No. 24-856

IN THE
Supreme Court of the United States

CISCO SYSTEMS, INC., ET AL.,
Petitioners,
v.
DOE I, ET AL.,
Respondents.

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

BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the American Free Enterprise Chamber of Commerce ("AmFree"). AmFree is a nonprofit entity organized consistent with I.R.C. § 501(c)(6). AmFree represents hardworking entrepreneurs and businesses across all sectors of the U.S. economy. Its members are vitally interested in the preservation of free markets, innovation, and the continued viability of our republic.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

"We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment); *see* Part I, *infra*.

But when it comes to the Alien Tort Statute, "unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law." *Sosa*, 542 U.S. at 750 (Scalia, J., concurring in part and concurring in the judgment).

This "is an extraordinary act that places great stress on the separation of powers." *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021) (op. of Thomas, J., joined by Gorsuch & Kavanaugh, JJ.); *see* Part II, *infra*. It also results in significant diplomatic strife with foreign nations, injecting the judiciary into a sphere it is ill-suited to handle, with potentially serious consequences for already-fraught international relations. *See* Part III, *infra*.

Further, the costs of such suits, which almost never succeed, deter investment by American corporations in foreign countries that would benefit the most from American ingenuity and standards. ATS suits thus ironically *increase* the risk of human-rights abuses. *See* Part V, *infra*.

This case presents an excellent vehicle for ending this misadventure. The Court should grant review.

ARGUMENT

I. The Legislative Power—Including Creating Causes of Action—Is Vested Exclusively with Congress.

Article I vests "legislative Powers" in Congress alone. U.S. Const. art. I, § 1. That power can be exercised only subject to certain stringent and precise procedural requirements such as bicameralism and presentment, subject to veto override procedures. U.S. Const. art. I, § 7. Congress through those procedural requirements is assigned the responsibility for enacting statutes creating federal jurisdiction. *See* U.S. Const. art. I, § 8, cl. 9. The parameters of legislative power extend not just to the announcement of new substantive federal law but also to the methods of enforcement of that federal law—e.g., whether to create a private cause of action.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020); *see Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, "[a]t bottom, creating a cause of action is a legislative endeavor." *Egbert v. Boule*, 596 U.S. 482, 491 (2022).

A second core structural feature of the federal government is the constitutionally limited assignment of federal courts to the resolution of certain enumerated matters. Article III permits federal courts to hear only certain limited categories of matters—"Cases" and "Controversies"—and this ensures that "federal courts exercise 'their proper

function in a limited and separated government.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "Under Article III, ... [f]ederal courts do not possess a roving commission to publicly opine on every legal question," nor do they have power to "exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *Id.* Rather, "federal courts instead decide only matters 'of a Judiciary Nature.'" *Id.* (quoting 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed. 1966)).

This structural reality, combined with the constitutionally ordained role of Congress and the President in the establishment (or not) of courts, causes of action, and permissible relief through statutory enactments, suggests that the entire enterprise of squinting to discern a cause of action from bare jurisdictional statutes is at odds with the Constitution's limited role for the judiciary. *See Nestle*, 593 U.S. at 636 (op. of Thomas, J., joined by Gorsuch & Kavanaugh, JJ.) ("[J]udicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers.").

As most pertinent here, this Court has already rejected the notion that courts can infer a cause of action for aiding-and-abetting liability from statutory silence. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). To be sure, that case addressed the Securities Exchange Act, but the reasoning is directly applicable here: Congress knows "how to impose aiding and abetting liability" but had not done so. *Id.* at 176. Then-Judge Kavanaugh has explained that *Central*

Bank "made crystal clear that there can be no civil aiding and abetting liability unless Congress expressly provides for it." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 87 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part). That makes the judicial recognition of aiding-and-abetting causes of action doubly improper: it violates separation of powers and also this Court's precedent.

II. Judicial Creation of ATS Causes of Action Is Barred by Separation of Powers.

The Alien Tort Statute, first enacted in 1789 and not meaningfully changed since, is "'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action for violations of international law." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 254 (2018); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004) ("As enacted in 1789, the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.")

"But the statute was not enacted to sit on a shelf awaiting further legislation. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of 'torts in violation of the law of nations.'" *Jesner*, 584 U.S. at 254. That limited category included only three "specific offenses": "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* (citing 4 W. Blackstone, *Commentaries on the Laws of England* 68 (1769)).

The "assumption" that federal courts would go on recognizing ATS causes of action, however, "depended

on the continued existence of the general common law," which this Court largely rejected in *Erie* in 1938. *Jesner*, 584 U.S. at 275 (Alito, J., concurring in part and concurring in the judgment).

