No. 24-856

IN THE

Supreme Court of the United States

CISCO SYSTEMS, INC. ET AL,
Petitioners,

V.

DOE I, ET AL.,
Respondents.

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

BRIEF OF CACI PREMIER TECHNOLOGY, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

CACI Premier Technology, Inc. ("CACI") is a Delaware corporation headquartered in Reston, Virginia, that, among other things, provides goods and services to the United States pursuant to government contracts. In 2003-2004, CACI provided civilian interrogators to augment U.S. Army intelligence-gathering efforts in wartime Iraq, with CACI's interrogators integrated into military interrogation teams and supervised by the U.S. Army chain of command.

Since 2004, CACI has faced a series of detainee abuse lawsuits brought under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), by Iraqis detained by the U.S. military in Iraq. Most plaintiffs' claims have been rejected pretrial. *See Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009), *cert. denied*, 564 U.S. 1037 (2011). In 2024, however, CACI proceeded to trial in a case filed in 2008 and, severely handicapped by the United States' three invocations of the state secrets privilege, suffered a $42 million judgment against it. *Al Shimari v. CACI Premier Tech., Inc.*, No. 08-cv-827 (E.D. Va.). CACI's appeal is pending before the Fourth Circuit. *Al Shimari v. CACI Premier Tech., Inc.*, No. 25-1043 (4th Cir.).

In *Al Shimari*, the district court concluded that the plaintiffs' case could proceed notwithstanding the D.C. Circuit's rejection of identical claims in

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[1] No counsel for a party authored this brief in whole or in part; and no party, party's counsel, or other person or entity—other than *amicus curiae* CACI Premier Technology, Inc.—contributed money that was intended to fund preparing or submitting the brief.

Saleh. Over the first sixteen years of the case, the district court in *Al Shimari* did, however, dismiss eighteen of the twenty counts asserted against CACI, including all counts alleging direct abuse by CACI personnel. The two trials of the *Al Shimari* case[2] proceeded solely on theories of co-conspirator and aiding-and-abetting liability. During the second trial, the district court entered judgment as a matter of law in CACI's favor on the plaintiffs' aiding-and-abetting claims based on a lack of evidence. The ultimate judgment in *Al Shimari* was premised on the district court's asserted power to create a cause of action under the ATS that combines two types of secondary liability, holding CACI liable under a theory of *respondeat superior* for the co-conspirator liability of individual CACI interrogators—individuals who were not defendants at trial.

CACI is a defendant in another ATS case filed by more than forty plaintiffs that has been stayed for more than a decade awaiting final resolution of *Al Shimari*. *Abbass v. CACI Premier Tech., Inc.*, No. 1:13-cv-1186 (E.D. Va.). Thus, CACI has a concrete interest in how this Court addresses questions relating to the availability of judge-made claims under the ATS.

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[2] The first trial resulted in a mistrial in May 2024 after the jury was unable to reach a verdict. The retrial occurred in October and November 2024.

SUMMARY OF ARGUMENT

Creating and defining causes of action is a disfavored judicial activity. *Egbert v. Boule*, 596 U.S. 482, 491 (2022). Lawmaking by federal judges strains the separation of powers that is fundamental to our Constitutional order and requires judges to make policy determinations they are ill equipped to make. *Id.* "Th[is] Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (internal quotations omitted). Any power that might theoretically remain for federal courts to imply new causes of action does not extend to the aiding-and-abetting claims endorsed by the Ninth Circuit in this case.

The experience in ATS litigation since this Court decided *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), including the ATS cases CACI has faced, demonstrates that lower courts have not followed the message of restraint embodied in this Court's ATS precedents. Instead, many lower courts have taken a broad view of their powers to imply new ATS causes of action rather than implementing this Court's admonition that judge-made causes of action are rarely, if ever, permissible. Indeed, many lower courts have flexibly construed this Court's decisions as wide-open vessels for judicial activism. *See Nestlé USA, Inc. v. Doe,* 593 U.S. 628, 644 (2021) (Gorsuch, J., concurring). Accordingly, the Court

should reverse the Ninth Circuit on the grounds that no new causes of action may be implied under the ATS beyond the three torts contemplated by the First Congress when it enacted the statute or, alternatively, that federal courts may not imply any secondary-liability claims under the ATS. A holding that disqualifies only aiding-and-abetting claims would inevitably result in ATS claims morphing into co-conspirator claims or other novel theories of secondary liability that are no more justifiable but that are not literally within a holding addressing only aiding-and-abetting claims.

