No. 24-856

In the Supreme Court of the United States

CISCO SYSTEMS, INC., ET AL., PETITIONERS

v.

DOE I, ET AL.

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

BRIEF FOR THE PETITIONERS

CHRISTOPHER G. MICHEL
Counsel of Record
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
555 13th Street, N.W.,
Suite 600
Washington, DC 20004
(202) 538-8000
christophermichel@quinn-emanuel.com

TODD ANTEN
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016

KANNON K. SHANMUGAM
MASHA G. HANSFORD
JAKE L. KRAMER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

ANNA M. STAPLETON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
535 Mission Street, 25th Floor
San Francisco, CA 94105

CANDICE J. YANDAM RIVIERE
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

QUESTIONS PRESENTED

1. Whether the Alien Tort Statute, 28 U.S.C. 1350, allows a judicially implied private right of action for aiding and abetting.

2. Whether the Torture Victim Protection Act, 28 U.S.C. 1350 note, allows a judicially implied private right of action for aiding and abetting.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Cisco Systems, Inc.; John Chambers; and Fredy Cheung. Cisco Systems, Inc., has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are 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 other individuals similarly situated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 73 F.4th 700. The order of the court of appeals denying panel rehearing and rehearing en banc, along with a statement respecting that order and an opinion dissenting from the denial of rehearing en banc (Pet. App. 95a-134a), are reported at 113 F.4th 1230. The opinion of the district court (Pet. App. 135a-153a) is reported at 66 F. Supp. 3d 1239. The unpublished opinion of the district court denying reconsideration (Pet. App. 154a-166a) is available at 2015 WL 5118004.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2023. A petition for rehearing was denied on September 3, 2024 (Pet. App. 95a-134a). On November 6,

2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 31, 2025, and the petition was filed on that date. The petition was granted on January 9, 2026. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alien Tort Statute, 28 U.S.C. 1350, provides:

> 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.

The Torture Victim Protection Act, 28 U.S.C. 1350 note, provides in relevant part:

> Section 2. Establishment of Civil Action.
>
> (a) Liability. — An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
>
> Section 3. Definitions.
>
> (a) Extrajudicial Killing. —
>
> For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such

killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. —

For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering * * * is intentionally inflicted on that individual * * * .

STATEMENT

The First Congress enacted the Alien Tort Statute to avert diplomatic strife by conferring jurisdiction on federal courts to hear the claims of foreign nationals arising under the law of nations or treaties to which the United States is a party. The ATS does not identify any cause of action that would be cognizable under its jurisdictional grant. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court explained that the First Congress likely had in mind three specific violations of international norms: the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. The Court also suggested that courts might, in the future, recognize the availability of other causes of action under the ATS through the analysis of norms of international law and the exercise of their discretion. But in a series of decisions over the last twenty years, the Court has narrowed the scope of ATS liability in various respects. This Court has never recognized any other cause of action under the ATS; the lower courts, by contrast, have recognized many.

The time has now come for this Court to close the door it left ajar in *Sosa*. The aiding and abetting claims asserted by respondents in this case are not cognizable under the ATS because judicial implication of any cause of

action under the ATS beyond the three likely contemplated by the First Congress is improper. As this Court has recently emphasized across diverse lines of jurisprudence, the creation of any cause of action is a fundamentally legislative endeavor. And in the context of the ATS, foreign-policy and separation-of-powers considerations weigh further against judicial innovation.

Even if the Court chooses to leave open the possibility of recognizing new ATS causes of action in the future, it should not permit a cause of action for aiding and abetting. Under the analytical framework of *Sosa*, no such cause of action may be implied for three reasons. *First*, the Court's analysis in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), makes clear that aiding and abetting liability is not available unless Congress has expressly provided for it. Because Congress did not do so in the ATS, this Court may not judicially imply such a cause of action here. *Second*, permitting aiding and abetting liability would blow the *Sosa* door wide open, capturing a broad array of conduct and amplifying lower courts' willingness to recognize new causes of action. *Third*, as the United States has emphasized, aiding and abetting claims pose a serious threat to foreign relations.

At the very least, the Court should reject respondents' causes of action here. The crux of their claims is that petitioners sold networking equipment to Chinese government agencies that those agencies allegedly then used to violate international law. The risk to foreign relations from claims of this sort is particularly acute.

One of the respondents also pursues an aiding and abetting claim against the individual petitioners under the Torture Victim Protection Act. That claim fails for similar reasons. The clear text of the TVPA does not provide for aiding and abetting liability. *Central Bank*'s warning

against the judicial implication of civil aiding and abetting liability therefore controls. The respondent contends that such liability is inherent in the statute's prohibition against "subject[ing]" victims to torture, but that language encompasses command responsibility for officials who have custody of the victim; it does not authorize liability for all aiding and abetting, which includes factual scenarios (as here) that are far removed from the ordinary meaning of "subject." The court of appeals erred by permitting the aiding and abetting claims against petitioners to go forward, and its judgment should be reversed.

A. Background

1. In the Nation's early years, a significant constraint facing the federal government was "its inability to cause infractions of treaties, or of the law of nations, to be punished." *Sosa*, 542 U.S. at 716 (internal quotation marks and citation omitted). Of particular concern, the Continental Congress had no means to "provide judicial relief to foreign officials injured in the United States." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 123 (2013). That jurisdictional gap created serious risks, because an "assault against an ambassador * * * if not adequately redressed could rise to an issue of war." *Sosa*, 542 U.S. at 715. Two notorious episodes involving the rights of ambassadors occurred in the United States shortly before the Founding, provoking foreign governmental protests that "embarrassed" a "fledgling Republic" that was still "struggling to receive international recognition." *Kiobel*, 569 U.S. at 123.

Against that backdrop, the First Congress enacted the Alien Tort Statute as part of the Judiciary Act of 1789. The ATS provides that federal 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. As the text reflects and this Court has confirmed, the ATS is "a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. Any cause of action asserted under the ATS must thus be conferred either by another act of Congress or by federal common law.

At the time of the ATS's enactment, the law of nations was understood to encompass a limited set of offenses carrying individual liability. See *Sosa*, 542 U.S. at 724. This Court has assumed that the First Congress understood federal courts to be able to entertain claims for three such offenses: the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. See *ibid.* The Court has "found no basis to suspect Congress had any examples in mind beyond those." *Ibid.* The ATS was thus designed to provide a federal forum for a narrow category of claims, in circumstances where the failure to provide a remedy could give rise to diplomatic friction.

In *Sosa*, however, the Court left open the possibility that courts could recognize new causes of action under the ATS, setting out a two-step test that must be satisfied before a court does so. *First*, a court must ensure that the alleged violation of international law reflects a norm that is "specific, universal, and obligatory." *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 257-258 (2018) (plurality opinion) (quoting *Sosa*, 542 U.S. at 732). *Second*, a court must determine whether allowing a case to proceed under the ATS would be a "proper exercise of judicial discretion," or instead whether "caution requires the political branches to grant specific authority" for the cause of action. *Id.* at 258.

This Court has never approved additional liability under the ATS pursuant to that test. See *Sosa*, 542 U.S. at 738 (rejecting a claim under the first step); *Jesner*, 584

U.S. at 265 (rejecting a claim under the second). Accordingly, the only causes of action recognized by this Court as cognizable under the ATS are the three specified in *Sosa* and any others created by "the political branches of the Government." *Jesner*, 584 U.S. at 274.

2. Since the ATS was enacted, Congress has created just one express cause of action that can be asserted under the ATS's jurisdictional grant. See *Jesner*, 584 U.S. at 256. Enacted in 1992, the Torture Victim Protection Act establishes a cause of action for victims of torture and extrajudicial killing in violation of international law. *Ibid.*; see *Mohamad* v. *Palestinian Authority*, 566 U.S. 449, 453 (2012). Specifically, the statute authorizes suit against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation[,] subjects an individual to torture" or "extrajudicial killing." 28 U.S.C. 1350 note, § 2(a)(1)-(2). It defines torture as certain acts "directed against an individual in the offender's custody or physical control." *Id.* § 3(b)(1). The TVPA contains no reference to aiding and abetting.

