

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 UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

1. Whether courts may create causes of action under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for aiding and abetting violations of international law.

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

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INTEREST OF THE UNITED STATES

This case concerns whether aiding-and-abetting claims exist under a judicially created private right of action under the Alien Tort Statute (ATS), 28 U.S.C. 1350, or under a statutory cause of action in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note). The United States has a substantial interest in the Court's disposition of those questions. Aiding-and-abetting actions under the ATS pose risks to the United States' foreign relations and to the political branches' ability to implement the Nation's foreign policy. And whether such ATS actions exist is informed by the scope of a TVPA action. At the Court's invitation, the United States filed a brief at the petition stage of this case.

INTRODUCTION

The Ninth Circuit erred in creating a new ATS cause of action against those who aid and abet violations of international-law norms and in interpreting the TVPA to include an action against aiders and abettors of torture.

With respect to the first question presented, this Court determined in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the ATS is a strictly jurisdictional statute that creates no new causes of action, *id.* at 712-713, but that courts may nonetheless retain limited “residual common law discretion” to create a “narrow class” of new ATS causes of action in limited circumstances, *id.* at 729, 738; see *id.* at 725-729.

To the extent that the Court wishes to address petitioners’ threshold argument that courts lack authority to create any new ATS causes of action, the United States agrees that no such authority exists. The Court’s post-*Sosa* decisions have clarified that creating a cause of action is a legislative endeavor and that the practice of judicially creating such actions raises significant separation-of-powers concerns. The Court has therefore instructed that “courts must refrain from creating” a cause of action “if there are sound reasons to think Congress might doubt the efficacy or necessity” of doing so. *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (citation omitted). Yet there is always a strong reason to defer to Congress in ATS cases: “foreign-policy * * * concerns [are] inherent in ATS litigation,” and it is “[t]he political branches, not the Judiciary, [that] have the responsibility and institutional capacity to weigh” them. *Id.* at 265; see *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 637 (2021) (plurality opinion). Intervening decisions have repudiated *Sosa*’s reasons for thinking that courts may retain any common-law power to recognize new ATS causes of ac-

tion that were unknown in 1789, and the Court has rejected each request it has heard to create any new ATS action. The Court may now acknowledge that the door that *Sosa* left barely open to new ATS actions should be firmly closed.

In any event, even under *Sosa*'s framework for "vigilant doorkeeping" when determining what, if any, new causes of action can proceed under the ATS, 542 U.S. at 729, there are at least three powerful reasons why the creation of aiding-and-abetting actions is a matter for Congress, not the courts. First, in civil contexts, aiding-and-abetting liability is the exception rather than the rule. Because Congress makes such decisions on a statute-by-statute basis, this Court has called for "congressional direction" before it will conclude that a civil action extends to aiders and abettors. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182-183 (1994). Courts therefore stray well beyond whatever residual discretion they possess by extending liability under the ATS in that fashion.

Second, aiding-and-abetting actions implicate significant foreign-policy concerns. They effectively allow plaintiffs to challenge acts taken by foreign states and officials against foreign nationals on foreign territory by bringing suit against defendants who allegedly aid and abet the states and officials that have purportedly committed the actual torts. The foreign-policy implications of allowing suits that, by their very nature, require courts to adjudicate the lawfulness of actions taken by or on behalf of foreign nations in their own territories are obvious. Federal courts cannot properly engage in that undertaking without express statutory authority.

Third, Congress eschewed aiding-and-abetting liability in the only statute that creates an ATS cause of ac-

tion: the TVPA. Any exercise of residual common-law discretion under *Sosa* could not properly go further than Congress has in that closely related context.

With respect to the second question presented, the TVPA itself fails to impose aiding-and-abetting liability. The statute simply provides a cause of action against “[a]n individual who * * * subjects an individual to torture” under authority or color of law of a foreign nation. TVPA § 2(a)(1). And *Central Bank* makes clear that there can be no civil aiding-and-abetting liability under a federal statute unless Congress expressly provides for it. The TVPA’s text does not expressly, or even implicitly, expand liability to aiders and abettors.

STATEMENT

1. a. Respondents are a United States citizen and 12 Chinese nationals who allege that they or their family members are or were Falun Gong practitioners who, while detained in China, suffered torture—and, for some, extrajudicial killing, disappearances, forced conversion, forced labor, or other abuses—at the hands of the Chinese government as part of its persecution of the Falun Gong movement. Pet. App. 7a, 14a-16a, 141a-142a; J.A. 68-91. Respondents allege that petitioner Cisco Systems, Inc. and the two individual petitioners—John Chambers and Fredy Cheung, both high-level Cisco executives at relevant times—aided and abetted those abuses. Pet. App. 7a. Petitioners allegedly marketed, developed, implemented, and then supported key components of a sophisticated and integrated surveillance and internal-security system called “Golden Shield,” which petitioners allegedly designed knowingly and specifically to aid China’s security apparatus to detect, apprehend, and interrogate Falun Gong practitioners. *Id.* at 11a-13a, 137a-140a; J.A. 37-67.

In 2011, respondents filed this putative class action. Pet. App. 15a; see J.A. 1-119 (operative complaint from 2013). As relevant here, the Chinese-national respondents assert nonstatutory causes of action against Cisco under the ATS. See Pet. App. 16a, 70a; J.A. 99-107. Charles Lee, the U.S.-citizen respondent, asserts a TVPA cause of action against only Chambers and Cheung. Pet. App. 16a, 73a; J.A. 8, 100-101.

b. The ATS provides in full: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court determined that the “ATS is a jurisdictional statute creating no new causes of action,” but that it was “enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations,” namely, “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 724; see *id.* at 715-716, 719-720. *Sosa* then identified a two-step test that, at a minimum, must be satisfied before a court may create a new non-statutory cause of action: First, the suit must be based on the “violation[] of [an] international law norm” that is “specific, universal, and obligatory,” *id.* at 732 (citation omitted); and second, the court must determine whether creating a cause of action for the violation would be an “appropriate * * * exercise” of judicial “discretion,” *id.* at 738, see *id.* at 725-726, 732-733. This Court later held that the ATS neither “appl[ies] extra-territorially,” *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 633 (2021), nor subjects foreign corporations to suit, *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 272 (2018).