ARGUMENT

I. The Court Has at Least Three Available Grounds for Rejecting the Aiding-and-Abetting Claims Endorsed by the Ninth Circuit

"At bottom, creating a cause of action is a legislative endeavor." *Egbert*, 596 U.S. at 491. In recent years, this Court has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.'" *Id.* (quoting *Hernández v. Mesa*, 589 U.S. 93, 100 (2020)). Courts engaged in the "unenviable task" of creating private rights of action "must evaluate a range of policy considerations . . . at least as broad as the range . . . a legislature would consider, including economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide," policy decisions the Legislature is far better equipped to evaluate. *Id.* (internal citations and quotations omitted) (omis-

sions in original). "And the Judiciary's authority to do so at all is, at best, uncertain." *Id.*

For these reasons, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Jesner*, 584 U.S. at 264 (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 137 (2017)). "'[E]ven a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy." *Egbert*, 596 U.S. at 491 (quoting *Nestlé*, 593 U.S. at 635 (plurality opinion)).

Indeed, this Court's decision in *Egbert* identified several sound reasons for courts to refrain from creating a damages remedy. First, courts should not imply a damages remedy for claims that have national security implications, with the Court holding that even a claim that a border patrol agent assaulted an American citizen, away from the border, had too close a nexus to national security to permit a judge-made cause of action. *Egbert*, 596 U.S. at 494. Second, courts generally should not create causes of action extending liability to "a new category of defendants," as "a court is not undoubtedly better positioned than Congress to create a damages action." *Id.* at 492. Finally, "if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure,'" courts generally should not imply a damages action in court. *Id.* at 493.

There are three grounds on which this Court can hold that the aiding-and-abetting claims brought against Cisco Systems, Inc. ("Cisco") are not viable

under the ATS. At the most fundamental level, this Court's continued development of the law regarding implied causes of action post-*Sosa* has appropriately established a standard for judge-made causes of action that is virtually insurmountable in the ATS context.[3] *See Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring) ("And if the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no."). The post-*Sosa* framework adopted by this Court allows, at most, only the three international torts contemplated by the First Congress when it enacted the ATS—violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, 542 U.S. at 724.

In *Jesner*, this Court noted that its "recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 584 U.S. at 264. *Jesner* invoked the rule the Court had established for *Bivens* claims—"if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress"—and held that "[n]either the language of the ATS nor the precedents interpreting it support

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[3] *Sosa* itself suggested that future "development" of the law might "preclud[e] federal courts from recognizing" new causes of action. *Nestlé,* 593 U.S. at 636 (plurality opinion) (quoting *Sosa,* 542 U.S. at 724-25).

an exception to these general principles in this context." *Id.* (omission in original).

Having applied the same rule to *Bivens* claims and judge-made ATS claims, the Court since *Jesner* has repeatedly relied on *Bivens* precedents in rejecting judge-made ATS claims and on ATS precedents in rejecting *Bivens* claims.[4] And since adopting the "single sound reason" standard for *Bivens* claims and judge-made ATS claims, this Court has never recognized a new judge-made claim. *See Goldey v. Fields*, 606 U.S. 942, 945 (2025) (summarily reversing Fourth Circuit decision allowing new *Bivens* claim).