3. The United States and China have long maintained a complex diplomatic and economic relationship. Following President Nixon's outreach in the early 1970s, President Carter normalized relations and recognized the People's Republic of China as China's official government in 1979. See *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 27 (2015). In the wake of the Tiananmen Square protests of 1989, Congress balanced human-rights concerns with the importance of ongoing trade with China by enacting the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991. See Pub. L. No. 101-246, 104 Stat. 15 (1990). As relevant here, the Act prohibits the export of certain crime-control equipment to China. See *id.* § 902(a)(4), 104 Stat. 83. The Department of Commerce subsequently issued detailed export regulations under the

Act, including a list of restricted crime-control equipment such as specified weapons. At the time of the transactions at issue in this case, the list did not include crime-control software and technology products. See 15 C.F.R. 742.7 (2010). Official United States policy then provided that expanding trade with China would "strengthen those in China who fight for decent labor standards, a cleaner environment, human rights, and the rule of law." President Clinton, *Remarks on Signing Legislation on Permanent Normal Trade Relations With China*, 2 Pub. Papers 2111, 2112 (Oct. 10, 2000).

B. Facts And Procedural History

1. Petitioners are Cisco Systems, Inc., and two of its former executives. Cisco is one of the Nation's leading technology companies, manufacturing the routers, switches, and related hardware that constitute the basic architecture of computer networking. Cisco's products have transformed global connectivity. While complying with U.S. export regulations and respecting human rights, Cisco's mission is to connect billions of people securely, thereby promoting free and open communication around the world. See *Global Internet Freedom: Corporate Responsibility & The Rule of Law: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong., 2d Sess. 13 (May 20, 2008) (*Internet Freedom Senate Hearing*) <tinyurl.com/ciscohearing>; Cisco, *The Power and Importance of a Free and Open Internet* (Aug. 21, 2023) <tinyurl.com/cisco-blog>.

Respondents are 12 Chinese nationals and one American citizen affiliated with Falun Gong, a religious movement that the Chinese government declared illegal in 1999. Respondents alleged that Chinese government and party officials violated international law by subjecting

them to torture, forced labor, beatings, forced conversions, and other abuses. Pet. App. 8a-10a, 14a-16a.

Notably, respondents did not sue the Chinese government, its officials, or members of the Chinese Communist Party who allegedly harmed them. Instead, they sued Cisco, asserting that Cisco had aided and abetted the Chinese officials' alleged violations of international law. Respondents asserted aiding and abetting claims against petitioners under the ATS for claimed violations of international-law norms prohibiting torture; cruel, inhuman, or degrading treatment; forced labor; prolonged and arbitrary detention; crimes against humanity; extrajudicial killing; and forced disappearance. Respondent Charles Lee, the American citizen, also asserted a claim against the individual petitioners for aiding and abetting torture under the TVPA. J.A. 100-101; Pet. App. 14a-16a.

Specifically, respondents alleged that petitioners sold custom networking equipment and related technology to the Chinese government that was used by the Chinese government to create a national network known as the "Golden Shield." As described in the complaint, the Golden Shield is a "surveillance and internal security network" that performs "standard crime control police functions" by "integrat[ing] * * * public security command and dispatch centers, intelligence and information analysis centers, [and] mobile and front line police technology," and enabling authorities to identify and monitor individuals suspected of criminal wrongdoing. Respondents alleged that Chinese security officials used the Golden Shield to surveil the internet activities of Falun Gong practitioners. J.A. 2-3, 33; Pet. App. 11a-15a.

Although this case arises on a motion to dismiss, Cisco has unequivocally denied the pertinent allegations. In particular, Cisco has consistently stated that it sold only

off-the-shelf networking equipment to the Chinese government, in compliance with United States export regulations, and that it did not customize that equipment. See Cisco, *The Power and Importance of a Free and Open Internet*, *supra*; Cisco, *Cisco Supports Freedom of Expression, an Open Internet and Human Rights* (June 6, 2011) <tinyurl.com/cisco-blog-2011>; *Internet Freedom Senate Hearing* 13.

2. a. The district court granted petitioners' motion to dismiss. Pet. App. 135a-153a.

As to the ATS aiding and abetting claims, the district court held that those claims were impermissibly extraterritorial under this Court's intervening decision in *Kiobel*, *supra*). Pet. App. 143a-148a. In the alternative, the court held that respondents had failed adequately to allege either the actus reus or the mens rea elements of the claims. *Id.* at 150a-152a. And as to the TVPA aiding and abetting claim, the district court held that aiding and abetting liability was unavailable under that statute, which is limited to "only the primary wrongdoer." *Id.* at 149a.

The district court subsequently denied respondents' motion for reconsideration, adding that "[t]he manner in which the Chinese government chooses to enforce its laws is a political question that is better suited for our executive and legislative branches of government." Pet. App. 162a-163a.

b. A divided court of appeals reversed in relevant part and remanded for further proceedings. Pet. App. 1a-84a.

i. In the majority opinion, written by Judge Berzon and joined by Judge Tashima, the court of appeals first held that a cause of action for aiding and abetting an alleged violation of international law was cognizable under the ATS. Pet. App. 23a-38a. As a preliminary matter, the

court of appeals acknowledged that this Court "has divided several times as to whether *any* new international law causes of action should be recognized under the ATS, beyond the three that existed in 1789." *Id.* at 19a-20a. But the court of appeals reasoned that, because that view had not "gained the support of a majority of the Court," recognizing new causes of action remained appropriate. *Id.* at 20a.

Proceeding to apply *Sosa*'s two-step test, the court of appeals first concluded under *Sosa*'s first step that "aiding and abetting liability is a norm of customary international law with sufficient definition and universality to establish liability under the ATS." Pet. App. 24a. In reaching that conclusion, the court looked to sources of international law, including the Statute of the International Court of Justice and "decisions of two modern[] international tribunals." *Id.* at 25a-27a.

The court then concluded under *Sosa*'s second step that "recognizing aiding and abetting liability does not raise separation-of-powers or foreign policy concerns." Pet. App. 24a. The court reasoned that *Sosa*'s "principal foreign policy concern" was that "ATS claims could impose liability on sovereign nations for behavior with respect to their own citizens." *Id.* at 30a. The court heavily relied on the absence of an amicus brief from the United States, even though it had not invited the United States to present its views. *Id.* at 32a-34a. And as to the separation of powers, the court saw no indication that Congress "might doubt" the efficacy or necessity of a cause of action for aiding and abetting. *Id.* at 38a (citation omitted). The court of appeals refused to rely on this Court's decision in *Central Bank* on the ground that the availability of an ATS cause of action was "generally determined under international law." *Id.* at 34a-35a. And it declined to place any weight on "Congress and the Executive's decision not

to regulate or prohibit generally the export of computer networking software" to China. *Id.* at 38a.

Having concluded that respondents' ATS claims were cognizable, the court of appeals then reversed the district court's dismissal of those claims on the grounds (1) that respondents had failed adequately to allege either the actus reus or mens rea elements of their claims, Pet. App. 38a-62a, and (2) that respondents' ATS claims were impermissibly extraterritorial, *id.* at 63a-69a.

ii. The court of appeals next held that a cause of action for aiding and abetting was cognizable under the TVPA. Pet. App. 73a-82a. While recognizing that the TVPA does not specifically permit aiding and abetting liability, the court reasoned that the TVPA's creation of liability for a defendant who "subjects an individual to torture" encompasses aiding and abetting. *Ibid.* (quoting 28 U.S.C. 1350 note, § 2(a)). The court of appeals again refused to apply this Court's decision in *Central Bank*, reasoning that the Court "declined to create a presumption favoring the inclusion of aiding and abetting liability in a civil statute" that does not expressly provide for it, but "did not adopt the opposite presumption." *Id.* at 79a.

iii. Judge Christen dissented as to the ATS. Pet. App. 85a-94a. She identified "several sound reasons to decline to recognize a cause of action for aiding and abetting the acts alleged in [respondents'] complaint." *Id.* at 88a. Specifically, she reasoned that the concerns the Court had expressed about foreign policy "apply tenfold to a case that hinges on whether a foreign government's treatment of its own nationals violated international law." *Id.* at 90a. Any finding of aiding and abetting liability in this case, Judge Christen explained, "would necessarily require a showing that the Chinese Communist Party and Ministry of Public Security violated international law with respect to the Chinese-national [respondents]"—a determination that

"could have serious ramifications for Sino-American relations, fraught as they already are." *Id.* at 89a. Judge Christen expressed "deep[] concern[]" about the practical consequences of allowing [respondents'] claims to go forward without input from the political branches." *Id.* at 88a-89a.

c. The panel denied rehearing over Judge Christen's dissent, and the court of appeals denied rehearing en banc over the dissents of seven judges (with three other judges not participating). Pet. App. 96a-97a.

i. Judge Berzon, joined by Judges Tashima and Paez, issued a statement respecting the denial of rehearing en banc. Pet. App. 97a-107a. She reiterated the reasoning of her opinion for the panel. *Ibid.*

ii. Judge Bumatay, joined by Judges Callahan, Ikuta, Bennett, R. Nelson, and VanDyke, issued an opinion dissenting from the denial of rehearing en banc. Pet. App. 108a-134a. He argued that "several principles emerge" from the history of the ATS and this Court's precedents interpreting it: (1) "the judicial creation of new causes of action under the ATS is extraordinarily disfavored if not dead letter"; (2) "some domestic law, including presumption canons, govern [the] interpretation of the ATS's scope"; and (3) "separation-of-powers concerns almost entirely foreclose the recognition of new causes of action under the ATS." *Id.* at 119a-120a.

