No. 24-856

In the Supreme Court of the United States

CISCO SYSTEMS, INC., ET AL., PETITIONERS

v.

DOE I, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether courts may infer a cause of action for aiding and abetting a violation of international law under the Alien Tort Statute (ATS), 28 U.S.C. 1350.

2. If aiding-and-abetting claims are cognizable under the ATS, whether knowledge or purpose suffices to show the requisite *mens rea*.

3. Whether the express cause of action in the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (28 U.S.C. 1350 note), extends to claims of aiding and abetting torture.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to Questions 1 and 3 of the petition.

INTRODUCTION

This case presents an important question about the authority of federal courts to create a private right of action under the Alien Tort Statute (ATS), 28 U.S.C. 1350, against those who have allegedly aided and abetted tortious acts that violate international law. ATS suits against domestic corporations frequently involve claims that they aided and abetted misconduct abroad—which often implicate the conduct of foreign states in their sovereign territories. By requiring federal courts to determine whether the underlying conduct of foreign governments and officials was unlawful, aiding-and-

abetting actions pose significant risks to the United States' relations with foreign states and to the political branches' ability to conduct the Nation's foreign policy.

The Ninth Circuit fundamentally erred in recognizing aiding-and-abetting liability in a private cause of action under the ATS. Even assuming that the federal courts retain authority to create new ATS actions, there are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in this context. *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (citation omitted). First, such judge-made actions must follow Congress's lead and, even outside the ATS context, no civil aiding-and-abetting liability can exist without express statutory authority. Second, ATS aiding-and-abetting actions carry significant foreign-affairs implications that, consistent with the Constitution's separation of powers, foreclose their creation by courts. And third, courts must look to analogous statutes for guidance on the appropriate boundaries of judge-made actions. Here, the only private cause of action that Congress has created under the ATS is in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note). But the TVPA does not reflect a decision by Congress to impose aiding-and-abetting liability. There should, accordingly, not be such secondary liability under the ATS.

Although there is no conflict in the circuits about aiding-and-abetting liability under the ATS, the United States has repeatedly urged this Court to grant review on the question, and many lower-court judges have expressed disagreement with the four circuits that now recognize such liability. The Court should grant review on that question (Question 1) in this case. And it should grant review on the interrelated question whether the

TVPA encompasses aiding-and-abetting liability (Question 3). But the question about *mens rea* for aiding-and-abetting claims under the ATS (Question 2) does not currently warrant this Court's review. That question will be obviated if the Court finds that there is no aiding-and-abetting liability, and if the Court recognizes such liability, the framework for analyzing the *mens rea* question will likely be substantially altered from the currently differing approaches in the courts of appeals.

STATEMENT

1. a. Respondents are 12 Chinese nationals and one United States citizen who allege that they or their family members are or were Falun Gong practitioners who, while detained in China, suffered torture—and, for some, extrajudicial killing, disappearances, forced conversion, forced labor or other abuses—at the hands of the Chinese government as part of its persecution of the Falun Gong movement. Pet. App. 7a, 14a-16a, 141a-142a; C.A. E.R. 78-94. Respondents allege that petitioner Cisco Systems, Inc. (Cisco) and the two individual petitioners —John Chambers and Fredy Cheung, both high-level Cisco executives at relevant times—aided and abetted those abuses. Pet. App. 7a. Petitioners allegedly marketed, developed, implemented, and then supported key components of a sophisticated and integrated surveillance and internal-security system called "Golden Shield," which petitioners allegedly designed knowingly and specifically to aid China's security apparatus to detect, apprehend, and interrogate Falun Gong practitioners. *Id.* at 11a-13a, 137a-140a; C.A. E.R. 55-77.