The *Jesner* majority recognized that "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." 584 U.S. at 265. Indeed, several members of this Court have expressed the view that the standard now applicable for judge-made ATS claims is so appropriately stringent that no claims can satisfy it beyond the three historical torts the First Congress contemplated when enacting the ATS.[5] Thus, the Court's current precedents sup-

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[4] *Jesner*, 584 U.S. at 264 (ATS case) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001), and *Ziglar*, 582 U.S. at 136 (*Bivens* cases)); *Hernández*, 589 U.S. at 101, 103 (2020) (*Bivens* case) (citing and quoting *Jesner*, 584 U.S. at 264 (ATS case)); *Nestlé*, 593 U.S. at 635 (plurality opinion) (ATS case) (citing *Hernández*, 589 U.S. at 102 (*Bivens* case); *Egbert* 596 U.S. at 491 (*Bivens* case) (quoting *Nestlé*, 593 U.S. at 635 (plurality opinion)).

[5] *See Nestlé*, 593 U.S. at 637-38 (plurality opinion of Justices Thomas, Gorsuch, and Kavanaugh) ("[F]ederal courts should not recognize private rights of action [under the ATS] beyond

port reversing the Ninth Circuit on the grounds that no new judge-made ATS claims are permitted.

Alternatively, the Court could rule that the aiding-and-abetting claims against Cisco fail because they are secondary-liability claims and such judge-made claims are unavailable under the ATS's jurisdictional grant. The United States took this position in its brief supporting Cisco's petition for writ of certiorari.[6] As this Court observed in *Jesner*, separation-of-powers principles counsel that the decision whether to recognize "new forms of liability" under the ATS generally is a delicate policy determination better left to legislative judgment. 584 U.S. at 265; *see also Egbert*, 596 U.S. at 492 (courts not better equipped than Congress to decide whether to create liability for a "new category of defendants").

This result is particularly appropriate in the ATS context. Even if federal courts have some limited authority to recognize new causes of action under

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the three historical torts identified in *Sosa*."); *id.* at 644-45 (Gorsuch, J., concurring) (the door left open in *Sosa* for new implied causes of action "is a door *Sosa* should not have cracked"); *id.* at 658 (Alito, J., dissenting) (noting "strong arguments that federal courts should never recognize new claims under the ATS"); *Jesner*, 584 U.S. at 274 (Thomas, J., concurring) ("Courts should not be in the business of creating new causes of action under the Alien Tort Statute."); *id.* at 276 (Alito, J., concurring) (stating he was "not certain that *Sosa* was correctly decided); *id.* at 281 (Gorsuch, J., concurring) ("I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability.").

[6] Brief for United States as Amicus Curiae at 16, *Cisco Sys., Inc. v. Doe I*, No. 24-856 (U.S. Dec. 9, 2025). This issue was presented, but not decided, in *Nestlé*, 593 U.S. at 633.

the ATS's jurisdictional grant, that jurisdictional grant is limited to "*a tort only*, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). Secondary-liability claims, such as aiding-and-abetting and co-conspirator liability, are not torts, but mechanisms for holding non-tortfeasors liable for the torts of others. *Beck v. Prupis*, 529 U.S. 494, 503 (2000) (Conspiracy is "not an independent cause of action, but only the mechanism for subjecting co-conspirators to liability when one of their members committed a tortious act."); *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 494 (2023) ("'Enterprises' or 'conspiracies' alone are therefore not tortious—the focus must remain on the tort itself."). Recognizing secondary-liability claims, such as aiding and abetting and conspiracy, under the ATS thus conflicts with the express terms of the statute, and is therefore impermissible. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (federal courts have "no authority to create equitable exceptions to jurisdictional requirements" established by Congress).

Judicial license to create private causes of action, if any such license exists, does not extend to creating causes of action against non-tortfeasors under a jurisdictional grant limited to torts. Thus, the Court could decide this case in favor of Cisco by holding that judges may not imply secondary-liability claims under the ATS because such claims are not "a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Finally, the Court has ample grounds to hold, simply, that judge-made aiding-and-abetting claims

are unavailable under the ATS. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held 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." *Id.* at 182. Thus, the Court could decide the case on the narrowest grounds possible by holding that federal courts cannot imply an aiding-and-abetting cause of action under the ATS. A reversal on this narrow ground likely would involve reasoning equally applicable to other forms of secondary liability, such as co-conspirator liability, but would depend on lower courts applying the Court's reasoning rather than limiting the precedential effect of the Court's decision to the specific causes of action brought against Cisco. That is a risk the Court should eschew.