Applying those principles, Judge Bumatay concluded that the panel had made "three main errors." Pet. App. 110a. *First*, the panel erred by "fail[ing] to restrict ATS liability to causes of action comparable to historically recognized torts," particularly in light of *Central Bank*'s reasoning that civil aiding and abetting liability has "no storied place in domestic law." *Id.* at 110a-111a, 123a-126a. *Second*, the panel "violated the separation of powers in pronouncing a new cause of action * * * even though

Congress has continued to legislate in this very area"—including through the TVPA. *Id.* at 111a-112a, 126a-130a. *Third*, the panel "ignored serious foreign-policy concerns" and "permit[ted] federal courts to intrude in the delicate relations with another world superpower" by allowing the claims to proceed despite the presence of "foreign policy concerns as obvious as they are serious." *Id.* at 110a-111a, 130a-134a.

SUMMARY OF ARGUMENT

Neither the Alien Tort Statute nor the Torture Victim Protection Act provides for aiding and abetting liability. The court of appeals erred by permitting aiding and abetting claims to go forward against petitioners under those statutes, and its judgment should be reversed.

I. Respondents' aiding and abetting claims alleging violations of international law are not cognizable under the ATS.

A. Judicial implication of aiding and abetting liability under the ATS is improper, because the implication of *any* cause of action under the ATS beyond the three likely contemplated by the First Congress would be contrary to the separation of powers. In a variety of contexts, this Court has emphasized that the creation of a cause of action is a matter for Congress, not the courts. Congress should specify any new causes of action under the ATS, and this Court should now clarify that courts may not imply them.

B. There are particular reasons for courts to defer to Congress with respect to creating a cause of action for aiding and abetting under the ATS. As this Court held in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the default rule is that civil aiding and abetting liability is not available unless Congress has clearly so provided. Because the ATS does

not provide for aiding and abetting liability on its face, courts may not impose it without congressional direction.

Even aside from *Central Bank*, two additional factors counsel against judicial recognition of aiding and abetting liability under the ATS. *First*, recognizing aiding and abetting liability would have a multiplicative effect on the recognition of other causes of action, throwing to the wind the "great caution" that this Court has previously urged before expanding ATS liability. *Second*, as the United States has consistently told this Court across administrations, recognizing aiding and abetting liability under the ATS poses serious risks to foreign policy. Indeed, as this case well illustrates, aiding and abetting claims often seek to impose liability for a primary underlying tort allegedly committed by foreign sovereigns or officials. Under this Court's precedents, any one of those reasons, much less all of them together, mean that the court of appeals should have deferred to Congress and declined to imply a private cause of action for aiding and abetting.

C. At a minimum, the particular aiding and abetting claims asserted by respondents in this case are not cognizable under the ATS. Prevailing on those claims requires a determination by American courts that the conduct of a foreign government against its own citizens on its own soil violated international law. Resolving those claims would therefore require a court to establish a primary violation of international law by a foreign state exercising sovereign authority as to its own people within its territory. Such a claim falls well beyond anything contemplated by the First Congress. Whether any such claim should be recognized is a sensitive exercise of political judgment better suited to the political branches.

II. Claims for aiding and abetting are also unavailable under the TVPA. Congress did not expressly provide for

aiding and abetting liability, and it would be improper to imply it.

A. This Court's decision in *Central Bank* makes clear that, when Congress intends to create aiding and abetting liability, it does so expressly. Congress did so in statutes throughout the United States Code. But the TVPA does not use any of the same language as those other statutes. While the TVPA imposes liability on those who "subject" victims to torture, that covers command responsibility—a particular form of vicarious liability for those who direct the torture of persons in their custody and control. It does not reach the distinct and far broader concept of aiding and abetting, which encompasses assistance of various forms and does not require a defendant even to be a cause of the victim's harm. Other textual limitations also foreclose the aiding and abetting claim here.

B. The court of appeals offered various reasons that the TVPA should nevertheless be construed to provide for aiding and abetting liability. None is sufficient to overcome the statute's text and structure. The court of appeals was incorrect in concluding that principles of international law, rather than the statutory-interpretation principles set out in *Central Bank*, should govern the statutory-interpretation question under the TVPA. And the TVPA's ambiguous legislative history, which at most reflects the use of loose language to describe command responsibility, cannot overcome the TVPA's clear text. Finally, recognizing aiding and abetting TVPA liability would not serve the Nation's foreign-policy interests, as the United States has correctly explained. In any event, such a judgment would be for Congress, rather than this Court. As to the TVPA as well as the ATS, the court of appeals' judgment should be reversed.

ARGUMENT

I. RESPONDENTS' AIDING AND ABETTING CLAIMS ARE NOT COGNIZABLE UNDER THE ATS

The court of appeals' recognition of a cause of action for aiding and abetting under the ATS is incorrect, and this Court should reject it for three reasons. *First*, the Court's decisions make clear that judicial implication of a cause of action is improper where there is reason to believe that Congress should specify the cause of action, and there is always a valid reason for that belief under the ATS. *Second*, as the Court explained in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), there are particular reasons to defer to Congress before implying *aiding and abetting* liability, and those reasons apply with even greater force in the ATS context given the risk that such liability will allow claims that create foreign-policy disruptions. *Third*, at a minimum, the Court should not recognize respondents' particular aiding and abetting claims, because those claims would create the most extreme form of diplomatic friction by allowing an American court to decide whether the conduct of a foreign government on its own soil violated international law.

A. No New Judicially Implied Private Causes Of Action Are Cognizable Under The ATS

The most straightforward reason that an aiding and abetting claim is unavailable under the ATS is that *no* causes of action are available under that statute beyond the three recognized at the time of its adoption (and any others subsequently created by Congress). See *Nestlé USA, Inc.* v. *Doe*, 593 U.S. 628, 637 (2021) (opinion of Thomas, J.). A majority of the Court has acknowledged that, "[i]n light of the foreign-policy and separation-of-

powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Jesner* v. *Arab Bank, PLC*, 584 U.S. 241, 265 (2018). Three Justices have already recognized that the argument is correct. See *Nestlé*, 593 U.S. at 637 (opinion of Thomas, J., joined by Gorsuch and Kavanaugh, JJ.). The Court should now take this opportunity to so hold.

1. a. The ATS provides that "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. The text of that statute "creat[es] no new causes of action." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004). Any cause of action asserted pursuant to the ATS must thus arise, if at all, either from another act of Congress or from federal common law.

In determining when to recognize such a claim under federal common law, this Court has emphasized that the ATS was enacted as part of the Judiciary Act of 1789 to provide a federal forum to adjudicate a "narrow set of violations of the law of nations" that, "if not adequately redressed," could give "rise to an issue of war." *Sosa*, 542 U.S. at 715. At the turn of this century, the Court canvassed the ATS's history, see *id.* at 715-721, and concluded that, in enacting the ATS, the First Congress "had * * * in mind" only "three primary offenses" against the law of nations recognized by Sir William Blackstone as having "a potential for personal liability": "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. The Court emphasized that it had "no basis to suspect Congress had any examples in mind beyond those." *Ibid.*

The Court nevertheless observed that, "subject to vigilant doorkeeping," the door remained at least theoretically "ajar" to the creation of new causes of action based on "a narrow class of international norms." *Sosa*, 542 U.S. at 729; but see *id.* at 739 (Scalia, J., concurring in part and concurring in the judgment, joined by Rehnquist, C.J., and Thomas, J.). The Court subsequently read *Sosa* to require a court to follow a two-step process before recognizing a new cause of action: *First*, the court must determine that the alleged international-law violation reflects a sufficiently "specific, universal, and obligatory" norm. *Jesner*, 584 U.S. at 257-258 (plurality opinion) (quoting *Sosa*, 542 U.S. at 732); *Nestlé*, 593 U.S. at 648 (Sotomayor, J., concurring). *Second*, the court must separately determine that allowing a case to proceed under the ATS would be a "proper exercise of judicial discretion." *Jesner*, 584 U.S. at 258 (plurality opinion) (discussing *Sosa*, 542 U.S. at 732-733); *Nestlé*, 593 U.S. at 648 (Sotomayor, J., concurring). Applying that framework, the Court in *Sosa* declined to create a cause of action for the particular claim raised by the plaintiff. See 542 U.S. at 738.

b. In declining to "close the door to further independent judicial recognition" of causes of action that could satisfy the Court's two-step test, the *Sosa* Court "assumed" that "no developments in the two centuries [since] the enactment of [the ATS] * * * categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law." 542 U.S. at 724-725.