"That left the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more." *Id.* Facing this "awkward" situation, the Court had two options: carve out an ATS exception to *Erie*, or decline to recognize (read "create") new causes of action under the ATS. But the Court has tried to have it both ways, declining to recognize new causes of action while never formally shutting the door on allowing exceptions in the future. *See Nestle*, 593 U.S. at 637; *Jesner*, 584 U.S. at 275–76.

The Court should not continue with one foot in *Erie* and one foot in *Swift v. Tyson*. As explained above in Part I, creating causes of action is inherently a legislative task, "even in the realm of domestic law." *Jesner*, 584 U.S. at 264. "The question is not what case or congressional action *prevents* federal courts from applying the law of nations as part of the general common law; it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist*." *Sosa*, 542 U.S. at 744 (Scalia, J., concurring in part and concurring in the judgment). No such exception exists for ATS suits, of course.

The usurpation of the legislative power to create causes of action is itself a sufficient basis to grant

review and reverse. But the problems with leaving the ATS door ajar run far deeper, as explained next.

III. ATS Causes of Action Interfere with Foreign Relations—the Quintessential Political Sphere.

The "separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS" because of the foreign-policy implications. *Jesner*, 584 U.S. at 264–65. "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 265.

Recall from Part I above that the "judicial role is to resolve cases and controversies," but the "Judiciary does not have the 'institutional capacity' to consider all factors relevant to creating a cause of action that will inherently affect foreign policy." *Nestle*, 593 U.S. at 639 (op. of Thomas, J., joined by Gorsuch & Kavanaugh, JJ.). ATS cases thus force courts to "navigat[e] foreign policy disputes" and "meddle in disputes between foreign citizens over international norms." *Jesner*, 584 U.S. at 281 (Gorsuch, J., concurring in part and concurring in the judgment). This yields a significant prospect of the judiciary triggering "collateral consequences" in the international realm. *Sosa*, 542 U.S. at 727.

In that sense, judicial intervention in this area "risk[s] doing exactly what Congress adopted the ATS to avoid: complicating or even rupturing this Nation's foreign relationships." *Nestle*, 593 U.S. at 645 (Gorsuch, J., concurring). Recall the "principal objective" of the ATS "was to avoid foreign

entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Jesner*, 584 U.S. at 255. But holding open the door for ATS actions—even if they never ultimately prevail—"cause[s] significant diplomatic tensions" with the nation whose conduct underlies the allegations. *Id.* at 271. It is therefore far from clear that "the United States would be embroiled in fewer international controversies if we created causes of action under the ATS." *Id.* at 279 (Alito, J., concurring in part and concurring in the judgment). Rather, "ATS cases based on acts occurring in foreign nations have often engendered conflict with other sovereign nations, rather than avoided it." *Exxon*, 654 F.3d at 77–78 (Kavanaugh, J., dissenting in part).

That has never been more true than in this particular case. The political branches are the ones that can decide how best to respond to China's behavior. *See, e.g.*, White House, *Fact Sheet: President Donald J. Trump Imposes Tariffs on Imports from Canada, Mexico and China*, Feb. 1, 2025, https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-imposes-tariffs-on-imports-from-canada-mexico-and-china/. But "Sino-American relations" are "fraught" enough without Ninth Circuit judges attempting to interlope by allowing foreigners to sue Petitioners under a not-even-thinly-veiled theory that accuses China of mass crimes, an accusation that "directly risks *heightening* diplomatic strife." Pet.App.131a (Bumatay, J., dissenting).

The risk of significant diplomatic tension means the judicial creation of ATS actions arguably works an even graver separation-of-powers violation than creation of *Bivens* actions, which represent the Court's other significant foray into creating causes of action. To be sure, *Bivens* lacked even a jurisdiction-creating statute like the ATS, but *Bivens* at least aimed to "enforce constitutional limits on our own State and Federal Governments' power," whereas ATS suits "claim a limit on the power of foreign governments over their own citizens, and [seek] to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727; *see id.* at 743 (Scalia, J., concurring in part and concurring in the judgment) ("[A]t least it can be said that *Bivens* sought to enforce a command of our *own* law—the *United States* Constitution.") (emphases in original).

As Justice Gorsuch aptly put it, "there are degrees of institutional incompetence and constitutional evil," *Jesner*, 584 U.S. at 292 (Gorsuch, J., concurring in part and concurring in the judgment), and it is difficult to imagine a task more ill-suited for the judiciary than creating or recognizing ATS causes of action.