It is beyond cavil that many lower courts presiding over ATS cases have evaded this Court's precedents, its repeated messages of restraint, and the reasoning of its decisions. But lower-court adherence to this Court's precedents is necessary to avoid vesting arbitrary discretion in individual judges, promotes predictable results, and fosters the actual and perceived integrity of the federal courts. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Cisco's appeal presents an opportunity to fashion a rule of law that reinforces Congress's

role as the creator of federal causes of action and that is not susceptible to lower-court misconstruction or evasion.

II. This Court Should Hold that Federal Courts May Not Imply ATS Claims Beyond the Three Torts Contemplated by the First Congress, or, Alternatively, May Not Imply Secondary-Liability Claims

A. Lower Courts Have Not Correctly Applied this Court's Framework for Judge-Made ATS Claims

While leaving the "ultimate criteria" for further development, the Court's decision in *Sosa* warned that lower courts should exercise "great caution" before implying a damages remedy under the ATS because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 727-28, 732. The Court held that judicial power to create an ATS claim "should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729. Subsequent decisions of this Court have made clear that "narrow" means extremely limited in scope, if permitted at all.

Many lower courts, however, have effectively ignored this message of restraint. As Justice Breyer correctly observed, "[m]any lower courts seemed to find in *Sosa* a green light, not a note of caution." Stephen Breyer, *The Court and the World: American*

Law and the New Global Realities 155 (2016).[7] Indeed, 300 ATS suits had been filed in federal courts as of 2022, the vast majority of which were filed after *Sosa*. Christopher Ewell, et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 Cornell L. Rev. 1205, 1240-41 (2022).

On some level, this disconnect is understandable. Plaintiffs bringing ATS suits often allege horrific mistreatment. Moreover, the defendants, particularly those sued on secondary-liability theories, often have limited access to evidence regarding the plaintiffs' allegations, as the alleged direct tortfeasor often is associated with a government that cannot be sued or otherwise refuses to participate fully in discovery.[8] As a result, despite this Court's admoni-

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[7] *Al Shimari* demonstrates the random nature of lower-court decisions on whether to recognize an ATS claim. The district court in *Al Shimari* recognized an ATS claim for "cruel, inhuman or degrading treatment," which the district court vaguely defined as "actions which inflict mental or physical suffering" but which "do not rise to the level of 'torture.'" *Al Shimari v. CACI Premier Tech., Inc.*, 263 F. Supp. 3d 595, 602-03 (E.D. Va. 2017). The district court reached this result by rejecting the Eleventh Circuit's reasoning in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 124, 1247 (11th Cir. 2005), which found such a cause of action too vague and imprecise to support a claim under the ATS. ATS litigation in lower courts is far too dependent on the value judgments of individual judges.

[8] As discussed below, this occurred in *Al Shimari*, as CACI's factual defense was severely limited by the United States' three invocations of the state secrets privilege, which denied CACI discovery of the identities of the interrogation personnel, both CACI and military, assigned to the plaintiffs as well as records of the interrogation approaches approved by the U.S. Army and used in the plaintiffs' interrogations.

tions, lower courts have regularly paid lip service to this Court's message of restraint while concluding that the case before them overcomes all of the barriers to recognizing a judge-made cause of action.

B. The *Al Shimari* Case Demonstrates the Need for Concrete Guidance to the Lower Courts

Al Shimari exemplifies the wholesale absence of any restraint by many lower courts in implementing the framework adopted by this Court for evaluating judge-made ATS claims. As a threshold matter, *Al Shimari* arises in the context of wartime military affairs, and "perhaps in no other area has the Court accorded Congress greater deference" than in the context of military affairs. *Rostker v. Goldberg,* 453 U.S. 57, 64-65 (1981). Our Constitutional scheme assigns no responsibility over military affairs to the judiciary, and this Court has recognized that the judiciary especially lacks competence in this area. *Id.* at 65-66; *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

The CACI interrogators in Iraq were "subject to military direction," and were "integrated and performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7. After multiple government investigations into detainee abuse, no "disciplinary, criminal, or contract proceedings" have been instituted against CACI, a fact that "alone indicates the government's perception of the contract employees' role in the Abu Ghraib scandal." *Id.* at 10. Moreover, the Secretary of Defense responded to the detainee abuse scandal by directing the U.S. Army to make funds available

for administrative claims by detainees with bona fide claims of detainee abuse. *See Saleh*, 580 F.3d at 2, 10.

