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 THE GUERNICA37 CENTRE FOR INTERNATIONAL JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Guernica37 Centre for International Justice (G37 Centre) is an international, not-for-profit legal organization that pursues accountability for human rights violations and other egregious acts. The G37 Centre is committed to upholding the integrity and fair application of the law, reducing systemic impunity, promoting community-driven interventions, expanding access to justice, and fostering both corrective and preventive change. Moreover, the G37 Centre has a substantial and cognizable interest in the adjudication of human rights violations in the United States, as multiple of its cases are brought in U.S. Federal Courts. Accordingly, beyond establishing important precedent for the vindication of human rights abuses, the present case also carries significant implications for the G37 Centre's practice in the United States.

SUMMARY OF ARGUMENT

The central thesis of this *amicus* brief maintains that nations of the Continental law tradition—also known as *Civil law* tradition[2]—establish and

[1] No counsel for a party authored this brief, in whole or in part, and no one, other than the G37 Centre and its counsel helped pay for this brief's preparation or submission.

[2] For the sake of clarity, the present *amicus curiae* will use the term "legal systems of Continental law" or "Continental legal systems" to refer to Civil law legal systems.

uniformly recognize the civil liability of aiders and abettors within their respective legal systems, without requiring the existence of a specific statutory category in civil regulations.

Continental legal systems structure civil liability around three core elements: the existence of damage; a basis of attribution—primarily intent, fault or negligence—and an adequate causal link. Within this framework, liability is not limited to the direct perpetrator of the wrongful act; rather, it extends to any subject whose conduct—whether by act or omission—has contributed causally to the occurrence of the harm.

This conclusion is based both upon an examination of the general principles of law governing extracontractual civil liability and a comparative legal-historical analysis, tracing the evolution of this practice from Roman Law to modern codifications and contemporary European and Latin-American principles. All Continental legal systems allow for the civil liability of *any* individual who participates in causing harm, treating as equally liable cooperators, collaborators, or assistants—and thus, fully obliged to provide reparations to harmed parties.

Under this premise, restricting civil liability for damages exclusively to direct perpetrators of the harm represents a legal anomaly that would separate the United States of America from the rest of the world's legal practice.

ARGUMENT

I. General Principles of Liability in Continental Law Regimes and Criteria for the Attribution of Liability

Continental legal systems, also known as Civil Law systems, articulate the legal pathways for the reparation of damages caused to third parties through what is known as extra-contractual liability. This body of law—broadly equivalent to the law of torts in Common Law systems—is inherently distinct from criminal liability.

Strictly speaking, civil liability in Continental legal systems is enforced through an action for damages brought by the person injured by an unjust interaction or harmful act, enabling that person to seek compensation from those whose conduct contributed to the harm. *See* Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1741 et seq (2012); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 37 (2020). The primary function of extracontractual liability is reparatory or compensatory in nature, not preventive or punitive. PABLO SALVADOR CODERCH & MARÍA TERESA CASTIÑEIRA PALOU, PREVENIR Y CASTIGAR: LIBERTAD DE INFORMACIÓN Y EXPRESIÓN, TUTELA DEL HONOR Y FUNCIONES DEL DERECHO DE DAÑOS [PREVENT AND PUNISH: FREEDOM OF INFORMATION AND EXPRESSION, HONOUR PROTECTION

AND FUNCTIONS OF TORTS LAW] 133 et. seq (1997). Those latter functions are instead ordinarily reserved to other branches of law, such as criminal or administrative law. RICARDO DE ÁNGEL YÁGÜEZ, DAÑOS PUNITIVOS [PUNITIVE DAMAGES] 10–55 (2012). At the same time, the underlying damage may arise from a conduct constituting a criminal offense giving rise to criminal liability.

In Continental legal systems, the existence of criminal liability is contingent upon satisfying the requirements of criminality, unlawfulness, culpability, and punishability to impose a conviction. *See* ERNST VON BELING, DIE LEHRE VOM TATBESTAND [THE DOCTRINE OF THE CORPUS DELICTI] (1906); FRANZ VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS [TREATY OF CRIMINAL LAW] 262 (1884). These requirements must be sufficiently proven to overcome the presumption of innocence. Eugenio Llamas Pombo, *Prevención y reparación, las dos caras del derecho de daños*, *in* LA RESPONSABILIDAD CIVIL Y SU PROBLEMÁTICA ACTUAL 443, 456 (J. A. Moreno Martínez ed., 2007).