In 2011, respondents filed this putative class action. Pet. App. 15a; see C.A. E.R. 29-115 (operative complaint from 2013). As relevant here, the Chinese-national respondents assert nonstatutory causes of action against

Cisco under the ATS. See Pet. App. 16a, 70a; C.A. E.R. 101-106. Charles Lee, the U.S. citizen respondent, asserts a TVPA cause of action against only Chambers and Cheung. Pet. App. 16a, 73a; C.A. E.R. 34, 102.

b. The ATS provides in full: "The district courts shall have original jurisdiction of 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. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that although the "ATS is a jurisdictional statute creating no new causes of action," it was "enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations," namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724; see *id.* at 715-716, 719-720. *Sosa* then identified a two-step test that, at a minimum, must be satisfied before a court may recognize a new cause of action: First, the suit must be based on the "violation[] of [an] international law norm" that is "'specific, universal, and obligatory,'" and second, the court must determine whether recognizing a cause of action for the violation would be an appropriate exercise of judicial discretion. *Id.* at 732-733 (citation omitted). This Court later held that the ATS "does not apply extraterritorially," *Nestlé USA, Inc.* v. *Doe*, 593 U.S. 628, 633 (2021), and does not subject foreign corporations to suit, *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 272 (2018).

The TVPA provides "the only cause of action under the ATS created by Congress rather than the courts." *Jesner*, 584 U.S. at 265 (plurality opinion). Under that cause of action, "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture shall, in a civil

action, be liable for damages to that individual." TVPA § 2(a)(1) (28 U.S.C. 1350 note) (hereinafter cited without references to the U.S. Code); see TVPA § 2(a)(2) (similar action for "extrajudicial killing"). The TVPA defines "'torture'" to mean certain intentionally harmful acts "directed against an individual in the offender's custody or physical control." TVPA § 3(b)(1).

c. The district court dismissed respondents' operative complaint. Pet. App. 135a-153a; see *id.* at 154a-166a (denying reconsideration). It dismissed the ATS claims on the grounds that they were impermissibly extraterritorial, *id.* at 143a-148a, and failed to allege the *mens rea* for aiding-and-abetting liability, *id.* at 149a-152a. The court concluded that TVPA does not impose aiding-and-abetting liability. *Id.* at 149a.

2. A divided panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-94a.

a. The panel majority reversed the dismissal of respondents' ATS claims against Cisco. Pet. App. 17a-73a. The court observed that respondents "do not contend that Cisco directly committed any of the alleged violations, but rather that it aided and abetted * * * [the Chinese government] to perpetrate the torts." *Id.* at 21a. The court recognized that "allegations of aiding and abetting require a predicate offence committed by someone other than Cisco," *id.* at 71a (citation, brackets, and internal quotation marks omitted), and it determined that respondents have sufficiently alleged that "the Chinese state * * * use[d] the Golden Shield technology" supplied by petitioners "to identify, detain, and torture Falun Gong adherents," *id.* at 73a.

The court of appeals inferred a cause of action for such aiding and abetting under *Sosa* because it determined (1) that international law "provides for aiding and

abetting liability," Pet. App. 25a-27a, and (2) that "no prudential reason [exists] to decline to recognize aiding or abetting liability," *id.* at 30a; see *id.* at 27a-38a. The court acknowledged that the district court had not asked the Department of State whether respondents' suit presents any foreign-policy concerns, and the court of appeals "decline[d] to request" such views itself, but it "infer[red] a lack of concern from the government's silence" and therefore concluded that no "foreign affairs implications" counsel against recognizing aiding-and-abetting liability. *Id.* at 32a-34a. The court also found no "'sound reasons to think Congress might doubt the efficacy or necessity' of recognizing aiding and abetting liability" because "[d]ecisions as to the appropriate scope of liability * * * depend on international law, not on statutory text." *Id.* at 34a-35a (citation omitted).

The court of appeals further determined that "[t]he standard for accomplice liability is determined by customary international law" and that "the *mens rea* [standard] for aiding and abetting liability" is the defendant's "knowledge" or "awareness of a 'substantial likelihood'" that its "'acts would assist the commission of a crime.'" Pet. App. 38a-39a, 58a (citation omitted); see *id.* at 48a-58a. The court disagreed with other circuits' contrary holdings requiring that a defendant have "the purpose of facilitating the crime," *id.* at 48a-49a; see *id.* at 52a-58a, and concluded that respondents have sufficiently pleaded Cisco's "knowledge" by plausibly alleging that (1) "Cisco was aware of the [Chinese government's] goal to use Golden Shield technology to target Falun Gong adherents" and (2) "it was widely known that [China's] efforts involved significant and ongoing violations of international law, especially torture and ar-

bitrary detention." *Id.* at 61a-62a; see *id.* at 58a-62a, 67a-68a.