The district court disregarded the D.C. Circuit's reasoning in *Saleh*, which rejected identical claims as a matter of law, and held, despite this Court's caution in *Sosa*, that Congress welcomed aggressive recognition of new claims under the ATS. *Al Shimari v. CACI Premier Tech., Inc.*, 684 F. Supp. 3d 481, 505-06 (E.D. Va. 2023) ("[T]he ATS represents Congress's determination, in accordance with its war powers, that victims of violations of international law should have a remedy in federal district courts."). The result has been eighteen years of litigation, six trips to the Fourth Circuit, two trials, and millions of dollars in defense costs, in a case that remains pending appeal, where a straightforward application of this Court's holdings should have resulted in prompt dismissal.

Even after this Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), that the ATS applied only domestically, a Fourth Circuit panel held that the "focus" test that applied to every other statute did not apply to the ATS. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014). Rather, the court of appeals held that *Kiobel* allowed it to apply a multi-factor balancing test that evaluated extraterritoriality by considering "all the facts relevant to the lawsuit, including the parties' identities and their relationship to the causes of action." *Id.* As a result, the Fourth Circuit relied on factors such as CACI's status as a U.S. corporation, its employees' U.S. citizenship and security

clearances, and the fact that its employees were in Iraq under a federal government contract to hold that the *Al Shimari* plaintiffs' claims, involving torts and injuries in Iraq, were nevertheless a domestic application of the ATS. *Al Shimari*, 758 F.3d at 530-31.

CACI renewed its extraterritoriality motion in 2021 after this Court held in *Nestlé* that the focus test precluded basing jurisdiction under the ATS on general corporate activity in the United States. The district court rejected CACI's motion, concluding that the ATS's focus "clearly is broader than regulating conduct" and therefore a court assessing extraterritoriality may consider "the identity of an ATS defendant and the claims' overall connections to the United States," notwithstanding this Court's holdings limiting the inquiry to the conduct relevant to the ATS's focus, *i.e.*, the tort in violation of the law of nations. *Al Shimari*, 684 F. Supp. 3d at 494.

After years of litigation, the *Al Shimari* plaintiffs conceded in open court that they were "not contending that the CACI interrogators laid a hand on the plaintiffs." Consequently, the district court dismissed the plaintiffs' direct tort claims under the ATS, which alleged that CACI personnel themselves had abused detainees. *Al Shimari v. CACI Premier Tech., Inc.*, 300 F. Supp. 3d 758, 782-83 (E.D. Va. 2018). During trial, the district court entered judgment for CACI on the plaintiffs' aiding-and-abetting claims on the grounds that they were completely unsupported by evidence. As a result, the case went to the jury solely on a theory that CACI, as an employer, could be held vicariously liable under the ATS for

the co-conspirator liability of any CACI interrogators in Iraq who may have conspired with U.S. soldiers in Iraq. During and after trial, the district court adhered to its prior rulings and held that the plaintiffs' claims were a domestic application of the ATS even though all alleged injuries occurred in Iraq, all alleged torts occurred in Iraq, and all alleged conspiratorial activity occurred in Iraq.

The district court also concluded that it had the power to recognize the plaintiffs' secondary-liability claims, notwithstanding that (1) the claims sought to hold CACI secondarily liable for its employees' secondary liability for torts by U.S. soldiers in a war zone, and (2) the United States had established an administrative claim process for detainee abuse claims. *Al Shimari*, 684 F. Supp. 3d at 504. The district court held that "*Egbert*'s analysis of *Bivens* actions is not material to this ATS action" even though this Court expressly held in *Jesner* that there was no reason to apply different separation-of-powers tests for *Bivens* and ATS claims. *Jesner*, 584 U.S. at 264. The district court also held, contrary to *Egbert*, 596 U.S. at 494, that "neither the military context nor the connection to the prosecution of war present a unique separation-of-powers bar to plaintiffs' claims." *Al Shimari*, 684 F. Supp. 3d at 505. *But see Rostker*, 453 U.S. at 65-66 ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence [than the] complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force.") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