Whether or not that assumption was correct at the time of *Sosa*, this Court's decisions in the two decades since have "clarified" the high bar for judicially creating causes of action and have confirmed that recognizing causes of action beyond the three contemplated by the First Congress would be unwarranted. See *Nestlé*, 593 U.S. at 635 (opinion of Thomas, J.). *Sosa* itself recognized

the evolution underway in the Court's implied-rights jurisprudence. Citing then-recent decisions like *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the Court invoked the need for "judicial caution" in "making international rules privately actionable" because the "decision to create a private right of action is one better left to legislative judgment." *Sosa*, 542 U.S. at 727. But in the decades since *Sosa*, this Court has gone even further, warning against judicial implication of private rights of action in virtually all circumstances.

For example, in *Ziglar* v. *Abbasi*, 582 U.S. 120 (2017), this Court acknowledged for the first time that, "in light of the changes to the Court's general approach to recognizing implied damages remedies," the Court's cases recognizing implied rights of action under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), "might have been different if they were decided today." *Ziglar*, 582 U.S at 134. In *Hernandez* v. *Mesa*, 589 U.S. 93 (2020), the Court confirmed that "it is doubtful" the Court "would have reached the same result" in its *Bivens* cases implying private rights of action given that the Court had "c[o]me to appreciate more fully the tension" between the practice of judicially implying causes of action and "the Constitution's separation of legislative and judicial power." *Id.* at 100. And in *Egbert* v. *Boule*, 596 U.S. 482 (2022), the Court stated even more categorically that "creating a cause of action is a legislative endeavor" permissible only in the vanishingly rare scenario "in which a court is * * * *undoubtedly* better positioned than Congress to create a damages action." *Id.* at 491-492 (emphasis added).

Accordingly, the prevailing rule today is simple: if "there is *any* rational reason (even one) to think that *Congress* is better suited" to decide whether to create a cause

of action, a court must "refrain from creating such a remedy." *Egbert*, 596 U.S. at 491, 496.

c. Under this Court's "precedents since *Sosa*," there "always is a sound reason" for a court not to create a new cause of action under the ATS. *Nestlé*, 593 U.S. at 640 (opinion of Thomas, J.). The "separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS." *Jesner*, 584 U.S. at 264-265. That is because "[t]he political branches, not the [j]udiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," *id.* at 265, and those concerns are necessarily "implicated in any case arising under the ATS," which confers jurisdiction over claims of violations of the law of nations, *Kiobel*, 569 U.S. at 117.

The Constitution vests Congress with the powers to "regulate Commerce with foreign Nations" and "define and punish * * * Offences against the Law of Nations." U.S. Const. Art. I, § 8, cl. 3, 10. And it grants the President the "executive power," as well as the powers to act as commander in chief, appoint and receive ambassadors, and make treaties with foreign nations. U.S. Const. Art. II. The "historical gloss on the 'executive power,'" moreover, "has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)); see *Hernandez*, 589 U.S. at 104.

The judiciary, by contrast, lacks any authority or institutional capacity over foreign affairs. "The propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). Foreign-policy

decisions "are delicate, complex, and involve large elements of prophecy." *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Such decisions "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Ibid.* Accordingly, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Egbert*, 596 U.S. at 494 (citation omitted).

Identifying actionable norms of international law requires sensitive judgments that put the judiciary in the unenviable position of balancing the desire to uphold human rights with the risks of increased tensions with other nations, threats of retaliation, and declines in foreign investment. Even then, "identifying such a norm is only the beginning of defining a cause of action." *Kiobel*, 569 U.S. at 117. A court needs to decide how to define the relevant norm; what limitations period applies; who would be amenable to suit; what exhaustion requirements might exist; and what defenses to allow. See *ibid.*; *Sosa*, 542 U.S. at 732 n.20, 733 n.21; cf. Pet. App. 32a-44a (devising standards for actus reus and mens rea). In short, there are "many different ways to create a cause of action that would enforce developments in international law." *Nestlé*, 593 U.S. at 639 (opinion of Thomas, J.). And "[e]ach of these decisions carries with it significant foreign policy implications." *Kiobel*, 569 U.S. at 117.

Moreover, the political branches have "ample means" to address violations of international law where they deem appropriate; or, "if they think best, the political branches may choose to look the other way." *Jesner*, 584 U.S. at 292 (Gorsuch, J., concurring in part and concurring in the judgment); accord *id.* at 272-274 (plurality opinion). The President can engage in international diplomacy; embark on bilateral negotiations; impose sanctions and export

controls; and even deploy military force. Congress, for its part, can employ a range of options, including creating a civil cause of action; imposing criminal liability or new economic sanctions; or developing and disseminating information to help potential victims of human-rights abuses. See, *e.g.*, TVPA, 28 U.S.C. 1350 note; Uyghur Human Rights Policy Act of 2020, Pub. L. No. 116-145, 134 Stat. 648; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

Because the judiciary has no role in foreign affairs, the many reasons for caution in implying causes of action apply with even greater force when the cause of action seeks to enforce violations of international law. Indeed, in *Hernandez*, this Court held that a "potential effect on foreign relations" was sufficient to counsel hesitation in recognizing a cause of action for the violation of a constitutional right. 589 U.S. at 103-104. That potential effect is always present under the ATS, and it is reason enough to foreclose the creation of new ATS causes of action.

d. A majority of this Court has already acknowledged that, "[i]n light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Jesner*, 584 U.S. at 265. Three Justices have gone further and expressly stated that, because creating a cause of action for a violation of international law beyond the three historical torts recognized in *Sosa* "*invariably* gives rise to foreign-policy concerns," there "will *always* be a sound reason" for a court not to do so. *Nestlé*, 593 U.S. at 638 (opinion of Thomas, J., joined by Gorsuch and Kavanaugh, JJ.) (emphases added); see also *id.* at 658 (Alito, J., dissenting) (noting the "strong arguments" to that effect).

Simply put, recognizing new causes of action for violations of international law exceeds the judicial role. This Court should follow the logic of its precedents and now hold that no new causes of action are available under the ATS through judicial implication—including the claims of aiding and abetting violations of international law being asserted by respondents.

2. a. The foregoing result is consistent with *Sosa*, which left open the possibility of recognizing new causes of action on the assumption that no "development" in the law had yet to "preclude[] federal courts from recognizing a claim under the law of nations as an element of common law." 542 U.S. at 724-725. For that reason, the Court can hold that no new causes of action are available "[e]ven without reexamining *Sosa*." *Nestlé*, 593 U.S. at 635 (opinion of Thomas, J.).

Clarifying that no additional causes of action are available is particularly appropriate because this Court did not recognize a new cause of action for the violation of a norm of international law in *Sosa* and has not done so since. For that reason, *Sosa*'s reasoning that federal courts possess ambient authority to do so is not "necessary to th[e] result" in that case—or any other. *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996); see *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 363 (2006). By holding now that federal courts lack the authority to recognize new causes of action for violations of international law, therefore, the Court would at most be rejecting dicta from *Sosa*.

Doing so is all the more warranted because *Sosa*'s statements about the potential for new causes of action were inconsistent with other aspects of its reasoning. Acknowledging the foreign-policy implications of recognizing new causes of action, *Sosa* appropriately urged "great caution in adapting the law of nations to private rights."