The court of appeals concluded that respondents' ATS claims are not impermissibly extraterritorial, Pet. App. 63a-69a, based on allegations that Cisco's California headquarters "handled all aspects of the high-level design" of Golden Shield, manufactured "key components," and "provided ongoing maintenance and support." *Id.* at 66a-68a.

b. The court of appeals was unanimous in reversing the dismissal of Lee's TVPA claim. Pet. App. 73a-83a. The court held that the TVPA's express cause of action applies to claims that allege "aiding and abetting torture," *id.* at 74a. See *id.* at 74a-80a. It reasoned that the statute's text imposing liability on one who "subjects an individual to torture," TVPA § 2(a)(1), supports aiding-and-abetting liability. Pet. App. 75a-76a. The court also concluded that *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), does not adopt the interpretive presumption that a civil statute provides aiding-and-abetting liability only if it "expressly" provides for it. Pet. App. 79a.

The court of appeals applied "the same standards for aiding and abetting liability that [it] applied under the ATS" because, it stated, "international law determines the scope of liability for torture under the TVPA." Pet. App. 80a. It then determined that Lee has sufficiently alleged *mens rea* with allegations that Chambers and Cheung were "aware[]" that torture was "substantially likely" to occur. *Id.* at 81a-82a.

c. Judge Christen concurred in part and dissented in part. Pet. App. 85a-94a. She agreed with the majority that Lee states a claim under the TVPA, *id.* at 85a, but she concluded that the court erred by inferring a

private right of action under the ATS for aiding and abetting international-law violations allegedly committed "in China and against Chinese nationals by * * * the Chinese government[]," *id.* at 85a; see *id.* at 87a-94a. Such an action, Judge Christen explained, will "necessarily require" proof "that the Chinese [government] committed those violations in the first place." *Id.* at 89a-90a, 94a. She stated that a judicial finding of liability would risk "provok[ing] a foreign nation" and "could have serious ramifications for Sino-American relations," adding that courts are "ill-equipped to serve as instruments of foreign policy." *Id.* at 89a-90a. She emphasized that the court should have "solicit[ed] the State Department's position" and expressed "deep[] concern[] about the practical consequences of allowing [respondents'] claims to go forward without input from the political branches." *Id.* at 88a-89a, 92a.

3. Judge Bumatay, joined by five other judges, dissented from the denial of rehearing en banc. Pet. App. 108a-134a. He concluded that the panel majority made "three critical mistakes." *Id.* at 120a. First, it erroneously granted "blanket authorization for aiding-and-abetting liability under the ATS" and overlooked "the historical scope of accomplice liability." *Id.* at 120a, 126a; see *id.* at 120a-126a. He stated that "domestic law supplies the *liability* for any violation of international norms" and, because "civil aiding and abetting has shallow roots," *id.* at 123a-125a, *Central Bank* shows that "statutory silence means that there is no[] * * * aiding-and-abetting liability," *id.* at 129a.

Second, Judge Bumatay concluded that the panel majority "upset the separation of powers" by "'creating a cause of action,'" which "'is a legislative endeavor.'"

Pet. App. 120a-121a, 127a (citation omitted). See *id.* at 126a-130a.

Finally, Judge Bumatay emphasized that the panel majority "rather baffling[ly]" refused "to request the State Department's views" and "ignored" "foreign policy concerns as obvious as they are serious." Pet. App. 121a, 130a, 133a; see *id.* at 130a-134a. He observed that "extending liability here directly risks *heightening* diplomatic strife" because aiding-and-abetting liability "is a form of secondary liability, meaning that *someone else* must have committed the tortious conduct" and, here, "that *someone else* must be the agents of the Chinese government." *Id.* at 131a-132a. Thus, he stated, "the only way for this suit to proceed is for a federal court to adjudicate the responsibility of the Chinese [government] for violations of international law"—an undertaking that "'could have serious [diplomatic] ramifications'" by increasing "tensions with a world superpower." *Id.* at 131a, 132a, 134a (citation omitted).

