No. 24A____

IN THE

Supreme Court of the United States

CISCO SYSTEMS, INC., JOHN CHAMBERS, AND FREDY CHEUNG,

Applicants,

v.

DOE I, DOE II, IVY HE, DOE III, DOE IV, DOE V, DOE VI, CHARLES LEE, ROE VII, ROE VIII, LIU GUIFU, DOE IX, WEIYU WANG, AND THOSE INDIVIDUALS SIMILARLY SITUATED,

Respondents.

UNOPPOSED APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 13.5, Applicants Cisco Systems, Inc., John Chambers, and Fredy Cheung (collectively, Applicants) respectfully request a 60-day extension of time to file a petition for a writ of certiorari—from the current due date of December 2, 2024, to and including January 31, 2025—to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1] Respondents do not oppose this requested extension.

The court of appeals entered its judgment on July 7, 2023 (App. A), and denied Applicants' timely petition for rehearing and rehearing en banc on September 3, 2024 (App. B). The panel decision was divided, with Judge Christen in partial dissent.

[1] Applicant Cisco Systems, Inc. has no parent corporation, and no publicly held companies own 10% or more of its stock.

App. A at 84. Judge Christen voted for panel rehearing and joined six other judges in voting for rehearing en banc. App. B at 2-3. Judge Bumatay issued an opinion dissenting from the denial of rehearing en banc on behalf of six judges. *Id.* at 13-39.

This Court would have jurisdiction under 28 U.S.C. § 1254(1). This application is being filed more than ten days before the current due date. S. Ct. R. 13.5, 30.2.

BACKGROUND

This case involves a complaint initially filed by Respondents against Applicants in 2011 invoking the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note). Respondents' operative complaint (as amended in 2013) alleges that Applicants aided and abetted Chinese officials' commission of international law violations in China against Chinese nationals by selling networking equipment to Chinese law enforcement authorities more than two decades ago—at a time when such sales were not controlled by applicable export regulations. C.A. ECF 10 ("ER") 29-115; *see* 15 C.F.R. § 742.7.

The district court dismissed Respondents' claims with prejudice. ER15-28; *see* ER5-14 (denying reconsideration). As to the ATS, the court ruled that Respondents' claims were impermissibly extraterritorial under *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and in any event that Respondents failed to adequately allege the mens rea or actus reus required for ATS aiding-and-abetting liability. ER21-27. The court dismissed the TVPA claims against Chambers and Cheung on the ground that the TVPA does not provide for aiding-and-abetting liability. ER25.

Respondents' appeal was twice argued and twice held in abeyance pending this Court's decisions in *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018), and *Nestlé USA,*

Inc. v. Doe, 593 U.S. 628 (2021). C.A. ECF 46, 72, 75. In a July 2023 decision authored by Judge Berzon and joined by Judge Tashima over the partial dissent of Judge Christen, the panel largely reversed the dismissal of Respondents' ATS and TVPA claims. App. A at 2-84. The majority concluded, among other things, that: (1) the ATS allows judicial implication of a private right of action for aiding-and-abetting liability, notwithstanding this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (App. A at 35-36); (2) separation of powers and international comity considerations did not favor dismissal, notwithstanding this Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Jesner* (App. A at 35-39); (3) the mens rea standard for ATS aiding-and-abetting claims is knowledge rather than purpose, notwithstanding contrary decisions from the Second and Fourth Circuits (App. A at 49-59); and (4) the TVPA recognizes aiding-and-abetting claims, notwithstanding *Central Bank* (*id.* at 74-83).

In her partial dissent (App. A at 84-93), Judge Christen dissented from the reinstatement of the ATS claims against Cisco. Judge Christen noted that, in this Court's "most recent decision on point," *i.e.*, *Nestlé*, "a majority of the Court agreed that the second step of the *Sosa* inquiry … demands that [courts] exercise judicial discretion to avoid creating foreign policy controversies." *Id.* at 88. Judge Christen warned that "a finding of liability in this case would necessarily require a showing that the Chinese Communist Party and Ministry of Public Security violated international law with respect to the Chinese-national Plaintiffs," which "could have serious ramifications for Sino-American relations, fraught as they already are." *Id.*

at 89. Judge Christen also would have solicited the views of the United States (*id.* at 91-92), dissenting from the panel majority's conclusion that the absence of an uninvited amicus brief from the United States permitted it to "infer a lack of concern from the government's silence" (*id.* at 32-43). Applicants filed a timely petition for panel and en banc rehearing. C.A. ECF 95.

On September 3, 2024, the Ninth Circuit issued an order in which Judges Tashima and Berzon voted to deny the petition for panel rehearing, while Judge Christen voted to grant the petition. App. B at 3. A vote to rehear the matter en banc was called and failed to receive a majority of votes of nonrecused active judges. *Id.* (Wardlaw, Nguyen and Collins, JJ., not participating). Judge Berzon, joined by Judges Tashima and Paez, submitted a statement respecting the denial of rehearing en banc. *Id.* at 3-13.