The TVPA provides “the only cause of action under the ATS created by Congress rather than the courts.” *Jesner*, 584 U.S. at 265 (plurality opinion). It provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture shall, in a civil action, be liable for damages to that individual.” TVPA § 2(a)(1), 106 Stat. 73 (28 U.S.C. 1350 note) (hereinafter cited without references to the Statutes at Large or the U.S. Code note); see TVPA § 2(a)(2) (similar action for “extrajudicial killing”). The TVPA defines “torture” to mean certain intentionally harmful acts “directed against an individual in the offender’s custody or physical control.” TVPA § 3(b)(1).

c. The district court dismissed respondents’ operative complaint. Pet. App. 135a-153a; see *id.* at 154a-166a (denying reconsideration). As relevant here, it concluded that the ATS claims are impermissibly extraterritorial, *id.* at 143a-148a, and that the TVPA does not impose aiding-and-abetting liability, *id.* at 149a.

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

a. The panel majority reversed the dismissal of respondents’ ATS claims against Cisco. Pet. App. 17a-73a. It observed that respondents “do not contend that Cisco directly committed any of the alleged violations [of international law], but rather that it aided and abetted * * * [the Chinese government’s] Public Security officers to perpetrate the torts.” *Id.* at 21a. The court recognized that “allegations of aiding and abetting require ‘a predicate offence committed by someone other than Cisco,’” *id.* at 71a (citation and brackets omitted), and it determined that respondents have sufficiently alleged that “the Chinese state * * * use[d] the Golden

Shield technology” supplied by petitioners “to identify, detain, and torture Falun Gong adherents,” *id.* at 73a.

The court of appeals created a cause of action for such aiding and abetting under *Sosa* because it determined (1) that international law “provides for aiding and abetting liability,” Pet. App. 25a-27a, and (2) that “no prudential reason [exists] to decline to recognize aiding or abetting liability,” *id.* at 30a; see *id.* at 27a-38a. Although it “decline[d] to request” views from the Department of State, the court “infer[red] a lack of concern from the government’s silence” and concluded that no case-specific “foreign affairs implications” counsel against allowing respondents’ claims to proceed. *Id.* at 32a-34a. The court also found no “sound reasons to think Congress might doubt the efficacy or necessity’ of recognizing aiding and abetting liability” because “[d]ecisions as to the appropriate scope of liability * * * depend on international law, not on statutory text.” *Id.* at 34a-35a (citation omitted).

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

b. The court of appeals unanimously reversed the dismissal of Lee’s TVPA claim. Pet. App. 73a-83a. The court held that the TVPA’s express cause of action applies to claims that allege “aiding and abetting torture,” *id.* at 74a. See *id.* at 74a-80a. It reasoned that the statute’s text imposing liability on one who “subjects an individual to torture” supports the existence of aiding-and-abetting liability. *Id.* at 75a-76a (quoting TVPA

§ 2(a)(1)). The court also concluded that *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), does not adopt the interpretive presumption that a statute will provide civil aiding-and-abetting liability only if it “expressly” provides for it. Pet. App. 79a.

c. Judge Christen concurred in part and dissented in part. Pet. App. 85a-94a. She agreed with the majority that Lee states a claim under the TVPA, *id.* at 85a, but she concluded that the court erroneously recognized an ATS right of action for aiding and abetting international-law violations allegedly committed “in China and against Chinese nationals by * * * the Chinese government[.]” *id.* at 85a; see *id.* at 87a-94a. Such an action, she explained, will “necessarily require” proof “that the Chinese [government] committed those violations in the first place,” placing the foreign “sovereign’s interest * * * squarely in the crosshairs.” *Id.* at 89a-90a, 94a. She stated that a judicial finding of liability would risk “provok[ing] a foreign nation” and “could have serious ramifications for Sino-American relations,” adding that courts are “ill-equipped to serve as instruments of foreign policy.” *Id.* at 89a-90a.

3. The court of appeals denied a petition for rehearing en banc, Pet. App. 97a, over the dissent of Judge Bumatay, who was joined by five other judges, *id.* at 108a-134a. Judge Bumatay concluded that the panel majority made “three critical mistakes.” *Id.* at 120a. First, it erroneously granted “blanket authorization for aiding-and-abetting liability under the ATS,” when *Central Bank* teaches that “statutory silence means that there is no[] * * * aiding-and-abetting liability,” *id.* at 120a, 129a. Second, it “upset the separation of powers” by “creating a cause of action.” *Id.* at 120a-121a,

127a (citation omitted); see *id.* at 126a-130a. Finally, it “ignored” “foreign policy concerns as obvious as they are serious.” *Id.* at 121a, 130a; see *id.* at 130a-134a. He observed that aiding-and-abetting liability “is a form of secondary liability, meaning that *someone else* must have committed the tortious conduct” and, here, “that *someone else* must be the agents of the Chinese government.” *Id.* at 131a-132a.

SUMMARY OF ARGUMENT

I. Federal courts lack authority to create an aiding-and-abetting action under the ATS.

A. As a threshold matter, petitioners contend (Br. 17-27) that federal courts may not create any new causes of action beyond the original three that this Court concluded in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 724 (2004), were supported by the general common law when Congress enacted the ATS in 1789. To the extent that the Court wishes to resolve that threshold question, the United States agrees that the Court’s post-*Sosa* jurisprudence demonstrates that courts may not create any new ATS actions.