DISCUSSION

The United States is committed to fostering respect for human rights and unequivocally condemns human-rights violations such as torture and those who aid and abet them. And the United States has long condemned China's treatment of Falun Gong practitioners, and has imposed sanctions and human-rights-based visa restrictions on Chinese officials determined by the Secretary of State to have been involved in gross violations of human rights and particularly severe violations of religious freedom. But this case involves legal questions about whether those who are alleged to have aided and abetted international-law violations purportedly committed by a foreign state against individuals within its sovereign territory are subject to an implied right of action under

the ATS or to the TVPA's express right of action. Those interrelated questions (Questions 1 and 3 in the petition) implicate important separation-of-powers principles, affect the political branches' exercise of their foreign-relations authorities, and warrant this Court's review. The question of what *mens rea* standard applies if the relevant ATS cause of action exists (Question 2) does not warrant review at this time.

I. THIS COURT SHOULD DECIDE WHETHER TO RECOGNIZE AIDING-AND-ABETTING LIABILITY UNDER THE ATS

The Ninth Circuit erred in creating a nonstatutory cause of action under the ATS for aiding and abetting a violation of international law. That question warrants this Court's review.

A. The First ATS Question Warrants Review

1. This Court's review of the first question presented has long been warranted. In 2008, the United States told this Court that "recognizing aiding and abetting liability constitutes an improper expansion of judicial authority to fashion federal common law" under the ATS. U.S. Amicus Br. at 8, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (capitalization omitted). The government recommended that the Court grant review of an interlocutory decision to resolve that question because of the "serious risks" that aiding-and-abetting actions pose "to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy." *Id.* at 18. The Court, however, lacked a quorum to resolve that case. 553 U.S. 1028.

Five years ago, the United States again advanced the same position and recommended that the Court address

the availability of an aiding-and-abetting cause of action under the ATS—which had "percolated extensively in the courts of appeals" and continued to have "substantial practical importance"—because that question was logically antecedent to the other ATS questions presented by the petitioners. U.S. Invitation Br. at 13-18, *Nestlé USA, Inc.* v. *Doe*, 593 U.S. 628 (2021) (No. 19-416). This Court granted review but did not decide whether courts may "create an aiding-and-abetting cause of action under the ATS" because "[e]ven if [it] resolved [that issue] in" favor of the plaintiffs, their ATS claims were "impermissibly" extraterritorial. 593 U.S. at 633-634.

Today, aiding-and-abetting actions under the ATS continue to pose significant risks to the United States' foreign relations and foreign policy. "[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." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). For that reason, "aiding and abetting is inherently a rule of secondary liability." *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 494 (2023). And where such liability exists, it makes the defendant liable for "aid[ing] and abett[ing] * * * another person in the commission of the actionable wrong," *i.e.*, for assisting *someone else's* "commi[ssion of] an actual tort." *Id.* at 494-495; see *Central Bank*, 511 U.S. at 177 (discussing 4 Restatement (Second) of Torts § 876(b) (1977)); see *Eastern Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (concluding that such liability is "a basis for imposing liability for the tort aided and abetted rather than being a separate tort").

When aiding-and-abetting liability is asserted under the ATS, the claims frequently involve underlying alle-

gations of misconduct by foreign sovereigns in their own territory. See, *e.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 113 (2013) (alleging underlying international-law violations by the Nigerian government in Nigeria); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 389, 395-396 (4th Cir. 2011) (Iraq); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 247, 251 (2d Cir. 2009) (Sudan), cert. denied, 562 U.S. 946 (2010); *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258, 260 (2d Cir. 2007) (per curiam) (South Africa), aff'd for lack of quorum *sub nom. American Isuzu Motors, Inc.*, *supra*.[1] The adjudication of such claims—which require a federal court to evaluate the lawfulness of a foreign state's actions in its own territory—risks harming the United States' relations with other countries. And without statutory authorization to engage in such adjudicatory forays, federal courts should not create causes of action allowing adjudication of matters with such obvious potential consequences for foreign relations.