This is, however, not the case for extracontractual civil liability. In Continental legal systems, attributing criminal liability is much more rigid and strict—as this field is a manifestation of the punitive power (*ius puniendi*) of the State—while civil liability for a harmful act is purely compensatory in purpose, justifying the application of less strict standards. Luis Fernando Reglero Campos, *Conceptos generales y*

elementos de delimitación, in 1 TRATADO DE RESPONSABILIDAD CIVIL [TREATISE ON CIVIL LIABILITY] 11, 131 et seq. (Luis Fernando Reglero Campos & Jose Manuel Busto Lago eds., 5th ed. 2014).

Three elements must be established in order to attribute the obligation to repair harm to one or more persons: (i) the existence of harm; (ii) a legally recognized basis for attribution, *i.e.* a basis for imputing liability; and (iii) a causal link between the harm and the conduct in question. *See* Diego M. Papayannis, *Responsabilidad civil (concepto)* [*Civil Liability (Concept)*], 21 EUNOMÍA: REVISTA EN CULTURA DE LA LEGALIDAD 294, 298 (2021); Reglero Campos, *Conceptos generales y elementos de delimitación*, at 52 et seq.

This framework allows for more than one natural or legal persons to be held liable for the same damage. In Continental legal systems, civil liability is not structured around the categories of principal or accessory liability that are inherent to criminal law. Instead, assignment of liability to a plurality of actors is determined by assessing whether each actor's conduct independently satisfies the requirements of attribution and causation. Where it does, each actor may be held directly liable.

The underlying purpose of this system is to decide which individuals and which assets must bear the loss in a specific case. Continental legal systems answer this question by finding "*the party who acted negligently must be held liable or bear the loss.*" 2 KARL

LARENZ & CLAUS-WILHELM CANARIS, LEHRBUCH DES SCHULDRECHTS [TEXTBOOK ON THE LAW OF OBLIGATIONS] 351, 351 (13th ed. 1994).

Following this approach, Continental legal systems permit an individual to be held liable irrespective of whether they were, in criminal law terms, characterized as a principal perpetrator or as having engaged an accessory conduct. In these systems, civil liability is not contingent upon such classifications. Nor does it require express statutory recognition of different forms of participation. Rather, the essence (*quid*) of extra-contractual liability lies in establishing that one or more individuals contributed to the generation of a harm through their conduct.

Thus, Continental legal systems do not depend on the formal notion of "accessory liability" in order to impose responsibility. It is sufficient to demonstrate a legally cognizable basis for attribution—such as intent or fault—and a causal link between the conduct of the alleged responsible party and the harm.

Establishing a causal link between the conduct (active or omissive) and the harmful event requires a two-step analysis:[3]

1. whether the conduct was a physical or material antecedent to the damage, as a

[3] Luis Fernando Reglero Campos & Luis Medina Alcoz, *El Nexo Casual. La pérdida de oportunidad. Las causes se exoneración de responsibilidad: culpa de la víctima y fuerza mayor*, *in* 1 TRATADO 721, 721 et. seq.

conditio sine qua non;[4] and

2. whether the damage was a probable consequence of the conduct considering the circumstances and analyzing whether, according to standards of reasonable certainty or statistical likelihood, the production of the harm could have been expected *a priori* or should have been prevented through some protective measures.[5]

This is closely linked to the criteria of subjective imputation for fault, as its premise is that the liable individual could and should have foreseen or reasonably expected the harm.

Traditionally, the primary basis of attribution in Continental legal systems has been *fault*, which gave rise to what are generally labelled as regimes of subjective liability. FERNANDO PEÑA LÓPEZ, LA CULPABILIDAD EN LA RESPONSABILIDAD EXTRACONTRACTUAL [CULPABILITY IN TORT LIABILITY] 184 et seq. (2002). From the nineteenth century onward, however, the Industrial Revolution prompted

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[4] *See generally* KARL ENGISCH, LA CAUSALIDAD COMO ELEMENTO DE LOS TIPOS PENALES [CAUSALITY AS AN ELEMENT OF CRIMINAL OFFENSE TYPES] (2008) .