The Court in *Sosa* left the door ajar to potential judicial recognition of a limited category of private rights of action under the ATS as a matter of federal common law. Since *Sosa*, however, the Court has recognized an inherent “‘tension between’ judicially created causes of action and ‘the Constitution’s separation of legislative and judicial power.’” *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (quoting *Hernández v. Mesa*, 589 U.S. 93, 100 (2020)). “[C]reating a cause of action is a legislative endeavor.” *Id.* at 491. Thus, “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy” under the ATS, “courts must refrain from creating” one. *Jesner v. Arab Bank, PLC*,

584 U.S. 241, 264 (2018) (citation omitted). Yet there will always be a powerful reason for hesitation in ATS cases: “foreign-policy * * * concerns [are] inherent in ATS litigation,” and “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Id.* at 265. Despite *Sosa*’s conclusion that courts may retain some degree of common-law discretion to recognize new ATS actions, the Court has rejected each request it has heard to create any new ATS action. The Court may now conclude that, in light of its intervening jurisprudence, the limited common-lawmaking authority to extend the ATS that was contemplated by *Sosa* has become “moribund.” *Edwards v. Vannoy*, 593 U.S. 255, 274 (2021).

B. In any event, even under *Sosa*’s framework for vigilant doorkeeping when analyzing the potential creation of a new cause of action, whether to create an aiding-and-abetting action under the ATS is a decision for Congress alone. “[T]he separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS,” and they prohibit the judicial creation of ATS remedies “if there are sound reasons to think Congress might doubt the[ir] efficacy or necessity.” *Jesner*, 584 U.S. at 264-265 (citation omitted). There are at least three strong reasons confirming that only Congress may decide whether to impose ATS aiding-and-abetting liability.

First, ATS aiding-and-abetting actions constitute a “new form[] of liability” on an entire category of actors, the imposition of which is “a question for Congress, not [the courts].” *Jesner*, 584 US. at 264-265 (citation omitted). Aiding-and-abetting actions impose a form of sec-

ondary liability on “persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). Even where Congress has itself provided a damages remedy for statutory violations, aiding-and-abetting liability is the exception, not the norm, and its imposition requires express “congressional direction.” *Id.* at 182-183. That principle applies with particular force in the ATS context, where “the question is not what Congress has done but instead what courts may do.” *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

Second, aiding-and-abetting actions under the ATS are especially likely to implicate significant foreign-policy concerns. As this case illustrates, such actions often allow plaintiffs to challenge indirectly the actions of foreign states and officials involving foreign nationals on foreign territory. They do so by bringing claims against defendants who allegedly aided and abetted the state or officials that purportedly committed the actual tort. *Sosa* itself warned against allowing judge-made actions having such effects because of the obvious “risks of adverse foreign policy consequences,” 542 U.S. at 727-728—consequences that the political branches, not the Judiciary, must weigh. Indeed, imposing such risks is antithetical to the very purpose of the ATS, which was enacted to promote harmony in the United States’ international relations.

Third, courts considering whether to create a new ATS cause of action must look to, and stay within, the bounds imposed by Congress for analogous statutory rights of action. The TVPA is the only ATS action that Congress has created. But it “provides no aiding and

abetting liability.” *Doe VIII 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). It therefore strongly indicates that this Court should not extend the ATS in that way for claims outside the TVPA’s ambit.

II. The TVPA provides a cause of action against “[a]n individual who * * * subjects an individual to torture” under authority or color of law of a foreign nation. TVPA § 2(a)(1). That statutory action does not impose liability on aiders and abettors.

Under *Central Bank*, “there can be no civil aiding and abetting liability unless Congress expressly provides for it.” *Doe VIII*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part). The Court in *Central Bank* thus emphasized that it “presume[s]” that Congress will “use[] the words ‘aid’ and ‘abet’ in the statutory text” if it “intend[s] to impose aiding and abetting liability.” 511 U.S. at 177. Congress, for instance, has specifically provided for tort actions against any person who “aids and abets” certain acts of international terrorism. 18 U.S.C. 2333(a) and (d)(2). If Congress intended to expand the TVPA in a similar fashion, it would have done so expressly.

Moreover, the TVPA’s text equates the “individual” who is liable for “subject[ing] [the victim] to torture,” TVPA § 2(a)(1), with “the offender[.]” who has “custody or physical control” of the victim, § 3(b)(1). But one who aids and abets another’s act of torture will generally have neither direct nor indirect custody or physical control of the victim. Even if an aider and abettor might be viewed as having some causal connection to such torture, the TVPA’s reference to an “offender[.]” who “subjects an individual to torture” while that victim is “in the

offender’s custody or physical control,” TVPA §§ 2(a)(1), 3(b)(1), requires a role and level of responsibility exceeding that of a mere aider and abettor. The TVPA does contemplate actions against individuals who have command responsibility over individuals who directly commit acts of torture. But command responsibility is a form of vicarious liability that rests on the existence of a superior-subordinate relationship. And a superior who directs or is otherwise responsible for the conduct of an underling is no mere aider and abettor.

ARGUMENT

I. COURTS MAY NOT CREATE AIDING-AND-ABETTING LIABILITY UNDER THE ATS

The ATS is a “strictly jurisdictional” statute that itself “creat[es] no new causes of action.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 724 (2004); see *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 254 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). Courts lack discretion to create an aiding-and-abetting action because sound reasons exist to leave the decision whether to do so to Congress.

A. Under The Court’s Post-*Sosa* Jurisprudence, Courts Should Not Create Any New ATS Cause Of Action

As an initial matter, petitioners contend (Br. 17-27) that the Court should reject aiding-and-abetting liability because the ATS cannot be extended beyond the three international-law violations that *Sosa* concluded were supported by the common law when the statute was enacted. To the extent that the Court wishes to reach that question as a threshold ground for decision, the United States agrees that petitioners’ conclusion is correct and supported by post-*Sosa* developments.