The district court also denied CACI's pretrial, trial, and posttrial motions to dismiss based on the state secrets privilege, holding that denying CACI access to the identities of interrogators assigned to the plaintiffs and records of their treatment in interrogations did not unfairly infringe on CACI's defense. In addition, the district court denied CACI's derivative sovereign immunity defense by becoming, to CACI's belief, the first court in the history of the Republic to hold that the United States, by joining the community of nations and condemning torture, impliedly waived its sovereign immunity for claims alleging violations of *jus cogens* norms. *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 970 (E.D. Va. 2019). *Contra Lane v. Pena*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." (internal citation omitted)).

C. Lower Courts' Failure to Follow this Court's Framework for ATS Claims Counsels Against a Holding Limited to Aiding-and-Abetting Claims

The Ninth Circuit's ruling against Cisco should be reversed because federal judges lack the power to imply new damages actions under the ATS, and certainly lack the power to create secondary-liability claims that are not within the ATS's grant of jurisdiction over "torts." If the Court agrees, it will need to determine the grounds on which to base its ruling. The history of ATS litigation post-*Sosa*, and especially the history of ATS litigation against CACI, coun-

sel against a ruling "good for this train only" that addresses solely aiding and abetting and leaves undecided whether lower courts have free rein to imply other types of secondary-liability claims.

In *Sosa*, the Court warned that lower courts must exercise "great caution" and "vigilant doorkeeping," but left for further development the "ultimate criteria" for judge-made ATS claims. 542 U.S. at 728-29, 732. Lower courts have escorted all manner of mischief through that open door,[9] and this Court should

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[9] *See, e.g.*, *Saludes v. República de Cuba*, 655 F. Supp. 2d 1290, 1291 (S.D. Fla. 2009) (entering judgment against foreign sovereign under the ATS for, among other things, "restriction on assembly" and "denial of the right to a fair trial" occurring solely in Cuba); *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 265 (S.D.N.Y. 2009) (holding that the plaintiffs stated a claim against IBM for aiding and abetting apartheid and "arbitrary denationalization" by foreign sovereign); *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 153 F. Supp. 3d 1291, 1305 (W.D. Wash. 2015) (holding that *Sosa* permitted an ATS claim for interference with "safe navigation on the high seas"); *Jane W. v. Thomas*, 560 F. Supp. 3d 855, 877 (E.D. Pa. 2021) (entering judgment against defendant under the ATS for his participation in a raid occurring in Liberia years before the defendant resided in the United States). And even where lower courts correctly apply this Court's decisions in *Kiobel*, *Jesner*, and *Nestlé*, leaving the door theoretically ajar for new ATS claims has led to the continued filing of patently meritless ATS claims, giving false hope to plaintiffs and taxing the resources of defendants and the courts. *See, e.g.*, *Jan v. People Media Project*, 783 F. Supp. 3d 1300, 1311 (W.D. Wash. 2025); *Alhathloul v. DarkMatter Group*, 795 F. Supp. 3d 1253, 1291 (D. Or. 2025); *Ali v. Al-Nahyan*, ___ F. Supp. 3d ___, 2025 WL 3250945, at *6 (D.D.C. 2025); *Estate of Alvarez v. Johns Hopkins Univ.*, 598 F. Supp. 3d 301, 315 (D. Md. 2022), *aff'd*, 96 F.4th 686 (4th Cir. 2024); *Kerwick v. Savino*, No. 24-cv-427, 2025 WL 2549278, at *3 (D. Conn. Sept. 4, 2025); *Al Otro Lado, Inc. v.*

put a stop to it. Similarly, in *Kiobel* and *Nestlé*, the Court established that the ATS applied only domestically and that the "focus" test applied, but declined to specify the ATS's focus. The effect of the indeterminate nature of the Court's ATS rulings can be seen in this appeal as it relates to Cisco. Cisco has been left to defend the present case since 2011 even though the case: (1) involves alleged injuries and alleged tortious conduct in China; and (2) involves an aiding-and-abetting theory of liability when the presumption is that implying an aiding-and-abetting cause of action is inappropriate even where, unlike ATS claims, Congress has actually enacted a cause of action for the primary wrongful conduct. *Central Bank of Denver*, 511 U.S. at 182.