[5] *See* Johannes von Kries, *Über die Begriffe der Wahrscheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrecht [On the Concepts of Probability and Possibility and Their Significance in Criminal Law*], 9 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 528 (1889); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42 (5th ed. 1984).

the development of objective (strict) liability regimes whereby liability is presumed for certain actors by virtue of the activity or the sphere in which they acted. Luis Díez-Picazo, *La culpa en la responsabilidad civil extracontractual* [*Fault in Tort Liability*], 54 ANUARIO DE DERECHO CIVIL 1009, 1018-1019 (2001). While these strict liability regimes are exceptional and jurisdiction-specific, imputation based on the subjective criterion of fault has remained homogeneous and uniform since Roman Law. *See* Luis Fernando Reglero Campos, *Los sistemas de responsabilidad civil*, in 1 TRATADO 247, 249 et seq.; Mario Talamanca, *Colpa civile (storia)* [*Civil Fault (History)*], in 7 ENCICLOPEDIA DEL DIRITTO 517 (Giuffrè Francis Lefebvre ed., 1969).

The criteria of civil fault—which encompasses cooperators, collaborators, and aiders and abettors—is based on the standard of due diligence expected from a person, given the context of their conduct, the particular facts of the case, and the level of care reasonably expected of an average person placed in a comparable situation. This assessment further requires consideration of the customs, practices, and inherent risks associated with the relevant activity. Reglero Campos, *Los sistemas de responsabilidad civil*, at 280 et. seq.

Continental legal scholarship since Roman Law has understood that fault exists when an individual should have foreseen the harm that would result from a certain course of conduct—both active and passive—

according to the rules of ordinary human experience and under the particular circumstances of the case. LÓPEZ, at 184 et seq.

During the twentieth century, in various European legal systems, risk was added to fault as a factor leading to the attribution of liability. French,[6] Italian,[7] Spanish,[8] and German[9] legal scholarship established that civil liability could be expanded, legally or through judicial rulings, when the liable party is the one who controls the source or origin of the risk. *See* Díez-Picazo, at 166.

What is relevant to this *amicus* is that while strict liability for risk requires a specific law, the principle of imputation for fault allows for liability to be attributed to *any* person for harm generated by their non-diligent conduct, without the need for an express statutory provision. This includes the conduct of those who aided and abetted the harmful conduct.

Continental legal systems do not treat "*aiding and abetting*" as a separate legal category of civil liability, nor do they require express recognition of

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[6] JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL [THE CIVIL LAWS IN THEIR NATURAL ORDER] bk. II, tit. VIII, § 2 (1689).

[7] CESARE SALVI, LA RESPONSABILITÀ CIVILE [CIVIL LIABILITY] 122 (1998).

[8] Luis Díez-Picazo, *Culpa y riesgo en la responsabilidad civil extracontractual* [*Fault and Risk in Tort Liability*], 4 ANUARIO DE LA FACULTAD DE DERECHO DE MADRID 153, 166 (2000).

[9] JOSEF ESSER, GRUNDLAGEN UND ENTWICKLUNG DER GEFÄHRDUNGSHAFTUNG [FOUNDATIONS AND DEVELOPMENT OF STRICT LIABILITY] 93 et seq. (1941).

these accessory forms of liability to impose an obligation to repair harm upon aiders and abettors. These systems apply, uniformly and homogeneously, the general principle of liability based on fault and causation to any person participating in the causation of a harm, regardless of whether their role was—in criminal terms—that of a principal or accomplice to the wrongdoing.

II. Liability for damages involving multiple participants in Continental legal systems

Having established the theoretical foundations governing civil liability in the Continental legal tradition, it is now appropriate to examine how these principles have been translated into practice in various legal systems and jurisdictions, specifically regarding individuals who have caused civil harm.

Starting from the Roman genesis, we observe how modern European and Latin American Continental law jurisdictions have maintained a structural cohesion that allows for the attribution of liability to those who—through accessory or collaborative conduct, in criminal law terms—are civilly liable for the production of a harm.