1. In *Sosa*, the Court unanimously concluded that the 1789 Congress likely understood that the ATS would “furnish jurisdiction” for up to three “actions alleging violations of the law of nations”: “offenses against ambassadors,” “probably” “violations of safe conduct,” and “may[be]” “actions arising out of prize captures and piracy.” 542 U.S. at 720; see also *id.* at 715. In an opinion concurring in part and concurring in the judgment, Justice Scalia (joined by the Chief Justice and Justice Thomas) concluded that, since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts’ common-lawmaking powers have been insufficient to authorize “the creation of private federal causes of action for violations of customary international law.” *Sosa*, 542 U.S. at 747. The *Sosa* majority, however, concluded that, while courts must proceed with “great caution,” *id.* at 728, their “judicial power should be exercised on the understanding that the door is still ajar” to the “recognition of * * * international norms” that are “actionable” under the ATS, “subject to vigilant doorkeeping,” *id.* at 729. See *id.* at 728-731 & n.19.

The Court has described that aspect of *Sosa*’s reasoning as a holding. *Kiobel* observed that *Sosa* “held that federal courts may ‘recognize private claims [for international-law violations] under federal common law.’” 569 U.S. at 115 (citation omitted). And *Jesner* said that *Sosa* “held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the ‘historical paradigms familiar when [the ATS] was enacted.’” 584 U.S. at 256 (citation omitted). The United States, too, has characterized *Sosa* as “permitting courts to recognize a ‘narrow class’ of implied

rights of action.” U.S. Amicus Br. at 10, *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021) (No. 19-416).¹

2. Nevertheless, intervening developments in this Court’s jurisprudence support the conclusion that the door should be closed to judicial recognition of any new causes of action under the ATS, as Justice Scalia originally concluded. In 2018, the Court in *Jesner* recognized “there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action” given “the foreign-policy and separation-of-powers concerns inherent in ATS litigation,” but found it unnecessary to resolve that argument. *Jesner*, 584 U.S. at 265. Three Justices have since expressly concluded that “federal courts should not recognize private rights of action for violations of international law beyond the three historical torts identified in *Sosa*.” *Nestlé*, 593 U.S. at 637 (plurality opinion of Thomas, J., joined by Gorsuch and Kavanaugh, JJ.); *id.* at 640, 643-646 (Gorsuch, J., concurring) (“[T]he time has come to jettison the misguided notion that courts have discretion to create new causes of action under the ATS.”); cf. *id.* at 658 (Alito, J., dissenting) (observing that “strong arguments” support that conclusion); *Jesner*, 584 U.S. at 276 (Alito, J., concurring in part and concurring in the judgment) (noting “uncertain[ty]” about whether “*Sosa* was correctly decided”). And in practice, the Court’s ATS decisions have consistently been able to find “a sound reason for courts not to create a cause of action for violations of international law.” *Nestlé*, 593 U.S. at 638 (plurality opinion).

¹ See also U.S. Amicus Br. at 8, *Jesner*, *supra* (No. 16-499); U.S. Supp. Amicus Br. at 2, *Kiobel*, *supra* (No. 10-1491); U.S. Amicus Cert. Br. at 12, *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919).

Further developments remove any doubt that courts should not create new ATS causes of action. Since *Sosa*, the Court has recognized an inherent “‘tension between’ judicially created causes of action and ‘the Constitution’s separation of legislative and judicial power.’” *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (quoting *Hernández v. Mesa*, 589 U.S. 93, 100 (2020)). And the Court has repeatedly yoked the creation of ATS causes of action to the creation of new judicially inferred suits under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court has treated its “general reluctance to extend judicially created private rights of action” in the *Bivens* context as being equally applicable to the ATS context. *Jesner*, 584 U.S. at 264 (citing, e.g., *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017)). The Court has similarly invoked its ATS decisions when addressing *Bivens*, see *Egbert*, 596 U.S. at 491 (quoting *Nestlé’s* plurality opinion); *Hernández*, 589 U.S. at 101, 103-104, 109, 110 (citing and quoting *Jesner* and *Kiobel*). And it has prescribed the same test for judicially inferred rights of action in both contexts: “[I]f 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*, 582 U.S. at 137).

Most recently, in the *Bivens* context, the Court has explained that, following *Erie*, “creating a cause of action is a legislative endeavor.” *Egbert*, 596 U.S. at 491. The Court has held that there can be no extension of *Bivens* when “there is *any* rational reason (even one) to think that *Congress* is better suited” to “‘decide whether to provide for a damages remedy’”—“as it will be in most every case.” *Id.* at 491-492, 496 (quoting *Her-*

nández, 589 U.S. at 114). Over the last 45 years, the Court has rejected every call to extend *Bivens* that it has considered. *Goldey v. Fields*, 606 U.S. 942, 945 (2025) (per curiam). And the Court has indicated that “if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.” *Egbert*, 596 U.S. at 502.

3. Under such circumstances, the Court may now acknowledge that *Sosa*’s barely open door should be firmly closed. Intervening decisions have repudiated *Sosa*’s reasons for thinking that courts may retain any common-law power to recognize new ATS causes of action that were unknown in 1789. *Sosa*’s own cautions have proved sufficient to preclude the Court from recognizing even a single one. And under the reasoning of *Egbert*, there will always be an extremely compelling reason for hesitation in every ATS case: “foreign-policy * * * concerns [are] inherent in ATS litigation,” and “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Jesner*, 584 U.S. at 265.