542 U.S. at 728. And as Justice Scalia recognized at the time, the inevitable upshot of proceeding with "caution" is that it will never be appropriate, without congressional authorization, to recognize a new cause of action for violations of norms of international law. See *id.* at 746-747 (opinion concurring in part and concurring in the judgment). Justice Scalia was correct in that respect: because there "will always be a sound reason for courts not to create a cause of action" for additional violations of international law, *Nestlé*, 593 U.S. at 638 (opinion of Thomas, J.), the reasons for "caution" laid out in *Sosa* support the conclusion that no new causes of action can be recognized.

b. Should the Court view *Sosa*'s statements about the possibility of new causes of action as rising to the level of a holding, it would be appropriate to overrule that aspect of *Sosa*.

Sosa's invitation to "judicial lawmaking" through the creation of new federal common law was wrong even at the time it was decided. See 542 U.S. at 744-747 (Scalia, J., concurring in part and concurring in the judgment); see *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 801-808 (D.C. Cir. 1984) (Bork. J., concurring), cert. denied, 470 U.S. 1003 (1985). *Sosa*'s fundamental premise that the judiciary can create new causes of action without congressional authorization was questionable then, and it has since been conclusively undermined. See pp. 19-21, *supra*; Chevron Cert. Br. 14-16. To the extent that *Sosa* invites courts to continue creating implied causes of action as a matter of federal common law, and to do so despite the potential effects on foreign relations, it has become a "doctrinal dinosaur," justifying a "depart[ure] from stare decisis." *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015).

Nor can reliance concerns compel adherence to *Sosa*'s mistaken language, because no litigant can reasonably

rely on *Sosa*'s ambient authority for courts to create new causes of action. To plan that *Sosa*'s authority will "yield[] a particular result" is "to gamble not only that the doctrine will be invoked, but also that it will produce readily foreseeable outcomes and the stability that comes with them." *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369, 410 (2024).

In addition, recognizing new causes of action under the ATS has proven to be unworkable. Despite this Court's efforts to police the scope of actionable conduct and the universe of potential defendants under the ATS, see, *e.g.*, *Nestlé*, 593 U.S. at 634; *Jesner*, 584 U.S. at 272; *Kiobel*, 569 U.S. at 124, plaintiffs and their lawyers have continued to pursue ambitious ATS litigation. In the years following *Sosa*, "the number of ATS cases grew to the highest levels yet." Christopher Ewell, Oona A. Hathaway & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 Cornell L. Rev. 1205, 1223 (2022) (Ewell). And despite *Sosa*'s plea for "great caution," 542 U.S. at 727-728, lower courts have recognized many new causes of action. See, *e.g.*, Pet. App. 22a-23a. Those decisions risk "establish[ing] a precedent that discourages American corporations from investing abroad," including deterring "active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 584 U.S. at 269-270 (plurality opinion); see Chamber Cert. Br. 7-20.

That recognition of new causes of action has entrenched defendants and courts in litigation that, as here, often lasts for a decade or more. And it has had little benefit for plaintiffs. One study determined that, in the history of ATS litigation, only six cases have resulted in collected monetary judgments (out of approximately 300 filed). See Ewell 1241, 1250.

As this Court has explained in other contexts, "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to [litigants], distorts the law, misleads judges, and wastes the resources of * * * counsel * * * and courts." *Edwards* v. *Vannoy*, 593 U.S. 255, 272 (2021). That aptly describes the last two decades of jurisprudence in the wake of *Sosa*. By leaving open the possibility of judicial recognition of new causes of action for violations of international law, *Sosa* went down a mistaken path. The Court should now hold that implying new causes of action under the ATS is improper.

B. A Private Cause Of Action For Aiding And Abetting Is Not Cognizable Under The *Sosa* Framework

Even if the ATS were to permit continued judicial recognition of causes of action for a "narrow class" of additional claims, *Sosa*, 542 U.S. at 729, 732, implying a private cause of action for aiding and abetting would still be impermissible under the *Sosa* framework.

In particular, *Sosa*'s second step requires a court to assess whether allowing a case to proceed under the ATS constitutes a "proper exercise of judicial discretion," or instead whether "caution requires the political branches to grant specific authority" for the cause of action. *Jesner*, 584 U.S. at 258 (plurality opinion); see *Sosa*, 542 U.S. at 732-733. When a court applies the second step, "[t]he potential implications for the foreign relations of the United States" are particularly significant. *Jesner*, 584 U.S. at 258 (plurality opinion) (quoting *Sosa*, 542 U.S. at 727). This Court's decisions have made clear that *Sosa*'s second step is "extraordinarily strict," and the Court "ha[s] yet to find it satisfied." *Nestlé*, 593 U.S. at 637 (opinion of Thomas, J.).

This should not be the first case in which the Court recognizes a new cause of action under the ATS. There are two compelling reasons to defer to Congress with respect to creating a cause of action for aiding and abetting. *First*, because the text of the ATS does not provide for aiding and abetting liability, this Court's decision in *Central Bank* forecloses judicial implication of such a cause of action. *Second*, recognizing such a cause of action would vastly expand liability under the ATS, contravening the cautious approach required by the Court's ATS precedents and, as the United States has long asserted, raising serious foreign-policy concerns.

1. Central Bank *Forecloses Implying An Aiding And Abetting Cause Of Action Under The ATS*

In *Central Bank*, *supra*, this Court "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), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013). Because Congress has not expressly provided for aiding and abetting liability under the ATS, and because doing so would involve a quintessentially legislative judgment, courts may not imply such a cause of action. See Pet. App. 125a (Bumatay, J., dissenting from the denial of rehearing en banc).

a. In *Central Bank*, the Court held that a private plaintiff could not bring a civil action for aiding and abetting securities fraud under Section 10(b) of the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 891. See 511 U.S. at 177-178. The Court explained that "the language of Section 10(b) does not in terms mention aiding and abetting," and added that any argument for implied aiding and abetting liability was unpersuasive because Congress knows "how to impose aiding and abetting

liability" when it wants to. *Id.* at 175-176 (citation omitted). The Court noted that Congress had not enacted a general civil aiding and abetting statute analogous to the corresponding statute in the criminal code (18 U.S.C. 2). See *Central Bank*, 511 U.S. at 176, 182. The Court also emphasized that, unlike liability for criminal aiding and abetting, which has "ancient" roots, liability for civil aiding and abetting has long been "uncertain in application," with, as the Court colorfully put it, "the common-law precedents largely confined to isolated acts of adolescents in rural society." *Id.* at 181 (internal quotation marks and citation omitted).

That historical record, the Court explained, reflects Congress's "statute-by-statute approach" to civil aiding and abetting liability and forecloses any "general presumption" in favor of aiding and abetting liability. 511 U.S. at 182. Congress therefore must provide an affirmative indication that it intends to create aiding and abetting liability; "statutory silence" is not "tantamount to an implicit congressional intent" to create it. *Id.* at 185.

The courts of appeals have applied *Central Bank*'s interpretive approach to federal statutes in a variety of contexts beyond securities law, consistently holding that "statutory silence on the subject of secondary liability means there is none." *Boim* v. *Holy Land Foundation*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc) (Antiterrorism Act), cert. denied, 558 U.S. 981 (2009); see, *e.g.*, *City Select Auto Sales Inc.* v. *David Randall Associates, Inc.*, 885 F.3d 154, 161 (3d Cir. 2018) (Telephone Consumer Protection Act); *Kirch* v. *Embarq Management Co.*, 702 F.3d 1245, 1246-1247 (10th Cir. 2012) (Electronic Communications Privacy Act), cert. denied, 569 U.S. 1013 (2013).

b. *Central Bank*'s approach dictates the result here. In a single sentence, the ATS confers on district courts "original jurisdiction of any civil action by an alien for a

tort only, committed in violation of the law of nations or a treaty." 28 U.S.C. 1350. That bare jurisdictional grant contains "[n]ot a word" concerning "judicial creation of new liability," much less "which standard of accomplice liability to use." Pet. App. 127a (Bumatay, J., dissenting from the denial of rehearing en banc); see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, '*Sosa*,' *Customary International Law, and the Continuing Relevance of* '*Erie*,' 120 Harv. L. Rev. 869, 926 (2007). And just as "[t]he principles underlying the presumption against territoriality" apply to "constrain courts exercising their power under the ATS," *Kiobel*, 569 U.S. at 117, so too do the principles underlying *Central Bank*'s presumption against aiding and abetting liability absent congressional direction. Accordingly, as the United States has advocated across administrations, *Central Bank* precludes aiding and abetting liability under the ATS. See, *e.g.*, U.S. Cert. Br. 16-17; U.S. Br. at 24 & n.5, *Nestlé*, *supra* (No. 19-416); U.S. Br. at 8, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