A. The origins of subjective civil liability: Roman law and the *Lex Aquilia*.

The origin of extra-contractual civil liability,[10] which permeates all Continental legal systems, arose in the year 286 B.C. with the plebiscite approval of the *actio legis Aquiliae damnum iniuria datum*, or *Lex Aquilia*. This action for liability for damages—*damnum iniuria datum*—was initially characterized by three elements:[11]

1. the performance of a typical conduct[12] that required direct, immediate, and material contact between the agent and the harm produced—that is, the harm had to be directly linked to a physical effort by the liable actor;[13]
2. the injustice or social rejection of the harm, referred to as *iniuria*, which corresponds to modern-day fault; and

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[10] *See* Giuseppe Valditara, *Damnum iniuria datum* [*Damage Unlawfully Caused*], *in* DERECHO ROMANO DE OBLIGACIONES: HOMENAJE AL PROFESOR JOSÉ LUIS MURGA GENER [ROMAN LAW OF OBLIGATIONS: A TRIBUTE TO PROFESSOR JOSÉ LUIS MURGA GENER] 825, 858 et seq. (Francisco Javier Paricio Serrano & Editorial Universitaria Ramón Areces eds., 1994).

[11] SANDRO SCHIPANI, RESPONSABILITÀ "EX LEGE AQUILIA": CRITERI DI IMPUTAZIONE E PROBLEMA DELLA "CULPA" [RESPONSIBILITY "EX LEGE AQUILIA": CRITERIA OF IMPUTATION AND THE PROBLEM OF "CULPA"] 45 (1969).

[12] Luis Carlos Sánchez Hernández, *La Lex Aquilia: La Estructura del Damnum Iniuria Datum y su Evolución a través de la Interpretatio Prudentium y la Actividad Pretoria* [*The Lex Aquilia: The Structure of Damnum Iniuria Datum and its Evolution Through the Interpretatio Prudentium and Praetorian Activity*], 73 THEMIS: REVISTA DE DERECHO 165, 172 (2018).

[13] ISABELLA PIRO, DAMNUM 'CORPORE SUO', DARE REM 'CORPORE' POSSIDERE [DAMAGE 'BY ONE'S OWN BODY', TO GIVE A THING, TO POSSESS 'BY THE BODY'] 38, 210 (2004).

3. the ownership by another of the property or rights that sustained said harm.[14]

A priori, it might seem that the original action for civil liability in Roman law only allowed for the direct and material perpetrator of the damages to be held liable, exonerating any other participant. This, however, was not the case. The direct Aquilian action—the *actio ex lege Aquiliana*—was expanded in Roman legal practice through various residual actions granted by praetors, *see* Sánchez Hernández, at 187, which allowed, *inter alia*, for the liability of those who had contributed to the generation of the harm through some form of intervention. CORBINO, 152.

Through *actiones in factum*, equity-based liability could be imposed on those who "*gave cause*" to a harm, regardless of whether they occasioned it directly or indirectly. *See generally* RICARDO PANERO GUTIÉRREZ, DERECHO ROMANO [ROMAN LAW] (2d ed. 2000); GUMESINDO PADILLA SAHAGÚN, DERECHO ROMANO [ROMAN LAW] (4th ed. 2008). Thus, in the Digest—one of the essential compilations of Roman law dating from the sixth century—the relevance of these types of actions is noted. For instance, the illustrious jurist Ulpian comments: "*it matters a great deal to know whether someone killed, or whether they provided the cause of death, so that the one who provided the cause of death is bound not by the Lex Aquilia, but by the*

[14] ALESSANDRO CORBINO, IL DANNO QUALIFICATO E LA LEX AQUILIA [QUALIFIED DAMAGE AND THE LEX AQUILIA] 96 (2005).

actio in factum." DIG. 9.2.7.6 (Ulpian, Ad Edictum 18).

The Digest sets forth examples of civil liability,under this *actio in factum*, of those indirectly taking part in the production of a harm, such as: (i) those who provide a tool to a person with which they subsequently cause harm, *id.*; (ii) those who hold a person down while another inflicts harm upon them, *id.* at 9.2.11.1; (iii) the nurse who provides someone with a medicine that is eventually used to harm another person, *id.* at 9.2.9; or (iv) the master who is negligent in choosing his slaves, and the slave who carries out his activities negligently and allows for other slaves to produce harm. *Id.* at 9.2.27.9. All these cases of civil liability are based on the premise that these conducts "*gave cause*" to the harm without directly producing it. The jurists in the Digest still understood that those individuals were liable for their contribution to the harm.