Recognizing that intervening developments have superseded *Sosa*’s reasoning about the potential availability of new ATS suits would be analogous to the Court’s conclusion in *Edwards v. Vannoy*, 593 U.S. 255 (2021). Three decades earlier, a plurality of the Court had held in *Teague v. Lane*, 489 U.S. 288 (1989), that new rules of criminal procedure generally do not apply retroactively to cases on collateral review, but it identified a narrow exception for “watershed rules of criminal procedure,” *id.* at 311. In the intervening decades, the Court repeatedly rejected attempts to invoke that exception, until *Edwards* determined that it “[wa]s time—probably long past time”—to clarify that “no new rules

of criminal procedure can satisfy the watershed exception.” 593 U.S. at 271-272. It had become “unmistakably clear” that “[t]he purported watershed exception is moribund.” *Id.* at 274.

As in *Edwards*, the Court “need not * * * overrule any post-*Sosa* cases” to reject the prospect of additional ATS causes of action. 593 U.S. at 274. “[N]o *stare decisis* values would be served by continuing to indulge the fiction that” this Court will ever approve the judicial recognition of a new cause action under the ATS; “[n]o one can reasonably rely” on a common-lawmaking power that this Court has never found to have “operated in practice.” *Ibid.* This Court has not hesitated to “repudiate[]” an earlier decision that is “impossible to harmonize” with the analysis of more recent decisions and therefore “retain[s] no vitality.” *Herrera v. Wyoming*, 587 U.S. 329, 342 (2019) (citation omitted); see *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015) (noting that justifications for departing from *stare decisis* include concluding that a decision’s “doctrinal underpinnings have * * * eroded” due to “subsequent legal developments,” leaving it a “doctrinal dinosaur or legal last-man-standing”). At this point, “perpetuating what has become” *Sosa*’s “illusory” authority to fashion new causes of action simply “misleads litigants and judges, and needlessly expends the scarce resources of” litigants and courts. *Edwards*, 593 U.S. at 275.

If the Court concludes that *Sosa*’s door is no longer ajar to judicial recognition of new ATS causes of action, that would obviate any aiding-and-abetting cause of action—including the one here, alleging that defendants aided and abetted an international-law violation that is itself beyond the three that were understood as being actionable under the law of nations in 1789.

B. Under *Sosa*'s Own "Vigilant Doorkeeping" Standards, Courts May Not Create An Aiding-And-Abetting Cause Of Action Under The ATS

Even if courts retain some authority to infer new private rights of action under the ATS, "subject to vigilant doorkeeping," *Sosa*, 542 U.S. at 729, they should not create actions against alleged aiders and abettors of international-law violations. *Sosa* determined that, at a minimum, federal courts should "*not* recognize private claims under federal common law for violations of any international law norm," unless (1) that norm is "specific, universal, and obligatory," *id.* at 732 (emphasis added; citation omitted), and (2) recognizing a federal-common-law cause of action for a violation of that norm is an "appropriate * * * exercise" of judicial "discretion," *id.* at 738, see *id.* at 725-726, 732-733; see also *Nestlé*, 593 U.S. at 636 (plurality opinion); *id.* at 648 (Sotomayor, J., concurring in part and concurring in the judgment). Under *Sosa*'s second step, creating or extending a cause of action against aiders and abettors would exceed the scope of judicial authority to fashion domestic remedies under federal common law.

1. Courts may not create or extend an ATS cause of action if any reason exists to leave that decision to Congress

Under *Sosa*, the exercise of "any residual common law discretion" to infer the existence of a new ATS cause of action is "appropriate" only under a highly "restrained concept[]" of that discretion. *Sosa*, 542 U.S. at 725, 738. *Sosa* itself emphasized that the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727. It contemplated that courts possess discretion to create only a "narrow class" of new ATS actions and

they may do so, “if at all, [only] with great caution.” *Id.* at 728-729.

When applying *Sosa*’s second step, the Court has made clear that “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy” under the ATS, “courts must refrain from creating the remedy in order to respect the role of Congress.” *Jesner*, 584 U.S. at 264 (citation omitted). “Even a single sound reason to defer to Congress’ is enough” to preclude any judicial extension of a cause of action to a new area. *Egbert*, 596 U.S. at 491 (quoting *Nestlé*, 593 U.S. at 635 (plurality opinion)) (brackets omitted). Here, aiding-and-abetting liability is unwarranted because there are at least three strong reasons why Congress might doubt its efficacy or necessity. First, aiding-and-abetting actions impose a new form of civil liability on a new category of actors, which is exceptional in the civil context and which Congress has imposed only on a statute-by-statute basis. Second, such actions as a category are especially likely to pose meaningful foreign-policy risks that are for Congress, not courts, to consider. Third, when Congress enacted the TVPA—the only statutory action it has created under the ATS—it eschewed aiding-and-abetting liability.

2. *Aiding-and-abetting liability would extend the ATS to a new category of defendants that Congress generally must decide to include on a statute-by-statute basis*

a. Whether to impose a “new form[] of liability” under the ATS on an entire category of actors is “‘a question for Congress, not [the courts], to decide.’” *Jesner*, 584 US. at 264-265 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001)). In *Jesner*, the Court concluded that, in the absence of “further action from

Congress, it would be inappropriate for courts to extend ATS liability to foreign corporations,” tracking its previous refusal to extend liability under *Bivens* to corporate defendants. *Id.* at 265. The same principle applies to aiding-and-abetting liability under the ATS. Even where Congress has enacted a statutory framework providing civil remedies for conduct that Congress itself has made unlawful, the decision to include those who merely aid and abet that unlawful conduct is a dramatic expansion of the sphere of liability—one that this Court has declined to countenance without specific congressional direction.

As this Court has explained, “aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). For that reason, “aiding and abetting is inherently a rule of secondary liability.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 494 (2023). And where such liability exists, it will make a defendant liable for “aid[ing] and abet[t[ing]] * * * another person in the commission of the actionable wrong,” *i.e.*, for assisting *someone else’s* “commi[ssion of] an actual tort.” *Id.* at 494-495; see *Central Bank*, 511 U.S. at 177 (discussing 4 Restatement (Second) of Torts § 876(b) (1977)).