History further supports the applicability of *Central Bank*'s approach. Shortly after enacting the ATS, the First Congress passed what has become known as the Crimes Act, which fashioned criminal punishment for the three then-recognized offenses against the law of nations—the violation of safe conducts, the infringement of the rights of ambassadors, and piracy. See Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 10, 25-28, 1 Stat. 112, 113-114, 117-118 (1790). The Crimes Act authorized capital punishment for those who "knowingly and wittingly aid[ed] and assist[ed]" piracy, *ibid.*, but it did not impose aiding and abetting liability for the other offenses. In short, the First Congress "knew how to impose aiding and abetting liability when it chose to do so." *Central Bank*, 511 U.S. at 176. Yet it

conspicuously decided not to adopt criminal aiding and abetting liability for certain offenses against the law of nations, and it did not provide for civil aiding and abetting liability at all. As the Court explained in *Central Bank*, such careful distinctions "indicate[] a deliberate congressional choice with which the courts should not interfere." *Id.* at 184.

c. In the decision below, the court of appeals determined that *Central Bank* was "not apposite" because "the appropriate scope of liability * * * depend[s] on international law, not on statutory text." Pet. App. 35a. Instead, it reasoned, the relevant question is whether Congress has offered an affirmative indication "*against* recognizing a particular form of international law liability under the ATS." *Ibid.*

That reasoning is mistaken. The ATS creates jurisdiction to "hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 542 U.S. at 712. Federal courts deciding whether to "recognize private claims under federal common law," *id.* at 732, should not do so when that recognition would conflict with other basic common-law principles, including the rule of *Central Bank*. See Pet. App. 125a (Bumatay, J., dissenting from the denial of rehearing en banc). More fundamentally, the court of appeals' suggestion that a court should recognize a cause of action under the ATS unless it can identify a reason *not* to do so inverts the proper analysis for implied private rights. See, *e.g.*, *Egbert*, 596 U.S. at 495. Given the ATS's silence on liability and the *Central Bank* principle, the judiciary is "not undoubtedly better positioned than Congress" to authorize aiding and abetting liability, and that alone suffices to foreclose respondents' claims. *Ibid.*; see *Jesner*, 584 U.S. at 264.

2. Additional Factors Counsel Against Implying An Aiding And Abetting Cause Of Action Under The ATS

Even aside from *Central Bank*, the judiciary should refrain from implying an aiding and abetting cause of action because doing so would multiply the range of conduct actionable under the ATS without congressional direction and pose particularly profound risks to foreign policy.

a. Recognizing new causes of action under the ATS requires, at a minimum, "great caution." *Sosa*, 542 U.S. at 728. But this Court's recognition of aiding and abetting liability, in combination with lower courts' demonstrated willingness to recognize new forms of primary wrongdoing, would throw caution to the wind. It would operate as a cause-of-action multiplier, markedly expanding the number of claims that can be brought under the ATS without any express congressional authorization. Respondents' claims here are a case in point: they assert aiding and abetting liability based on no fewer than seven theories of primary wrongdoing. See p. 9, *supra*. None of those theories is among the three that this Court has deemed actionable under the ATS. A recognition of aiding and abetting liability in this case would sharply accelerate the project of "future conversions of perceived international norms into American norms" by lower courts. *Sosa*, 542 U.S. at 750-751 (Scalia, J., concurring in part and concurring in the judgment).

As it is, recognizing a cause of action for aiding and abetting vastly expands the available remedy under the ATS, capturing many types of conduct downstream from the primary violation. See *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 488-489 (2023); *Central Bank*, 511 U.S. at 176. In recent years, this Court has repeatedly been called upon to rein in broad interpretations of aiding and abetting liability by plaintiffs and the lower courts. See *Smith & Wesson Brands, Inc.* v. *Estados Unidos Mexicanos*,

605 U.S. 280, 294-299 (2025); *Twitter*, 598 U.S. at 506-507; cf. *Cox Communications, Inc.* v. *Sony Music Entertainment*, No. 24-171 (U.S. argued Dec. 1, 2025).

That experience reinforces the risks that respondents ask this Court to accept. Allowing aiding and abetting liability here would put this Court's imprimatur on a new wave of ATS litigation, including claims challenging ordinary commercial activity that was allegedly conducted with improper intent. That expansion contravenes both the caution this Court urged in *Sosa* and the restraint the Court has steadily practiced in subsequent ATS cases. Even if the Court is not ready to shut the door to all new causes of action under the ATS, see pp. 17-27, *supra*, it should decline respondents' invitation to blow the door wide open. Cf. *Sandoval*, 532 U.S. at 287.

b. The Court should also refuse to recognize aiding and abetting liability under the ATS because it poses particularly acute risks to the Nation's foreign policy.

Aiding and abetting is "inherently" a type of "secondary liability." *Twitter*, 598 U.S. at 494. Where that liability exists, a defendant is held liable for assisting *someone else's* "commi[ssion] of an actual tort." *Id.* at 494-495. When plaintiffs assert aiding and abetting claims under the ATS, the allegations of underlying misconduct frequently involve acts of foreign actors—including foreign states and officials—within their own territory. By bringing aiding and abetting claims against the private associates of those foreign actors, plaintiffs can evade the limitations of sovereign immunity and the presumption against extraterritoriality while nevertheless requiring American courts to pass on the foreign actors' conduct, thereby replicating the kinds of concerns that have led this Court to limit the range of available ATS claims in its recent line of precedents applying the statute. See, *e.g.*, *Jesner*, 584 U.S. at 270-271; *Kiobel*, 569 U.S. at 124.

Consistent with those concerns, the United States has explained for nearly two decades that aiding and abetting liability would pose "serious risks" to foreign relations and foreign policy. U.S. Cert. Br. 10 (quoting U.S. Br. at 18, *American Isuzu Motors*, *supra*). Under *Sosa*, the view of the Executive Branch is entitled to "serious weight." 542 U.S. at 733 n.21. As then-Judge Kavanaugh explained, "if an ATS suit would harm the Nation's foreign relations—as assessed and explained by the Department of State or Department of Justice as representative of the President of the United States—then the courts have no business ignoring that statement of interest, thereby threatening the Nation's foreign relations and thwarting Congress's intent in the ATS." *Doe*, 654 F.3d at 89 (opinion dissenting in part). Here, the position of the Executive Branch is both unequivocal and longstanding. That alone provides a sufficient reason for the judiciary to stay its hand.

The original purpose of the ATS confirms that conclusion. As explained above, see pp. 5-6, the First Congress enacted the ATS 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; see *id.* at 276-277 (Alito, J., concurring). Given that purpose and courts' limited authority to create federal common law, courts should "decline to create * * * causes of action" whenever "doing so would not materially advance the ATS's objective of avoiding diplomatic strife." *Id.* at 278 (Alito, J., concurring); see *id.* at 274 (Thomas, J., concurring).

Far from "avoiding diplomatic strife," aiding and abetting liability would create it. *Jesner*, 584 U.S. at 276 (Alito, J., concurring). In point of fact, many countries have raised objections to the litigation of aiding and abetting

claims in federal courts, citing the strain such suits place on those countries' relationships with the United States. See U.S. Br. at 18, *Corrie* v. *Caterpillar Inc.*, No. 05-36210, 2006 WL 2952505 (9th Cir. Aug. 11, 2006) (noting protests by foreign governments).

It is not hard to find examples of increased tensions caused by litigation of aiding and abetting claims under the ATS. In *Jesner*, Jordan considered the ATS suit at issue to be "a grave affront" to its sovereignty that "risk[ed] destabilizing Jordan's economy and undercutting one of the most stable and productive allies the United States has in the Middle East." Jordan Br. at 3-4, *Jesner*, *supra* (No. 16-499). Canada warned that an ATS suit targeting conduct in Sudan negatively interfered with its efforts to promote the "peaceful resolution of Sudan's internal disputes" through trade. *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, Civ. No. 01-9882, 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005). Indonesia stated that it "c[ould] [not] accept" an American court adjudicating alleged abuses of human rights by the Indonesian government. *Doe*, 654 F.3d at 59. And Papua New Guinea expressed concern that ATS litigation touching on conduct during its civil war had "potentially very serious social, economic, legal, political and security implications," as well as adverse effects on "its relations with the United States." *Sarei* v. *Rio Tinto, PLC*, 487 F.3d 1193, 1199 (9th Cir. 2007), superseded on reh'g en banc, 550 F.3d 822 (2008) (citation omitted). In several of those cases, the foreign sovereigns were specifically objecting to suits against private plaintiffs who were alleged to have aided and abetted their primary wrongdoing.

c. The court of appeals subordinated those foreign-policy concerns to its own view that recognizing aiding and abetting liability would enhance "the original goals of the ATS." Pet. App. 31a. The court observed that "the

current record"—which did not include the views of the United States, because the court refused to solicit them—does not reflect any case-specific foreign policy considerations that present a reason to bar this action." *Id.* at 32a. But at *Sosa*'s second step, the question is not whether a court can imagine any salutary effects from creating a cause of action, but whether there are any "sound reasons to think Congress might" choose not to do so. *Jesner*, 584 U.S. at 264. The foreign-policy concerns that the United States has long raised provide such a reason.