In summary, at the foundation of modern Continental legal systems, it was already envisioned that actions to obtain reparations from civil liability could be directed against any person involved in the causation of said harm—including those we understand today as "*aiders and abettors*"—and not only against the direct material perpetrator of the wrongdoing.

B. Extra-contractual civil liability in the common principles of Civil law of the European Union

Within the European Union, there are two codification proposals regarding extra-contractual liability for damages that re-state the prevailing principles in the modern law of all EU member states: the Principles of European Tort Law (PETL)[15] and Volume IV of the Draft Common Frame of Reference (DCFR).[16]

The PETL outline a set of general principles common to the extra-contractual liability laws of all European countries and serve as the foundation for respective national legislations on the matter. Bjarte Askeland, *Principles of European Tort Law (PETL)*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW (Jürgen Basedow et al. eds., 2012).

Article 9:101 of the PETL addresses the concurrence of multiple subjects in the production of harm, expressly recognizing as a principle of European comparative law the liability of collaborators, instigators, and facilitators (which would encompass "*aiders and abettors*") under a regime of joint and several liability with the material

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[15] PRINCIPLES OF EUROPEAN TORT LAW: TEXT AND COMMENTARY [PETL] (European Group on Tort Law ed., 2005).

[16] 4 PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE [DCFR] (Christian von Bar et al. eds., 2009).

wrongdoer. PETL, at art. 9:101.

It states that liability is joint and several when "*the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons*" indicating that this occurs automatically when a "person participates in, instigates or encourages an unlawful conduct of others that causes damage." *Id.* Examples of the application of this rule include cases where a subject conspires with another to commit harm, encourages them, or facilitates the commission of the harmful act in any way, despite not having participated directly in the harmful conduct. *Id.* at arts. 9:101–102.

The DCFR collects the rules, principles, and definitions of private law that are common to all legal systems of the European Union. PRINCIPIOS, DEFINICIONES Y REGLAS DE UN DERECHO CIVIL EUROPEO: EL MARCO COMÚN DE REFERENCIA (DCFR) [PRINCIPLES, DEFINITIONS AND RULES OF A EUROPEAN CIVIL LAW: THE COMMON FRAME OF REFERENCE (DCFR)] (Carmen Jerez Delgado coord., 2010). Its origin lies in the European Parliament's initiative to create a European Civil Code to condense common rules. Currently, it is considered by the courts of Member States as a reflection of the general principles of private law. *Id.*

The DCFR addresses the liability of multiple participants in Chapter 4 of Book VI, when covering the causal link between the conduct and the production of the harm. The principles establish the

general rule that "*a person causes legally relevant damage to another if the damage can be regarded as a consequence of that person's conduct or of a source of danger for which that person is responsible*." DCFR, at bk. VI, art. 4:101. Furthermore, Article 4:102 emphasizes that a person will be considered a cause of the harm if they "*collaborate with, instigate or offer significant assistance to*" another in the causation of harm. *Id.* at art. 4:102.

Both bodies of European law recognize, as an inherent feature of all the legal systems in the European Union, that civil liability for unjust harm is not limited to the direct perpetrator. On the contrary, they show that civil liability can be triggered by any faulty conduct that contributed causally to the production of a harm, including that of "*aiders and abettors*."

C. Extra-contractual civil liability in various Continental legal systems

Article 1902 of the Spanish Civil Code provides that "[*a*]*ny one who by act or omission causes damage to another, involving fault or negligence, is obliged to repair the damage caused*." CÓDIGO CIVIL [CIVIL CODE] art. 1902 (Spain). Based on the literal text of this provision, the Spanish Supreme Court has repeatedly held that where multiple actors contribute to a single injury, they are jointly and severally liable. S.T.S., 03/12/1998 (ECLI:ES:TS:1998:7253) (Spain). This

applies both when actors are conscious co-participants in the wrongful act[17] and when their independent actions produce the harm without prior concerted cooperation,[18] even in cases where the conduct of a single actor would not have been sufficient, on its own, to cause the final injury.[19]

The Spanish Supreme Court has noted that joint liability is "not precluded by a plurality of behaviors, acts and omissions, that may be independent and autonomous, simultaneous or successive, but which obviously concur or concatenate in the production of the harmful result." S.T.S., 14/07/2003 (ECLI:ES:TS:2003:4957) (Spain). To hold all participants jointly and severally liable for the totality of the damages, the Court requires that it be "impossible to individualize the relevance of each concurrent action in the harmful result or to estimate the specific liability of each participant." S.T.S., 01/12/1987 (ECLI:ES:TS:1987:8841) (Spain). Otherwise, liability is apportioned based on the causal relevance of each actor's conduct. S.T.S., 25/11/1998 (ECLI:ES:TS:1988:8307) (Spain).