In *Central Bank*, this Court refused to recognize a civil cause of action for aiding and abetting a violation of a statutory prohibition on committing a manipulative act in connection with the purchase or sale of securities. 511 U.S. at 170-191. Several aspects of its reasoning show why expanding civil liability to aiders and abettors reflects a quintessentially legislative judgment. There is no “general civil aiding and abetting statute.” *Id.* at

182. And even “when Congress enacts a statute” that permits private civil recovery for the “violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.” *Ibid.* “Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability.” *Ibid.* Accordingly, the imposition of aiding-and-abetting liability in cases of statutory silence would work a “vast expansion of federal law,” which the Court would not undertake without “congressional direction.” *Id.* at 183.

Central Bank also explained that “[s]econdary liability for aiders and abettors exacts costs” that Congress may be unwilling to accept in particular contexts. 511 U.S. at 188. In particular, Congress may deem such liability unwarranted in areas where “certainty and predictability” are desirable. *Ibid.* (citation omitted). Even though “competing policy arguments in favor of aiding and abetting liability” may “be advanced,” it will be “far from clear” when such considerations would be sufficient to persuade Congress that the costs outweigh the benefits. *Id.* at 189. As then-Judge Kavanaugh aptly summarized, *Central Bank* “ma[kes] crystal clear that there can be no civil aiding and abetting liability unless Congress expressly provides for it.” *Doe VIII 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); see Pet. App. 125a (Bumatay, J., dissenting from the denial of rehearing en banc).

Those principles carry particular force here. The need to respect Congress’s role is “magnified in the context of the ATS,” where “the question is not what Congress has done but instead what courts may do.” *Kiobel*, 569 U.S. at 116. Moreover, the costs of imposing aiding-

and-abetting liability in the ATS context can be substantial. Individuals and companies that seek to operate in the international sphere that have not themselves committed an underlying tort may nevertheless face immense economic and reputational costs if they are deemed to have aided and abetted a foreign government or others who have. And given that “[t]he issues [presented by aiding-and-abetting claims] would be hazy, their litigation protracted, and their resolution unreliable,” *Central Bank*, 511 U.S. at 189 (citation omitted), Congress could reasonably conclude that the costs and risks of imposing such liability are too high, particularly because the incentives for bringing “a private right of action” lack the moderating “check imposed by prosecutorial discretion,” *Sosa*, 542 U.S. at 727.

The decision below viewed *Central Bank*’s reasoning to be irrelevant because the “scope of [ATS] liability” turns on “international law.” Pet. App. 35a. But under *Sosa*, “identifying [an international-law] norm is only the beginning of defining a cause of action”; courts must also specify the remedy’s details, including “who may be liable.” *Kiobel*, 569 U.S. at 117. More fundamentally, creating an action under the ATS as a remedy in United States courts “for violations of [an] international law norm” is itself a matter of “*federal* common law.” *Sosa*, 542 U.S. 732 (emphasis added). Thus, “while international law may provide the *norms* at issue, domestic law supplies the *liability* for any violation of international norms,” meaning that “the scope of liability must be similarly guided by domestic law” and, thus, that “*Central Bank* controls.” Pet. App. 125a (Bumatay, J., dissenting).

b. In any event, even apart from the limited scope of judicial common-lawmaking authority under *Sosa*, the

reasoning of *Central Bank* itself should preclude aiding-and-abetting actions under the ATS. *Central Bank* requires that “congressional direction” be manifested in statutory text before such liability may be imposed. 511 U.S. at 183; see *id.* at 177. The ATS, which simply refers to “tort[s] * * * committed in violation of the law of nations,” 28 U.S.C. 1350, provides no such direction. Moreover, this Court has already determined that “the principles underlying [an analogous interpretive] canon”—the canon against a statute’s extraterritorial application—“constrain courts considering causes of action that may be brought under the ATS.” *Kiobel*, 569 U.S. at 116. Just as Congress must affirmatively provide for extraterritorial application, it must affirmatively authorize aiding-and-abetting liability.

3. *Aiding-and-abetting liability under the ATS is especially likely to pose foreign-policy risks that Congress must weigh*

Aiding-and-abetting actions under the ATS are especially likely to implicate significant foreign-policy concerns, which should foreclose courts from exercising common-law authority to create such liability. In practice, such actions offer plaintiffs a means of indirectly challenging acts taken *by foreign states and their officials abroad*, because they allow claims against defendants who allegedly aided and abetted the foreign state or officials that purportedly committed the “actual tort” underlying the claim. See *Twitter*, 598 U.S. at 494-495; see p. 21, *supra*. When aiding-and-abetting liability is asserted under the ATS, the claims—like those here—frequently involve underlying allegations of misconduct by foreign sovereigns in their own territories. See U.S. Cert. Br. 11-12 & n.1 (citing illustrative cases).

Sosa itself warned against the creation of ATS actions that would allow adjudication of asserted “limit[s] on the power of foreign governments over their own citizens,” because a court’s finding that “a foreign government or its agent has transgressed [such] limits” would present obvious “risks of adverse foreign policy consequences.” 542 U.S. at 727-728. “The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh [such] foreign-policy concerns.” *Jesner*, 584 U.S. at 265; accord *Nestlé*, 593 U.S. at 638 (plurality opinion). “[C]ourts are not well suited to make the required policy judgments that are implicated” by the decision whether to create a new category of ATS actions that risk creating “foreign-relations tensions.” *Jesner*, 584 U.S. at 272. The Ninth Circuit here disregarded those fundamental separation-of-powers principles and improperly “imping[ed] on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Sosa*, 542 U.S. at 727.