Nor was the court of appeals correct to suggest that ATS litigation serves the First Congress's "original goals." Pet. App. 31a. As used today, litigation under the ATS has transformed the statute from a "shield" protecting the United States from "being drawn into disputes with other nations" into a "sword" to "punish foreign nations through their alleged aiders and abetters." *Id.* at 112a (Bumatay, J., dissenting from the denial of rehearing en banc) (emphasis omitted). For that reason, too, the Court should hold that aiding and abetting claims are unavailable under the ATS.*

C. At A Minimum, Respondents' Particular Aiding And Abetting Claims Are Not Cognizable

At a minimum, the Court should reject the aiding and abetting claims that respondents seek to assert here.

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* In addition, allowing aiding and abetting liability under the ATS would circumvent Congress's judgments in crafting the TVPA. The TVPA expressly creates a cause of action for torture and extrajudicial killing under color of foreign law, but, as discussed below, it does not provide for aiding and abetting liability. See pp. 39-46. The Court should look to that "legislative guidance" in determining what is cognizable under the ATS. *Sosa*, 542 U.S. at 726; see *Doe*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part).

1. To begin with, respondents' aiding and abetting claims would require a federal court to find a primary violation of international law by a foreign state against its own people on its own soil. See Pet. App. 87a-90a (Christen, J., dissenting); *id.* at 130a-132a (Bumatay, J., dissenting from the denial of rehearing en banc). It is difficult to imagine a case less suited to judicial resolution. Indeed, in *Sosa*, this Court expressly warned against using the ATS to permit suits that "claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727.

Respondents assert ATS claims against Cisco for aiding and abetting torture; cruel, inhuman, or degrading treatment; forced labor; prolonged and arbitrary detention; crimes against humanity; extrajudicial killing; and forced disappearance. See p. 9, *supra*. As the court of appeals recognized, those allegations "require a predicate offen[s]e committed by someone other than" petitioners. Pet. App. 71a (internal quotation marks and citation omitted). And there is no mystery who that "someone" is alleged to be. *Ibid.*

As Judge Christen aptly explained in dissent, respondents' theory of aiding and abetting liability "would necessarily require a showing that the Chinese Communist Party and Ministry of Public Security violated international law with respect to the Chinese-national [respondents]." Pet. App. 89a; see *id.* at 130a-132a (Bumatay, J., dissenting from the denial of rehearing en banc).

Respondents' claims thus use petitioners as "surrogate defendants to challenge the conduct of [a] foreign government[]." *Jesner*, 584 U.S. at 267. What is more, "[t]he concerns the Court expressed in *Jesner* about holding a foreign corporation liable apply tenfold to a case that hinges on whether a foreign government's treatment of its

own nationals violated international law." Pet. App. 90a (Christen, J., dissenting). This Court has mandated "judicial caution" to avoid "triggering * * * serious foreign policy consequences" under the ATS, and that caution must encompass suits that put a foreign government's conduct on trial in an American court without any directive from the political branches. *Jesner*, 584 U.S. at 272 (quoting *Kiobel*, 569 U.S. at 124).

Allowing respondents' claims to proceed here would be especially troubling because the United States has specifically taken the position that these claims (and others like them) should not go forward. "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." U.S. Cert. Br. 12. Exactly so. In light of the United States' concerns, these ATS claims should not be allowed to go forward.

2. Allowing respondents' claims to proceed would also be troubling because Cisco's sales of software and technology to China were in compliance with American export controls and consistent with relevant policies in place in the late 1990s and early 2000s. See pp. 7-10, *supra*. Subjecting Cisco to liability under a judicially implied cause of action would arrogate legislative power to the judiciary while simultaneously trampling the executive's judgment regarding appropriate trade policies.

The potential adverse consequences for the Nation's business community are significant. American companies operate in global markets. Their supply chains reach into a host of countries with varied human-rights risks. ATS litigation accusing American companies of aiding and abetting those foreign governments' human-rights violations against their own citizens—including companies like Cisco that have complied with export controls—has the

potential to embroil large swaths of the Nation's economy in complex litigation that will harm the reputation of American companies and chill foreign trade and investment. See p. 26, *supra*. Nowhere has Congress indicated that it intends to impose such a burden, and no other source of authority empowers the judiciary to do so.

II. RESPONDENT LEE'S AIDING AND ABETTING CLAIM IS NOT COGNIZABLE UNDER THE TVPA

One of the respondents, Charles Lee, seeks to impose liability under the TVPA on the individual petitioners for "aid[ing] and abet[ting] * * * officers in the unlawful conduct that led to * * * torture." J.A. 101. As relevant here, 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." 28 U.S.C. 1350 note, § 2(a).

Respondent's TVPA claim reflects the same fundamental flaw that pervades the other respondents' ATS claims: it seeks to create through implication what Congress declined to enact through legislation. The TVPA reflects a deliberate legislative choice to provide a narrow cause of action against individuals who, acting under color of foreign law, subject a victim to torture. It does not expressly provide for aiding and abetting liability. Nothing in the text or structure of the TVPA remotely suggests that Congress meant to authorize secondary liability for those who do not themselves order or inflict that torture.

A. The TVPA's Text And Structure Establish That An Aiding And Abetting Cause Of Action Is Not Cognizable

1. Because the text of the TVPA does not expressly provide for aiding and abetting liability, respondent may

not pursue an aiding and abetting claim here. See *Central Bank*, 511 U.S. 164.

a. As explained above, see pp. 28-29, this Court held in *Central Bank* that aiding and abetting liability is not available unless Congress expressly so provides. See 511 U.S. at 182. Notably, even language expanding liability beyond the primary wrongdoer, such as language covering those who act "directly or indirectly," does not suffice. See *id.* at 176. If Congress intended to provide that liability in the TVPA, "it would have used the words 'aid' and 'abet' in the statutory text." *Id.* at 177. Indeed, at the time Congress enacted the TVPA, it had used those specific words time and again to create secondary liability. See, *e.g.*, 18 U.S.C. 2333(d)(2) (providing that "any person who aids and abets * * * [an] act of international terrorism" is civilly liable); 18 U.S.C. 2(a) (providing that whoever "aids" or "abets" the commission of a criminal offense against the United States is punishable as a principal); see also *Central Bank*, 511 U.S. at 182-183 (collecting other examples).

The *Central Bank* rule resolves the aiding and abetting question here. The TVPA nowhere refers to aiding, abetting, assisting, facilitating, or otherwise participating in another's conduct. As then-Judge Kavanaugh explained, *Central Bank* establishes that "liability for aiding and abetting torture and extrajudicial killing does not exist under the TVPA." *Doe*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part).

b. The TVPA imposes liability on those who "subject" a person to torture. Pet. App. 76a. But it does not follow that liability for *aiding and abetting* is available.

As this Court explained in *Mohamad* v. *Palestinian Authority*, 566 U.S. 449 (2012), those who "subject" victims to torture include superiors who "give[] an order to torture." *Id.* at 458. The term "subject" renders liable

those who "do not personally execute the torture" but who direct the actions of the individual who personally carries out the torture. Pet. App. 76a-77a (citation omitted). The TVPA's language thus captures the concept of command responsibility—a particular form of vicarious liability that is different from (and narrower than) aiding and abetting liability. See Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 Harv. L. & Pol. Rev. 339, 348 (2012); Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 Leiden J. Int'l L. 139, 139, 141-142 (2000).