2. Four courts of appeals now allow ATS claims to proceed on judicially inferred causes of action for aiding

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[1] See also, *e.g.*, *Ali* v. *Al-Nahyan*, No. 23-cv-576, 2025 WL 3250945, at *10 (D.D.C. Oct. 31, 2025) (Saudi Arabia and United Arab Emirates); *Alhathloul* v. *DarkMatter Grp.*, No. 21-cv-1787, 2025 WL 2320474, at *26 (D. Or. Aug. 12, 2025) (United Arab Emirates); *Xiong* v. *Laos People's Democratic Republic*, No. 23-cv-2531, 2025 WL 1207536, at *1, *5 (Apr. 25, 2025) (Laos), report and recommendation adopted, 2025 WL 2521177 (E.D. Cal. Sept. 2, 2025), appeal pending, No. 25-5914 (9th Cir.). That sovereign-targeting use of ATS aiding-and-abetting actions is not new. See, *e.g.*, *Sarei* v. *Rio Tinto PLC*, 671 F.3d 736, 748-749 (9th Cir. 2011) (en banc) (Papua New Guinea), vacated and remanded, 569 U.S. 945 (2013); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000) (Nigeria), cert. denied, 532 U.S. 941 (2001).

and abetting. See Pet. App. 26a-27a (agreeing with the Second, Fourth, and Eleventh Circuits); *Aziz*, 658 F.3d at 395-396 (4th Cir.); *Talisman*, 582 F.3d at 257-258 (2d Cir.); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315-1316 (11th Cir. 2008); *Khulumani*, 504 F.3d at 260 (2d Cir.); see also *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 28-32 (D.C. Cir. 2011), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013). While no other circuit has disagreed, numerous judges have dissented from, or criticized, holdings recognizing ATS aiding-and-abetting liability. See, *e.g.*, Pet. App. 108a-134a (Bumatay, J., joined by five judges, dissenting from the denial of rehearing en banc); *id.* at 85a-94a (Christen, J., dissenting in relevant part); *Exxon*, 654 F.3d at 73, 87 (Kavanaugh, J., dissenting in part); *Khulumani*, 504 F.3d at 333 (Korman, J., concurring in part and dissenting in part).

Moreover, after bringing ATS aiding-and-abetting actions into existence, the courts of appeals have disagreed about what those judicially created actions require. The court of appeals here, for instance, expressly disagreed with two sister circuits about the requisite *mens rea* standard for an aiding-and-abetting claim. Pet. App. 48a-49a (disagreeing with *Aziz* and *Talisman* and agreeing with *Romero*). That disagreement confirms that this Court should address whether the courts should recognize aiding-and-abetting liability under the ATS in the first place.

B. The Ninth Circuit Erroneously Recognized Aiding-And-Abetting Liability Under The ATS

The Ninth Circuit erroneously recognized nonstatutory aiding-and-abetting causes of action for violations of international-law norms under the ATS. As the government has long argued, aiding-and-abetting liability

in this ATS context reflects an improper expansion of judicial authority to fashion domestic remedies under federal common law.

"[T]he ATS is a jurisdictional statute creating no new causes of action." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004). In *Sosa*, this Court concluded that when Congress enacted the ATS in 1789, it was understood that "the common law would provide a cause of action for [a] modest number of international law violations," which, "at the time" referred to "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 712, 724. Even "assum[ing]" that federal courts are not "categorically precluded * * * from recognizing" ATS "claims under federal common law for violations of [other] international law norm[s]," *id.* at 724-725, 732, the Court in *Sosa* identified a "series of reasons" warranting "great caution" before creating any new private right of action under the ATS. *Id.* at 725, 728.