The adverse foreign-policy risks posed by such aiding-and-abetting actions are antithetical to the ATS’s purpose. Congress intended the statute to “promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable,” *Jesner*, 584 U.S. at 270, for “refus[ing] to provide redress to their citizens” for “torts committed * * * *within the United States*,” *Nestlé*, 593 U.S. at 654 (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis added).² Aiding-and-abetting ac-

² Both of the diplomatic incidents that influenced the ATS’s enactment—the 1784 assault of a French diplomat in Philadelphia and the 1787 entry into and arrest of a servant within the Dutch

tions do the opposite: They allow plaintiffs to litigate claims resting on allegations that foreign states or officials committed international-law torts against their own citizens within their own territories. They therefore risk the “very foreign-relations tensions the First Congress sought to avoid” by enacting the ATS. *Jesner*, 584 U.S. at 272; accord *id.* at 276 (Alito, J., concurring in part and concurring in the judgment).

The decision below reached its contrary view on grounds that are insubstantial. The court of appeals concluded that aiding-and-abetting liability, “historically and [in this case], is much more likely to be used to address the transgressions of nongovernmental actors than the actions of foreign governments themselves.” Pet. App. 30a. But that conclusion ignores the essential feature of aiding-and-abetting liability—“a form of secondary liability” that necessarily rests on the allegation that “*someone else* must have committed the tortious conduct.” *Id.* at 132a (Bumatay, J., dissenting). In many ATS cases, as here, “that “*someone else*” is allegedly an “agent[] of [a foreign] government.” *Ibid.*

The court of appeals found no case-specific “foreign policy considerations” counselling against allowing this case to proceed because “no foreign government or Executive Branch agency” had filed anything “objecting to this lawsuit.” Pet. App. 32a. But the court refused even to solicit the government’s views, and it inexplicably

Ambassador’s home in New York—involved such circumstances. See *Kiobel*, 569 U.S. at 120; *Sosa*, 542 U.S. at 716-717 & n.11. Each of the three original torts that *Sosa* identified would typically have involved harms sustained inside the United States (in cases involving offenses against ambassadors or violations of safe conduct) or beyond the territorial jurisdiction of other countries (in cases of piracy upon the high seas).

deemed the resulting silence as supporting its own assessment of potential foreign-policy implications. It is no secret that “the Government has long opposed the recognition of aiding and abetting liability under the ATS.” *Id.* at 133a-134a (Bumatay, J., dissenting); see *id.* at 91a-93a (Christen, J., dissenting in part). The salient point is that the general category of aiding-and-abetting actions—regardless of the “circumstances in the ‘particular case’”—presents foreign-policy risks that are for Congress, in conjunction with the Executive, to consider. *Egbert*, 596 U.S. at 496 (citation omitted). The Ninth Circuit’s approach is irreconcilable with the “great caution” demanded by the Constitution’s separation of powers. *Sosa*, 542 U.S. at 728.

4. Existing legislative guidance counsels against recognizing ATS aiding-and-abetting liability

Sosa recognized that a court deciding whether to create a new ATS cause of action should “look for legislative guidance before exercising [such] innovative authority.” 542 U.S. at 726. “Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action.” *Jesner*, 584 U.S. at 265 (plurality opinion). When evaluating whether Congress might hesitate before extending liability to a new category of cases, such statutes are “instructive” because they reflect what “Congress chose to” do in similar circumstances. *Hernández*, 589 U.S. at 109. It would be “remarkable” for a court creating an ATS action “to take a more aggressive role” than Congress itself has done when answering that question. *Sosa*, 542 U.S. at 726.

“[T]he logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only

cause of action under the ATS created by Congress.” *Jesner*, 584 U.S. at 265 (plurality opinion). And as discussed in Part II, below (pp. 28-33, *infra*), “the TVPA provides no aiding and abetting liability.” *Doe VIII*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part). In light of that congressional judgment, the courts should not extend aiding-and-abetting liability under the ATS to the violation of other international-law norms. *Ibid.*; accord Pet. App. 128a (Bumatay, J., dissenting). Moreover, Congress has chosen to authorize a form of secondary liability in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466 (22 U.S.C. 7101 *et seq.*). There, a trafficking victim may “bring a civil action against the perpetrator (*or whoever knowingly benefits*)” from participating in a venture known to be engaged in prohibited trafficking). 18 U.S.C. 1595(a) (emphasis added). Those variations in treatment—*i.e.*, “Congress’s decision in the TVPA to limit liability to individuals” who subject victims to torture while excluding aiding-and-abetting liability, and its creation of secondary liability for trafficking offenses—“demonstrates that there are two [or more] reasonable choices” when prescribing the scope of civil liability. *Jesner*, 584 U.S. at 268 (plurality opinion). That should be “dispositive,” for it further shows that “Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include” aiders and abettors. *Ibid.*

II. THE TVPA DOES NOT IMPOSE AIDING-AND-ABETTING LIABILITY

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 individ-

ual.” TVPA § 2(a)(1). That statutory cause of action, which imposes liability “only [on] natural persons,” *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 451-452 (2012), does not impose liability on aiders and abettors.

A. *Central Bank* “ma[kes] crystal clear that there can be no civil aiding and abetting liability unless Congress expressly provides for it.” *Doe VIII*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part). The Court reasoned that although Congress has enacted “a general aiding and abetting statute” for “all federal criminal offenses,” it has not done so for civil actions, opting instead to follow a “statute-by-statute approach” under which civil aiding-and-abetting liability is the exception, not the rule. *Central Bank*, 511 U.S. at 181-182. Congress’s express “impos[ition of] aiding and abetting liability” in various statutory contexts, moreover, shows that it knows how to impose such liability “when it cho[oses] to do so.” *Id.* at 176. The Court has therefore presumed that Congress will “use[] the words ‘aid’ and ‘abet’ in the statutory text” if it “intend[s] to impose aiding and abetting liability.” *Id.* at 177. And because the TVPA does not expressly provide for “aiding” and “abetting” liability, it does not impose such liability.

