in any law of the United States").

[to the waiver of immunity provided in the Federal Tort Claims Act], when it is clear Congress knew how to specify 'act or omission' when it wanted to"). The rule recognized in *Central Bank* should apply with greater force here, where the Court has emphasized the need for extreme "judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute." *Sosa*, 542 U.S. at 725.[8] On this ground alone the Court should reverse the decision below and remand for dismissal.[9]

B. It Is for Congress to Determine Whether and When Corporate Conduct for Aiding and Abetting Torts Under International Law Should Be Recognized Under the ATS, Especially Where the Primary Tortfeasors,

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[8] That the ATS is "strictly jurisdictional" should not limit application of *Central Bank*. As in *Kiobel*—where this Court applied the presumption against extraterritoriality, typically applied to statutes regulating conduct, to the ATS—"the principles underlying the canon of interpretation" announced in *Central Bank* should "similarly constrain courts considering causes of action that may be brought under the ATS." 569 U.S. at 108-09.

[9] Because, based on the nature of the ATS, this issue is jurisdictional, it may be raised and resolved whether or not it is encompassed within the granted questions presented. *See Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 (2017); *see also* Sup. Ct. R. 24.1(a). The operative complaint relies solely on the ATS for jurisdiction. *See* Pet. J.A. 305. While respondents had alleged "vicarious liability" in addition to aiding and abetting, the district court found the former allegations inadequate, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1111-1113 (C.D. Cal. 2010), and respondents did not appeal that ruling.

Their Conduct, and Their Victims Are Outside the United States.

This Court has cautioned that any judicially created cause of action under the ATS "inevitably must" examine "the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33; *see Jesner*, 138 S. Ct. at 1399 ("[I]t must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion . . . ."). Significant practical considerations counsel against a judge-made transformation of the ATS into an aiding-and-abetting jurisdictional hook for principal international law offenses in far-away places committed by persons (and/or governments) not party to the litigation. Moreover, pending legislation shows that Congress today is focused on the policy issues of corporate conduct and potential liability vis-à-vis international human rights law. It is for Congress to determine the scope and reach of U.S. law in this area.

1. Contrary to respondents' assertion that "allegations against a private corporation assisting in private wrongs do not entangle foreign governments *at all*" (*see* Resp'ts Br. in Opp'n to Pet. for Writ of Cert. 21 (emphasis added)), the United States has repeatedly stressed exactly the opposite in other ATS litigation. *See Exxon*, 654 F.3d at 89-90 (Kavanaugh, J., dissenting) (summarizing repeated statements by the Departments of State and Justice in 2002, 2003, and 2008 that decade-long ATS litigation against U.S. corporation concerning conduct in Indonesia

harmed, *inter alia*, national security interests and foreign relations with Indonesia).

2. These foreign relations concerns then merge with significant extraterritorial and practical concerns: For example, much or all of the necessary evidence relevant to the parties' primary claims, defenses, and potential damages (including witnesses, physical evidence, and even documents) will be outside the subpoena power of federal district courts. *See* Fed. R. Civ. P. 26(b). Having admitted that their aiding and abetting claims necessarily would require this very evidence of principal offenses by principal actors—indeed, in some cases, as alleged here, principal offenses that are "endemic" and "continu[ing]" (*see* Resp'ts Br. in Opp'n 21), respondents ignore that the tools for managing this type of mass, class action discovery are widely acknowledged to be "unpredictable," "notoriously slow," and "cumbersome."[10] *See, e.g.*, Timothy P. Harkness et al., Fed. Jud. Ctr., *Discovery in International Civil Litigation: A Guide for Judges* 22 (2015). More importantly, given the inherently extraterritorial nature of the primary claims, foreign policy implications would routinely adhere to U.S. courts issuing discovery requests to the very foreign

[10] Even in *typical* tort cases in which subject-matter jurisdiction *unquestionably* exists, this Court has recognized that federal courts may decline to exercise jurisdiction where these types of practical difficulties are present. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981) ("[F]ewer evidentiary problems would be posed if the trial were held in Scotland" because "[a] large proportion of the relevant evidence is located in Great Britain.").

governments allegedly allowing violations of international law by their own citizens, within their own borders, and under their own national laws—especially discovery intended to secure a final judgment, by a *U.S. court*, that the other nation's citizens had committed serious international crimes. These are "the very foreign-relations tensions the First Congress sought to avoid" with the ATS. *See Jesner*, 138 S. Ct. at 1406.