IV. The Court Should Shut the Door on ATS Suits.

Given all of this, it's an understatement to say that litigation under the ATS "implicates serious separation-of-powers and foreign-relations concerns." *Jesner*, 584 U.S. at 256. The Court should get out of the game altogether. The *Jesner* majority correctly noted "there is an argument that a proper application

of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS," but the Court declined to resolve that question definitively. *Jesner*, 584 U.S. at 265. Justices Thomas, Gorsuch, and Kavanaugh, however, got it exactly right when they argued in *Nestle* that "there will always be a sound reason for courts not to create a cause of action for violations of international law." *Nestle*, 593 U.S. at 638. Like Justice Scalia before them, they recognized the Court should end the "judicial occupation of a domain that belongs to the people's representatives." *Sosa*, 542 U.S. at 747 (Scalia, J., concurring in part and concurring in the judgment).

To be sure, the Court has narrowed ATS liability over the years, chipping away at each particular cause of action as it came before the Court. Respectfully, the Court should "stop feigning some deficiency in these offerings" and close the "door *Sosa* should not have cracked" in the first place. *Nestle*, 593 U.S. at 644 (Gorsuch, J., concurring). The Court could perhaps decide to continue recognizing "those three torts that were well established in 1789," *id.* at 638, but the wiser move—and the one doctrinally consistent—would be to unambiguously end this judicial foray, root and stem.

As Judge Bumatay put it below, it's past time for the judiciary to recognize that when it comes to playing international relations, "we don't belong on the field at all." Pet.App.130a (Bumatay, J., dissenting).

* * *

"A self-governing people depends on elected representatives—not judges—to make its laws." *Nestle*, 593 U.S. at 644 (Gorsuch, J., concurring). That rule applies all the more to "[w]hether and which international norms ought to be carried into domestic law—and how best to accomplish that goal while advancing this country's foreign policy interests." *Id.* The Court should accordingly grant review and hold that if any ATS causes of action are to be recognized going forward, Congress must be the one to create them by express statutory language.

V. Ironically, ATS Suits Likely Increase Human-Rights Abuses by Deterring Foreign Investment by American Companies.

The separation-of-powers and foreign-relations harms caused by judicially created ATS suits are bad enough. But they also cause significant harm for American investment and ingenuity, which—ironically—makes human-rights abuses more likely to occur in foreign nations.

The U.S. government has previously told this Court that ATS suits "hinder global investment in developing economies, where it is most needed." Br. for United States as *Amicus Curiae* at 20, *American Isuzu Motors, Inc. v. Ntsebeza,* No. 07–919. There is the obvious explanation that companies "may be less likely to engage in intergovernmental efforts if they fear those activities will subject them to private suits." *Nestle*, 593 U.S. at 638. ATS suits often last upwards of a decade or more—this very case is now fifteen years old. Pet.24. Unsurprisingly, "[m]erely litigating

an ATS case can cost a corporation upwards of $15 million in attorneys' fees," a number that is likely on the low end these days, given increasing hourly rates. Joseph Downey, *Domestic Corporations and the Alien Tort Statute*, 1 U. Chi. Bus. L. Rev. 481, 484 (2022).

But despite their resource-intensive nature, very few ATS suits ever result in material victories for plaintiffs. "[S]ince the first ATS case was decided in 1793, only twenty-five cases have resulted in monetary judgments that were not subsequently overturned," and "only six out of these twenty-five awards appear to have been collected." Christopher Ewell et al., *Has the Alien Tort Statute Made A Difference?: A Historical, Empirical, and Normative Assessment*, 107 Cornell L. Rev. 1205, 1250 (2022).

Rather, "most ATS plaintiffs pursue litigation 'because they wanted to expose what had happened to them and to get a chance to air the facts, to tell their story in court.'" *Id.* at 1254. Telling their stories is important, of course, but doing so in the form of an ATS suit very well may cause the kinds of insidious harm the plaintiffs want to prevent.

That is because, as this Court has explained, ATS suits invite retaliatory suits in foreign courts against American companies. "If … the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle would imply that other nations, also applying the law of nations, could hale our corporations into their courts for alleged violations of the law of nations." *Jesner*, 584 U.S. at 269 (Kennedy, J.) (cleaned up). That would "subject American corporations to an immediate,

constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts." *Id.* And the inevitable result is to "discourage[] American corporations from investing abroad." *Id.* Although *Jesner* narrowed the ATS's scope regarding foreign companies, the statute is still wielded against American companies with a presence in other countries, e.g., Petitioner Cisco Systems.

Thus, ironically, ATS suits seeking to challenge alleged human-rights abuses may just make them more common by "deter[ring] the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Id.* at 270.

From both a practical and constitutional perspective, therefore, the best way to respond to China's abusive behavior is to let President Trump and Congress chart the most appropriate path. Absent a clear statutory cause of action, federal judges should play no role in such fraught matters of international relations.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition and reverse.

Respectfully submitted,

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March 13, 2025