The TVPA’s text contrasts sharply with that of the Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.* In 2016, Congress amended the ATA’s original cause of action for United States nationals harmed by certain tortious acts of “international terrorism”—which had been interpreted as not imposing secondary liability—by adding a right of action against any person who “aids and abets” such terrorist acts “by knowingly providing substantial assistance.” 18 U.S.C. 2333(a) and (d)(2); see *Twitter*, 598 U.S. at 483. Congress also enacted text expressly identifying a lower-court decision that it

viewed as providing the “proper legal framework” for that “civil aiding and abetting” liability. *Id.* at 485 & n.6 (citation omitted). If Congress had intended analogous liability under the TVPA, it could have enacted “aiding” and “abetting” language to do so. It did not.³

Additional statutory text in the TVPA confirms that conclusion. The TVPA defines “torture” as an intentionally harmful act “directed against an individual in *the offender’s* custody or physical control.” TVPA § 3(b)(1) (emphasis added). Congress thus equated the “individual” who is liable for “subject[ing] [the victim] to torture,” TVPA § 2(a)(1), with “the offender[.]” who has “custody or physical control” of the victim. But those who aid and abet generally will *not* have either direct or indirect custody or control of the victims—as Chambers and Cheung did not here. See J.A. 86-87 (Lee’s allegations of torture in Chinese prison).

B. The decision below interpreted the TVPA as imposing aiding-and-abetting liability because the statute refers to an individual who “subjects” another to torture, which, the court reasoned, includes not only individuals who “directly torture” but also those “who in some respect *cause* another to undergo torture.” Pet. App. 75a-76a. But it does not follow that the relevant

³ Congress authorized ATA aiding-and-abetting actions only where the primary tortfeasor responsible for the underlying “act of international terrorism” is “an organization that had [already] been designated [by the Secretary of State] as a foreign terrorist organization.” *Twitter*, 598 U.S. at 484 (quoting 18 U.S.C. 2333(d)(2)); see 8 U.S.C. 1189(a)(1) and (d)(4). The expanded ATA cause of action thus applies only to a meaningfully narrowed category of cases in which the aider and abettor would have had advance notice of the primary tortfeasor’s terrorist designation and for which a court’s adjudication of the underlying act of terrorism would presumably pose limited risks of adverse foreign-policy consequences.

category of individuals who “subject” others to torture encompasses aiders and abettors.

First, as a textual matter, it is implausible that Congress would have imposed the well-known and doctrinally distinct category of aiding-and-abetting liability by using a verb like “subjects” in the TVPA. To “subject” someone means to “make [him] submit to a particular action or effect” or “to cause [him] to undergo or submit to” the action or effect. *Webster’s Third New International Dictionary* 2275 (1989) (def. 4). Even if an aider and abettor of torture might be viewed as having some causal connection to torture, the TVPA’s application to an “offender[]” who “subjects an individual to torture” while that victim is “in the offender’s custody or physical control,” TVPA §§ 2(a)(1), 3(b)(1), connotes a role and level of responsibility exceeding that of a typical aider and abettor. Thus, in *Central Bank*, the Court rejected the argument that a statute imposed aiding-and-abetting liability by making it unlawful for any person to engage in certain activity “directly or indirectly.” 511 U.S. at 175-176 (quoting 15 U.S.C. 78j(b)). The “basic flaw” with the argument was that “aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity” because it “reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do.” *Id.* at 176. Here, someone would not need to have a torture victim in his “custody or physical control” to give a degree of aid to the torturer who does have custody or control.

The decision below correctly recognized that the TVPA’s use of “subjects” extends beyond those who “personally execute the torture” to individuals who have “‘command responsibility’ liability—that is, the vi-

carious liability of superior officers for the actions of subordinates” in certain contexts. Pet. App. 76a-77a (citation omitted). This Court, too, has observed that the TVPA contemplates liability for the “officer who gives an order to torture.” *Mohamad*, 566 U.S. at 458 (citing *Chavez v. Carranza*, 559 F.3d 486 (6th Cir.), cert. denied, 558 U.S. 822 (2009), which discusses “the law of command responsibility,” *id.* at 499). But the long-standing “principle of ‘command responsibility’” simply “holds a superior responsible for the actions of subordinates.” *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996); see *In re Yamashita*, 327 U.S. 1, 15 (1946) (concluding that a commander’s failure to discharge the duty to take appropriate measures “to control the troops under his command” can make him “responsible for [his] subordinates” who commit widespread war crimes); see also Pet. Br. 41. Again, a superior who directs (or is responsible for) the conduct of an underling is not merely an aider and abettor.⁴

In short, “Congress knew how to impose aiding and abetting liability” by “us[ing] the words ‘aid’ and ‘abet’ in the statutory text,” “[b]ut it did not” do so in the TVPA. *Central Bank*, 511 U.S. at 176-177. Because the Court should not “extend liability beyond the scope of

⁴ The court of appeals quoted (Pet. App. 78a) a committee report stating that the TVPA would permit “lawsuits against persons who ordered, abetted, or assisted in the torture.” S. Rep. No. 249, 102d Cong., 1st Sess. 8 (1991). But the quoted sentence introduced a discussion of command responsibility, as made clear by the rest of the paragraph and the one the followed, which described *Yamashita* and explained that “responsibility for torture * * * extends beyond the person or persons who actually committed those acts” to “anyone *with higher authority* who authorized, tolerated or knowingly ignored those acts.” *Id.* at 9 (emphasis added).

* * * the statutory text,” that “resolves” the second question presented. *Id.* at 177.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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