3. To address precisely these kinds of concerns, Congress conferred sovereign immunity from civil tort suits on foreign states and their agencies and instrumentalities unless the *entire tort* is completed in the United States. 28 U.S.C. § 1605(a)(5) (the "FSIA") (abrogating immunity only for torts "occurring in the United States"). The FSIA counsels caution with regard to non-U.S. tort claims that necessarily implicate foreign governments. It should take an express act of Congress before U.S. courts may be used to burden non-U.S. legal systems with compelling cooperation from either the private parties who are allegedly violating international law, or the government ostensibly allowing those violations to occur and continue (and whose judicial system also would be asked to enforce any judgment).

4. *Sosa* teaches that the better approach is to let the expertise and considered judgment of the political branches fashion tailored solutions to violations of international law like the scourge of modern slavery. In addition to the TVPA, discussed above, Congress is already considering relevant legislation. *See, e.g.*, Slave-Free Business Certification Act of 2020, S. 4241, 116th Cong. (2020) ("S. 4241") (proposing

mandatory supply chain audits to prohibit domestic companies from indirectly purchasing from sellers using forced labor; providing civil damages, punitive damages, and injunctive remedies); Leveraging Information on Foreign Traffickers Act, S. 4478, 116th Cong. (2020) ("S. 4478") (proposing mandatory State Department reports to Congress to address human trafficking and "modern slavery"); Business Supply Chain Transparency on Trafficking and Slavery Act of 2020, H.R. 6279, 116th Congress (2020) ("H.R. 6279") (proposing securities law amendments to require publicly traded companies to "disclose information describing any measures the company has taken to identify and address conditions of forced labor, slavery, human trafficking, and the worst forms of child labor within the company's supply chains"). U.S. states also have enacted and are considering additional supply chain regulations. *See, e.g.*, California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43 (Deering 2020) (enacting audit and disclosure requirements and public enforcement); An Act Relating to Transparency in Agricultural Supply Chains, S.B. 5693, 2020 Reg. Sess. (Wash. 2020) (proposing private right of action to enforce disclosure requirements regarding supply chains).[11]

[11] Policymakers in the United States are not alone in these projects. For example, the European Commission is currently considering proposing a new EU law that would require corporations to carry out due diligence into supply chains extraterritorially—highlighting again that this legal responsibility is not currently universally recognized. European Commission Directorate General for Justice and Consumers,

5. Further counseling caution by the courts, these proposed legislative responses—all directed at the harms for which respondents are suing—evidence a range of approaches. For example:

- What corporations or corporate activity should be covered. *See* H.R. 6279 (determining applicability with reference to securities laws); S. 4241 (determining applicability by, *inter alia*, worldwide gross receipts).

- Whether to enforce by public action or a private right of action. *Compare, e.g.*, S. 4241 (providing public enforcement by the Attorney General or the Secretary of Labor), *with* TVPA § 2, 28 U.S.C. § 1350 (note) (providing private right of action).

- Whether to impose an exhaustion requirement regarding the jurisdiction where the primary wrongdoing occurred. *See* TVPA § 2(b).

- Whether to allow for punitive damages and injunctive or other remedies. *See* S. 4241 (permitting punitive damages up to $500,000,000 and declaratory and injunctive relief).

Study on Due Diligence Requirements through the Supply Chain (2020), https://bit.ly/31VhULA; *see also* Australian Law Reform Commission, *Final Report: Corporation Criminal Responsibility*, 461-62 & nn.72-77, 477 & nn.132-134 (Apr. 2020) (noting mandatory due diligence regimes adopted or proposed in France, the Netherlands, Switzerland, Finland, Norway, Denmark, Austria, Germany, and Canada).

- Whether to provide a statute of limitations, and if so, how long. *See* TVPA § 2(c) (providing 10-year statute of limitations).

These variations highlight why the Court should decline to fashion an omnibus approach to corporate aiding and abetting liability for alleged violations of international law. Rather, it should defer to Congress and the Executive in deciding how the United States should address the complex cross-border issues presented by certain violations of international law. Given the limited jurisdictional grant of the ATS, and the teachings of *Sosa*, this Court should not mandate a single approach as to how U.S. companies should confront these types of issues as they buy goods from abroad.

CONCLUSION

For the foregoing reasons, the Court should reverse the holding below with respect to corporate liability—or at a minimum, corporate aiding and abetting liability—under the ATS.

Respectfully submitted,

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