For its part, CACI has been defending ATS suits for twenty-two years where the alleged injuries, alleged tortious conduct, and alleged conspiratorial activity all occurred in Iraq. Moreover, lower courts have declined to give effect to this Court's observation in *Jesner* that the same separation-of-powers test applies to *Bivens* and ATS claims. Indeed, the district court in *Al Shimari* squarely held that the existence of alternative administrative remedies and the wartime context of the plaintiffs' claims imposed no restraint on its power to create judge-made sec-

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Mayorkas, No. 23-cv-1367, 2024 WL 4370577, at *12 (S.D. Cal. Sept. 30, 2024); *Husayn v. Mitchell*, No. 2:23-cv-270, 2024 WL 816597, at *5 (E.D. Wash. Feb. 27, 2024); *Datres v. Winfree*, No. 1:23-cv-519, 2024 WL 1756160, at *14-15 (W.D. Wash. Apr. 24, 2024); *Freites v. Medina*, No. 25-cv-20465, 2025 WL 1425491, at *17 (S.D. Fla. May 16, 2025).

ondary-liability claims under the ATS. *Al Shimari*, 684 F. Supp. 3d at 505.

Thus, the discretion afforded lower courts has caused two decades of expensive litigation, six appeals to the Fourth Circuit, including one *en banc* proceeding, two trials in which CACI had no meaningful ability to contest the facts about the plaintiffs' treatment, and a $42 million judgment based on tertiary liability, which remains on appeal in the Fourth Circuit. All of these expenditures of resources, from the parties' litigation costs to the massive imposition on judicial resources, have come in a case that should have been dismissed promptly as inconsistent with this Court's message of restraint. CACI's experience shows why narrow and/or indeterminate rulings are ineffective and lead to federal judges acting more as legislators than as jurists, causing considerable harm to parties and to the courts.

As a general matter, lower courts are bound to adhere "not only to the holdings of [this Court's] prior cases, but also to their explications of the governing rules of law." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989) ("[W]hen the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system . . . ."). But, as the experiences of Cisco and CACI show,

there is no guarantee in the ATS context that lower courts will apply the Court's holdings, much less its reasoning.

A ruling in this appeal that is limited to aiding and abetting would only result in plaintiffs shifting to other theories of secondary liability that are no more defensible, such as the "co-conspirator liability plus *respondeat superior* theory" on which the judgment against CACI rests. And no matter how applicable this Court's reasoning might be to other types of secondary liability, there is a considerable likelihood that lower courts will distinguish a ruling on aiding and abetting as limited to that specific type of secondary liability, just as the district court in *Al Shimari* disregarded *Egbert* as a "*Bivens* only" rule of law.

As noted above, several members of this Court have expressly concluded that case law regarding judge-made causes of action has developed to the point where the ATS claims beyond the three contemplated by the First Congress cannot pass muster, as they infringe on Congress's role in delineating substantive causes of action. The Court should so hold, rather than deferring that question for another day while leaving defendants such as CACI at risk of incurring millions of dollars more in defense costs. Short of that, the Court should rule that judge-made secondary-liability claims are unavailable under the ATS, a holding that would eliminate the "Whack-a-Mole" effect of closing the door on aiding and abetting under *Central Bank* only to have plaintiffs and lower courts shift to other forms of secondary liabil-

ity that are equally inappropriate for judicial law-making.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit on the grounds that no claims may be implied under the ATS's jurisdictional grant beyond the three historical torts contemplated by the First Congress when it enacted the ATS. Alternatively, the Court should reverse on the grounds that judge-made secondary-liability claims are categorically unavailable under the ATS.

Respectfully submitted,

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