Without deciding what the "ultimate criteria" might be for inferring an ATS cause of action, *Sosa* determined that, at the least, federal courts should "not recognize private claims under federal common law for violations of any international law norm" unless (1) the international-law norm is "'specific, universal, and obligatory'" and (2) recognizing a federal-common-law cause of action for the violation of that norm is an appropriate exercise of judicial discretion. *Sosa*, 542 U.S. at 732-733 (citation omitted); see *Nestlé USA, Inc.* v. *Doe*, 593 U.S. 628, 636 (2021) (plurality opinion); *id.* at 648 (Sotomayor, J., concurring in part and concurring in the judgment). Under those standards, the Ninth Circuit erred in recognizing aiding-and-abetting liability.

1. As an initial matter, we note that Justices Thomas, Gorsuch, and Kavanaugh have already concluded that this Court's post-*Sosa* decisions show that, under the ATS, "federal courts should not recognize private rights of action for violations of international law beyond the three historical torts identified in *Sosa*." *Nestlé*, 593 U.S. at 637-640 (2021) (plurality opinion); see *id.* at 640, 643-646 (Gorsuch, J., concurring). But see *id.* at 646-657 (Sotomayor, J., concurring in part and concurring in the judgment) (disagreeing). Justice Alito has also stated that there are "strong arguments that federal courts should never recognize new claims under the ATS." *Id.* at 658 (Alito, J., dissenting). Petitioner contends (Pet. 15-17) that this Court may determine on that basis that courts may not create a cause of action for aiding and abetting the international-law violations alleged here.

2. Regardless of whether the Court adopts that approach, it should in any event decline to recognize aiding-and-abetting liability under the ATS.

Sosa emphasizes that the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727. "[T]he separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS," where recognizing a new right of action can implicate foreign-policy concerns that should be weighed by "[t]he political branches, not the Judiciary." *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 264-265 (2018). The Court has therefore made clear that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" under the ATS, "courts must refrain from creating the remedy in order to respect the role of

Congress." *Id.* at 264 (citation omitted). Here, there are at least three reasons why Congress might doubt the efficacy or necessity of a cause of action for aiding and abetting international-law violations.

First, civil aiding and abetting is a "rule of secondary liability" that makes a person liable for having assisted another's commission of the "actual tort." *Twitter*, 598 U.S. at 494-495; see p. 11, *supra*. Consistent with fundamental separation-of-powers principles, the decision whether such a "new form[] of liability" should be imposed under the ATS on an entire category of actors is "'a question for Congress, not [the courts], to decide.'" *Jesner*, 584 US. at 264-265 (citation omitted).

Rather than "enact[] a general civil aiding and abetting statute," Congress "has taken a statute-by-statute approach" to such liability. *Central Bank*, 511 U.S. at 182. *Central Bank* therefore holds that "when Congress enacts a statute under which a person may 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." *Ibid.* The Court observed that recognizing aiding-and-abetting liability in cases of statutory silence would work a "vast expansion of federal law," which should not be undertaken without "congressional direction." *Id.* at 183. The Court thus "made crystal clear that there can be no civil aiding and abetting liability unless Congress expressly provides for it." *Exxon*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part); see Pet. App. 125a (Bumatay, J., dissenting). And the need to respect Congress's role is only "magnified in the context of the ATS,"

where "the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116.[2]

The panel majority deemed those principles inapplicable because the "scope of [ATS] liability" turns on "international law." Pet. App. 35a. That is fundamentally mistaken. "[I]dentifying [the international-law] norm is only the beginning of defining a cause of action": Courts must also specify the remedy's details, including "who may be liable." *Kiobel*, 569 U.S. at 116-117 (applying the domestic-law presumption against extraterritorial application to decide what "causes of action * * * may be brought under the ATS"). And creating an action under the ATS as a remedy in United States courts "for violations of * * * international law norms" is itself a matter of "federal common law." *Sosa*, 542 U.S. 732. Thus, "while international law may provide the *norms* at issue, domestic law supplies the *liability* for any violation of international norms," meaning that "the scope of liability must be similarly guided by domestic law" and, thus, that "*Central Bank* controls." Pet. App. 125a (Bumatay, J., dissenting).