Seven judges dissented from the denial of rehearing en banc. Judge Christen dissented without a further opinion. App. B at 13. Judge Bumatay issued an opinion dissenting from the denial of rehearing en banc that was joined by Judges Callahan, Ikuta, Bennett, R. Nelson and VanDyke. *Id.* at 13-39. The dissent argued, among other things, that "any private claims under the ATS must come from federal common law, … so fashioning the scope of liability must be similarly guided by domestic law—meaning *Central Bank* controls." *Id.* at 30-31 (cleaned up). The dissent from denial further noted that "courts should not be in the business of creating causes of action, especially when Congress has spoken (or not spoken) in this very field," and courts

"should be especially reluctant to permit judicially manufactured causes of action that exacerbate foreign policy headaches rather than ease them." *Id.* at 34-35.

The Ninth Circuit unanimously agreed to stay issuance of the mandate pending resolution of a certiorari petition by this Court. C.A. ECF 103.

REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a petition for a writ of certiorari should be extended by 60 days—to and including January 31, 2025—for multiple reasons.

First, this is a significant and complex case that was pending in the court of appeals for nearly a decade, producing 93 pages of divided panel opinions and a denial of rehearing en banc over seven dissenting votes accompanied by 39 pages of opinions. *See* Apps. A & B. The appeal involves multiple claims under two separate statutes (the ATS and TVPA) against three different defendants—one corporate defendant (Cisco) and two individual defendants (Chambers and Cheung). That substantive and logistical complexity warrants additional time for preparation of the petition.

Second, Applicants anticipate that they will present multiple questions creating a significant prospect of certiorari, including (1) whether judicially implied aiding-and-abetting liability is available under the ATS in light of *Central Bank*; (2) whether judicially implied aiding-and-abetting liability is available under the ATS in this case given the separation-of-powers and foreign-policy limitations imposed by *Sosa* and *Jesner*; (3) whether any available aiding-and-abetting liability requires a mens rea of purpose or can be satisfied with a mens rea of knowledge; and (4) whether aiding-and-abetting liability is available under the TVPA.

Several of those questions are subject to express circuit conflicts or disagreements among leading jurists. *See, e.g.*, *Nestlé*, 593 U.S. at 639-40 (plurality opinion) (questioning whether courts should recognize any new causes of action under the ATS); *id.* at 657-58 (Alito, J., dissenting) (noting circuit conflict on mens rea question); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 85-87 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (addressing unavailability of aiding-and-abetting liability under the ATS and TVPA); *see also*, *e.g.*, Amicus Br. of United States at 8, *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021), *available at* 2020 WL 5498509 ("The Court should conclude that aiding and abetting is not cognizable under the ATS."). As indicated by those disagreements, the seven dissenting votes below, and the Ninth Circuit's stay of the mandate, these questions present substantial grounds for certiorari and warrant additional time for preparation of the petition.

Third, although counsel for Applicants have been working diligently, the press of other matters will make preparation of the petition difficult absent an extension of time. Among other matters, counsel of record was appointed by this Court as *amicus curiae* in defense of the judgment below in *Glossip v. Oklahoma*, No. 22-7466, which was argued on October 9, 2024. Counsel of record also filed a petition for a writ of certiorari in *National Association of Realtors v. United States*, No. 24-417, on October 10, 2024, the reply for which will likely be due in November or December 2024. Counsel of record is further engaged in preparation of the merits reply brief in *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122, which is due to this Court in December 2024, and that case was recently set for argument on January 15, 2025. In addition,

counsel of record has been and is engaged in preparing: (1) opening and reply briefs in *County of Westchester v. Express Scripts*, No. 24-1639 (2d. Cir.); (2) opening and reply briefs in *City of Martinsville v. Express Scripts*, No. 24-1912 (4th Cir.); (3) an opening brief in *Nagase v. United States*, No. 25-1008 (Fed. Cir.); (4) a response brief in *EchoSpan, Inc. v. Medallia*, No. 24-4751 (9th Cir.); (5) a reply brief in *City of Buffalo v. Hyundai Motor America*, No. 24-2350 (9th Cir.); and (6) a reply brief in *City of Los Angeles v. Express Scripts*, No. 24-1972 (9th Cir.), all of which currently have filing deadlines in October through December 2024. Counsel of record also has oral argument scheduled for November 19, 2024, in *In re Beef and Pork Antitrust Litigation*, Nos. 18-cv-1776, 22-md-3031 (D. Minn.).

Finally, this application is unopposed.

CONCLUSION

For these reasons, the time to file a petition for a writ of certiorari in this matter should be extended by 60 days—from the current due date of December 2, 2024, to and including January 31, 2025.

Dated: November 1, 2024

Respectfully submitted,

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