The foregoing understanding comports with contemporaneous dictionary definitions of the verb "subject." See, *e.g.*, Oxford English Dictionary 31 (2d ed. 1989) (to "cause to undergo or experience something" or to "lay open or expose to the * * * infliction of * * * something"); Webster's Third New International Dictionary 2275 (1993) (to "cause" a person to "undergo or submit to" something or to "expose" them to it); Random House Dictionary 1893 (2d ed. 1987) (to "cause [someone] to undergo the action of something specified" or to "expose" them to it); American Heritage Dictionary 807 (3d ed. 1994) (to "expose to something" or to "cause to experience"). Modern usage has not shifted: the current edition of Black's Law Dictionary defines "subject" as "to cause to undergo some action * * * or operation." Black's Law Dictionary 1729 (12th ed. 2024). Those definitions illustrate that "subjecting" a victim to something requires inflicting some action on the victim, even if indirectly, not simply providing assistance somewhere in the process.

Indeed, the term "subject" cannot create aiding and abetting liability because (as the dictionary definitions reflect) it covers those who "cause" the torture. Aiding and abetting liability, by contrast, does not require any causal connection between the defendant and the injury. See,

e.g., *Twitter*, 598 U.S. at 491. As this Court has explained, aiding and abetting liability "extends beyond persons who engage, even indirectly, in a proscribed activity" and reaches those "who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." *Central Bank*, 511 U.S. at 176. "[T]he party whom the defendant aids"—that is, the primary wrongdoer—"must perform a wrongful act that causes an injury." *Twitter*, 598 U.S. at 486 (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

By contrast, the aiding and abetting defendant is liable as long as that defendant "g[ave] knowing and substantial assistance to the primary tortfeasor." *Twitter*, 598 U.S. at 491. Put differently, liability can be imposed "even though [the aiding and abetting] was not the ultimate case of the harm." *United States* v. *Hatatley*, 130 F.3d 1399, 1406 (10th Cir. 1997). And it is precisely because respondent cannot establish that petitioners "subject[ed]" him to torture that the complaint alleges that they "aided and abetted" others who did. See J.A. 99-107; Pet. App. 16a.

An ordinary English speaker would not use the verb "subject" to refer to those who merely facilitate or assist another's actions. For example, a parent might subject a child to a punishment (say, by grounding him). But a neighbor who complained about the child's behavior, thereby prompting the parent's anger, would not comfortably be described as "subjecting" the child to punishment as well. The neighbor's comment may have led to the punishment, but he did not subject the child to it.

Similarly, a regulator subjects a company to a fine by imposing it directly, or by instructing enforcement staff to do so. But an ordinary speaker would not say that a software vendor "subjected" the company to a fine merely because it sold compliance tools to the agency, even if it knew that they would be used in enforcement actions.

Again, different language is needed to convey that meaning: the vendor may have facilitated or enabled the fine, but it did not subject the company to it.

Congress's choice of language encompassing one indirect—and particularly reprehensible—form of carrying out torture does not suffice to capture the far broader universe of aiding and abetting liability. The text of the TVPA does not provide for such liability.

2. An additional feature of the TVPA's text confirms the foregoing conclusion. The TVPA defines "torture" as an intentionally harmful act "directed against an individual *in the offender's* custody or physical control." 28 U.S.C. 1350 note, § 3(b)(1) (emphasis added). That definition thus requires that "the offender"—that is, the "individual" who is liable for "subject[ing]" a victim "to torture," *id.* § 2(a)(1)—is a person who has "custody or physical control" of the victim.

That additional element reflects the statute's evident purpose of creating liability for those who directly abuse victims (or who command others to do so). But it makes little sense when applied to defendants whose alleged involvement consists of remote assistance, far removed from custody or physical control of the victim. As the United States has explained, "those who aid and abet generally will not have either direct or indirect custody or control of the victims." U.S. Cert. Br. 21 (emphasis omitted). Aiding and abetting liability thus has no grounding in the statutory text.

3. Statutory context further illustrates that the TVPA does not provide for aiding and abetting liability. The TVPA targets a narrow class of defendants—natural persons acting under color of foreign law. It includes a ten-year limitations period; an exhaustion requirement, and a remedial scheme that carefully balances the need for accountability with respect for foreign sovereignty.

See 28 U.S.C. 1350 note, § 2(b); *Sosa*, 542 U.S. at 727-728. Congress's calibrated approach makes sense, given the substantial foreign-policy considerations implicated in this area. See pp. 22-23, *supra*. But recognizing aiding and abetting claims would work an open-ended expansion of liability at odds with that approach.

Moreover, in light of the especially acute foreign-policy concerns with permitting liability for conduct against foreign nationals on foreign soil, see pp. 33-36, *supra*, the Court should be particularly reluctant to expand that liability in the absence of clear text. Accordingly, even if the TVPA were susceptible to the broader interpretation urged by respondent, the Court should reject that interpretation in favor of petitioners' narrower (and at least equally natural) interpretation.

B. Respondent's Contrary Arguments Are Unpersuasive

Both the court of appeals and respondent offer various reasons that the TVPA should be read to recognize aiding and abetting liability. None holds water.

1. The court of appeals adopted the position that *Central Bank* does not apply where, as here, Congress creates a statutory cause of action reflecting a norm of international law. Pet. App. 78a-80a. In so doing, the court embraced the idea that secondary liability could be derived from the statute's "background," and it reasoned that "international customary law determines the scope of liability for torture under the TVPA" despite the absence of clear text. *Ibid.*

That reasoning is irreconcilable with *Central Bank*. See 511 U.S. at 180-183. As *Sosa* itself confirms, the TVPA stands as an example of Congress's acting deliberately and specifically in this sensitive area, supplying an "unambiguous and modern basis" for liability while carefully defining its scope. 542 U.S. at 728. It would greatly

expand the text of the TVPA to read aiding and abetting liability into it, and *Central Bank* forbids that result.

2. Next, both the court of appeals and respondent have pointed to snippets of the Senate Report suggesting that the TVPA was intended to reach those who "abetted" or "assisted" in torture. Pet. App. 75a-79a; S. Rep. No. 102-249, 102d Cong., 1st Sess. 8-9 (1991) (Senate Report). But this Court has repeatedly cautioned—including in the context of the TVPA itself—that "reliance on legislative history is unnecessary in light of [a] statute's unambiguous language." *Mohamad*, 566 U.S. at 458-459. So too here.

In any event, "the problems with legislative history are well rehearsed." *Wooden* v. *United States*, 595 U.S. 360, 381 (2022) (Barrett, J., concurring in part and concurring in the judgment). The legislative history invoked here illustrates the reasons for caution. Although it describes the scope of the law using the broad terms "abetted" and "assisted," in context those descriptions plainly refer only to command responsibility—liability for officials who authorized, tolerated, or knowingly ignored abuses. See Senate Report 8-9. None of the examples of actionable conduct in the Senate Report reflects any expectation that conduct by entities providing mere assistance could qualify, nor does similar language appear in the House Report. And critically, the language Congress actually enacted (and that President George H.W. Bush signed into law) reflects a contrary expectation by using the term "subjects" rather than looser terms such as "abets" or "assists." The legislative history cannot overcome the statute's plain text.

3. Respondent further contends that expanding the TVPA to include aiding and abetting liability would "further" American foreign policy. See Br. in Opp. 33-35. But "[p]urposive argument simply cannot overcome the force

of the plain text." *Bowe* v. *United States*, No. 24-5438, slip op. 24 (U.S. Jan. 9, 2026) (citation omitted). That is especially true because the United States has rejected respondent's interpretation of the TVPA *in this case* and warned that recognizing aiding and abetting claims would "pose significant risks to the United States' relations with foreign states and to the political branches' ability to conduct the Nation's foreign policy." U.S. Cert. Br. 2, 20.

Whatever one thinks about the merits of broader TVPA liability, Congress made a deliberate choice to authorize a narrow cause of action against direct perpetrators acting under color of foreign law—and to go no further. Claims that additional liability would serve American foreign-policy interests are best addressed to Congress, not this Court, in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER G. MICHEL
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
555 13th Street, N.W.,
Suite 600
Washington, DC 20005
(202) 538-8000
christophermichel@quinn-emanuel.com

TODD ANTEN
QUINN EMANUEL
URQUHART & SULLIVAN, LLP
295 Fifth Avenue
New York, NY 10016

KANNON K. SHANMUGAM
MASHA G. HANSFORD
JAKE L. KRAMER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

ANNA M. STAPLETON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
535 Mission Street, 25th Floor
San Francisco, CA 94105

CANDICE J. YANDAM RIVIERE
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

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