Second, Congress enacted the ATS "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States

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[2] As the government noted in its merits brief in *Nestlé*: "*Central Bank* arguably resolves" the question of aiding-and-abetting liability under the ATS "without need to resort to the *Sosa* framework." U.S. Amicus Br. at 24 n.5, *Nestlé, supra* (No. 19-416). Because the ATS refers to "tort[s] * * * committed in violation of the law of nations," 28 U.S.C. 1350, without mentioning secondary liability, it lacks the requisite "congressional direction" to support recognizing such liability, *Central Bank*, 511 U.S. at 183.

accountable," *Jesner*, 584 U.S. at 270, for "refus[ing] to provide redress to their citizens" for "torts committed * * * *within the United States*," *Nestlé*, 593 U.S. at 654 (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis added). But aiding-and-abetting claims offer plaintiffs a means for evading the limitations of sovereign immunity and challenging acts taken *by foreign states and officials abroad*. Creating such a cause of action requiring federal courts to determine the lawfulness of foreign-state actions impermissibly increases the "very foreign-relations tensions the First Congress sought to avoid." *Jesner*, 584 U.S. at 272; accord *id.* at 276 (Alito, J., concurring in part and concurring in the judgment).

The decision below ignored *Sosa*'s clear warning against creating ATS actions allowing adjudication of asserted "limit[s] on the power of foreign governments over their own citizens," because a court's finding that "a foreign government or its agent has transgressed [such] limits" would "raise risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 727-728. The Ninth Circuit refused even to solicit the government's views and inexplicably deemed the resulting silence as evidence that no "foreign affairs implications" counsel against creating a new ATS right of action, Pet. App. 32a-34a—even though "the Government ha[d] long opposed the recognition of aiding and abetting liability under the ATS." *Id.* at 133a-134a (Bumatay, J., dissenting); see *id.* at 91a-93a (Christen, J., dissenting in part). That deeply flawed approach is wholly inconsistent with the "great caution" that the Constitution's separation of powers demands. *Sosa*, 542 U.S. at 728.

Third, *Sosa* makes clear that a court deciding whether to create a new cause of action should "look for legisla-

tive guidance before exercising [such] innovative authority." *Sosa*, 542 U.S. at 726. "Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action." *Jesner*, 584 U.S. at 265 (plurality opinion).

"[T]he logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress." *Jesner*, 584 U.S. at 265 (plurality opinion). And as discussed below (pp. 20-21, *infra*), "the TVPA provides no aiding and abetting liability," *Exxon*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part). Accordingly, courts should not themselves create aiding-and-abetting liability under the ATS. *Ibid.*; accord Pet. App. 128a (Bumatay, J., dissenting). "Congress's decision in the TVPA to limit liability to individuals" who subject victims to torture and to exclude aiding-and-abetting liability, at a minimum "demonstrates that there are two reasonable choices." *Jesner*, 584 U.S. at 268 (plurality opinion). And that should be "dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS" to aiders and abettors. *Ibid.*

II. THIS COURT SHOULD DECIDE WHETHER THE TVPA ENCOMPASSES AIDING-AND-ABETTING LIABILITY

In the United States' view, the court of appeals erred in concluding that the TVPA provides a cause of action for aiding and abetting torture. If the Court grants certiorari to resolve the first question presented (whether aiding-and-abetting liability exists under the ATS), it should also resolve the third question presented (whether the TVPA's express cause of action includes aiding-and-abetting liability).

1. The Court's consideration of the availability of aiding-and-abetting liability under the ATS should already include examining whether the TVPA encompasses aiding-and-abetting liability. Petitioner correctly emphasizes (Pet. 4, 32-33) that the ATS and TVPA questions are "intertwined" and that "this Court has looked to the TVPA in interpreting the scope of the ATS." Respondents also acknowledge (Br. in Opp. 17) that "courts applying *Sosa*'s second step should look to analogous statutes like the TVPA" before creating a new ATS action. In their view, "the TVPA permits claims for aiding and abetting," so the ATS should too. *Ibid.* As discussed above (see p. 19, *supra*), then-Judge Kavanaugh and Judge Bumatay (joined by five colleagues) expressed agreement with respondents' basic analytical approach, even though they concluded that the TVPA does *not* impose aiding-and-abetting liability.