The Portuguese Civil Code, one of the most modern in Europe, addresses extra-contractual liability for harmful acts in Article 483, stating:

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[17] S.T.S., 13/02/2001 (ECLI:ES:TS:2001:954) (Spain); S.T.S., 27/06/2001 (ECLI:ES:TS:2001:5533) (Spain); S.T.S., 13/06/2006 (ECLI:ES:TS:2006:3463) (Spain); S.T.S., 01/02/2007 (ECLI:ES:TS:2007:444) (Spain).

[18] S.T.S., 10/03/1994 (ECLI:ES:TS:1994:14835) (Spain).

[19] S.T.S., 12/11/1998 (ECLI:ES:TS:1998:6675) (Spain).

"[*w*]*hoever, with intent or mere fault, unlawfully violates the rights of another or any legal provision intended to protect the interests of others, shall be obliged to indemnify the injured party for the damages resulting from such violation*." CÓDIGO CIVIL [CIVIL CODE] art. 483 (Port.). This article establishes a system of subjective liability based on fault.

In cases involving multiple participants, Article 490 of the Portuguese Code provides that "*if there are several principals, instigators, or accomplices of the illicit act, all of them shall be liable for the damages they have caused*." *Id.* at art. 490. The Supreme Court of Justice (*Supremo Tribunal de Justiça*) interprets this provision as imposing joint and several liability upon both direct perpetrators and others who "facilitate in any way the commission of the damage or provide any type of material or psychological aid." Supremo Tribunal de Justiça [Supreme Court of Justice] of 07/05/2012 in Proceedings no. 146/09.0PBEPS.G1.S1 (2012), available at https://www.dgsi.pt (Port.). Like the Spanish regime, the Portuguese framework clearly encompasses those who "aid and abet" within its scope of civil liability for damages.

Similarly, in France, Articles 1240 and 1241 of the *Code Civil* establish a subjective liability system based on fault. These rules provide, respectively, that "[*a*]*ny act of a person which causes damage to another obliges the person, through whose fault it occurred, to make a reparation*" and that "[*e*]*veryone is responsible*

for the damage they have caused, not only by their actions, but also by negligence or imprudence." CODE CIVIL [CIVIL CODE] arts. 1240, 1241 (Fr.). As in other Continental legal systems, French extra-contractual liability requires three elements: (i) a damage (*dommage*); (ii) the conduct causing the harm (*fait générateur* or *faute*); (iii) and a causal link (*lien de causalité*) between the two. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., 05/11/1996, Bull. civ. I, No. 378 (Fr.).

The second of these elements—the conduct causing the harm—has been interpreted by French courts to mean that a mere breach of a standard of conduct or duty of care is sufficient for liability. This duty may arise from the context in which the actor is situated, regardless of whether it is expressly codified in statutes or regulations. Cass. civ., 27/02/1951, Bull. civ., No. 77. In other words, French civil liability does not require an intentional element; rather, it objectifies fault in connection with the duties of care that all persons must observe in their dealings with others.

In cases involving multiple participants, French court rulings establish that all actors involved, regardless of the magnitude or relevance of their conduct, are jointly and severally liable for the totality of the harm. Cass. 2e civ., 04/02/1981, Bull. civ. II, No. 21. The sole requirement is that all behaviors converge in the production of the same harm. Cour d'appel [CA] [regional court of appeal] Versailles, 3e

ch. 30/06/2016, No. 14/04397 (Fr.). Again, it is clear that French law embraces a notion of civil liability that covers those considered "*aiders and abettors*."

The core of civil liability in German law is found in Sections 823 and 826 of the *Bürgerliches Gesetzbuch* (BGB). German law is distinctive in that it recognizes two primary paths for extra-contractual liability.