2. The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture shall, in a civil action, be liable for damages to that individual." TVPA § 2(a)(1). That language does not impose liability on aiders and abettors.

Congress has enacted "a general aiding and abetting statute" for "all federal criminal offenses" but has "not enacted a general civil aiding and abetting statute," opting instead to follow a "statute-by-statute approach" under which civil aiding-and-abetting liability is the exception, not the rule. *Central Bank*, 511 U.S. at 181-182. Congress's express "impos[ition of] aiding and abetting liability" in various statutory contexts, moreover, shows that it knows how to impose such liability "when it cho[oses] to do so." *Id.* at 176. This Court has therefore presumed that Congress will "use[] the words 'aid' and

'abet' in the statutory text" if it "intend[s] to impose aiding and abetting liability." *Id.* at 177. The absence of any such language here demonstrates the absence of TVPA-based aiding-and-abetting liability.

Additional statutory text confirms that conclusion. The TVPA defines "'torture'" as an intentionally harmful act "directed against an individual in *the offender's* custody or physical control." TVPA § 3(b)(1) (emphasis added). Congress thus equated the "individual" who is liable for "subject[ing] [the victim] to torture," TVPA § 2(a)(1), with "the offender" who has "custody or physical control" of the victim. But those who aid and abet generally will *not* have either direct or indirect custody or control of the victims—as Chambers and Cheung did not here. See C.A. E.R. 91 (Lee's allegations of torture in Chinese prison).

The decision below observed that the TVPA imposes liability on "those who in some respect *cause* another to undergo torture" because it refers to one who "'subjects'" another to torture. Pet. App. 76a. This Court, too, has referred to the "officer who gives an order to torture." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 458 (2012). Such references, however, capture those who "do not personally execute the torture" but who are liable because they direct (or have "command responsibility" for) the actions of the ones who do. Pet. App. 76a-77a (citation omitted); see Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 Harv. L. & Pol. Rev. 339, 348 (2012) (explaining that command responsibility is a "theor[y] of vicarious liability" like respondeat superior). A superior who directs (or is responsible for) the conduct of an underling is not merely an aider and abettor.

III. THE *MENS REA* QUESTION DOES NOT WARRANT REVIEW AT THIS TIME

The second question presented (about the *mens rea* for an aiding-and-abetting claim under the ATS) will be relevant only if the Court's decision about the first question recognizes aiding-and-abetting liability under the ATS. And even if the Court were to uphold the existence of such liability, its reasoning is likely to bear significantly on how to resolve the *mens rea* question. Question 2 thus does not warrant review at this time.

If the Court, in deciding Question 1, were to confirm that an ATS right of action arises under federal common law and, thus, is governed by domestic remedial principles applicable in civil suits, see p. 17, *supra*, that would likely affect the *mens rea* analysis. Although four courts of appeals have divided over the *mens rea* standard for ATS aiding-and-abetting liability, each has divined its *mens rea* tort standard primarily from international-law sources concerning criminal liability. See Pet. App. 38a, 48a-58a & n.16 (discussing decisions). The parties likewise fail to address whether and how domestic remedial law is relevant to the standard. See Pet. 25-26; Br. in Opp. 25-28; cf. U.S. Amicus Br. at 17-21, *Cox Communications, Inc.* v. *Sony Music Entm't*, No. 24-171 (argued Dec. 1, 2025) (discussing common-law aiding-and-abetting principles in the civil-law context).

Moreover, courts defining the details of an ATS implied right of action should consider and borrow limitations from analogous statutes like the TVPA. See p. 19, *supra*. Here, the decision below did the opposite. It applied the "same [*mens rea*] standard[]" to the TVPA's statutory cause of action that it had derived from international-law sources for the ATS, Pet. App. 80a, rather than interpreting the TVPA under traditional

principles of statutory construction. Neither petitioners nor respondents address the TVPA's *mens rea* standard or whether any ATS remedy should adopt it.

Under these circumstances, further percolation on Question 2 is warranted in the event that this Court recognizes in the first place that the ATS includes aiding-and-abetting liability.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to Questions 1 and 3 of the petition.

Respectfully submitted.

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