The first, Section 823 of the BGB, is tied to the infringement of a specific right, specifying that "[*a*] *person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable for the damage arising therefrom*." BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 823 (Ger.). To impute liability, this section requires the breach of a duty of care. Hartwig Sprau, *Introduction to §§ 823 et seq.*, *in* Bürgerliches Gesetzbuch [BGB] ¶ 11 (Christian Grüneberg et al. eds., 80th ed. 2021).

The second, Section 826 of the BGB, stipulates that "[*a*] *person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person for the damage*." BGB, at § 826. German judicial rulings have defined such wrongful acts or omissions as those that offend the "sense of decency of all those who think with impartiality and justice." Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 6, 2014, Neue Juristische Wochenschrift [NJW] 1098 (Ger.); GERHARD WAGNER, MÜNCHENER KOMMENTAR ZUM

BÜRGERLICHEN GESETZBUCH [MUNICH COMENTARY ON THE GERMAN CIVIL CODE] (Franz J. Säcker et al. eds., 8th ed. 2020).

Regarding harm caused by multiple participants, Section 830 of the BGB enumerates the methods for attributing liability to participants and other contributors. It states that "[*i*]*f several persons have caused damage by a jointly committed tort, each is liable for the damage*" even "[*i*]*f it cannot be determined which of the participants caused the damage by their individual act*." BGB, at § 830. Paragraph (2) expressly affirms: "*instigators and accomplices are treated in the same way as joint actors*." *Id.* This legislative formula is broad enough to encompass a wide spectrum of responsible parties, including those categorized as "*aiders and abettors*."

According to the rulings of the German Federal Court (*Bundesgerichtshof* or 'BGH'), the accessory conducts described in Section 830 apply to any contribution that favors the commission of the principal wrongful act and is relevant to its causation,[20] including mere psychological support to the material wrongdoer,[21] provided that it facilitated the harmful act.[22] No express agreement or promise of

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[20] Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 20, 2010, Zeitschrift für Wirtschaftsrecht [ZIP] 786 (Ger.).

[21] Bundesgerichtshof [BGH] [Federal Court of Justice], July 17, 2012, Zeitschrift für Wirtschaftsrecht [ZIP] 1552 (Ger.).

[22] Bundesgerichtshof [BGH] [Federal Court of Justice], July 19, 2012, Neue Juristische Wochenschrift [NJW] 3439, 3441 (Ger.).

assistance between the intervenors is required. Bundesgerichtshof [BGH], Mar. 9, 2010, Neue Juristische Wochenschrift [NJW] 1877 (Ger.).

The BGH has affirmed that, within the German civil law of torts, participation in a civil wrong is governed by principles derived from criminal law. Bundesgerichtshof [BGH], Mar. 20, 1995, Neue Juristische Wochenschrift [NJW] 1739 (Ger.); Bundesgerichtshof [BGH], July 13, 2004, Wertpapier-Mitteilungen [WM] 1768 (Ger.). Participants must have a general knowledge of the circumstances of the conduct to which they contribute. Bundesgerichtshof [BGH], Mar. 9, 2010, Neue Juristische Wochenschrift [NJW] 1877 (Ger.). This general knowledge is satisfied when the participants are willfully blind to the consequences of their acts,[23] when they recklessly violate professional duties,[24] or when the conduct is so imprudent that they are presumed to have accepted the risk of contributing to the harm[25] or to have left the outcome to chance.[26] This applies even if the

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[23] Bundesgerichtshof [BGH], Nov. 4, 1997, Neue Juristische Wochenschrift [NJW] 535 (Ger.); Bundesgerichtshof [BGH], Feb. 28, 1989, Zeitschrift für Wirtschaftsrecht [ZIP] 564 (Ger.).

[24] Bundesgerichtshof [BGH], May 6, 2008, Neue Juristische Wochenschrift [NJW] 2266 (Ger.); Bundesgerichtshof [BGH], Mar. 5, 1975, Wertpapier-Mitteilungen [WM] 559 (Ger.); Bundesgerichtshof [BGH], Sept. 24, 1991, Wertpapier-Mitteilungen [WM] 2034 (Ger.).

[25] Bundesgerichtshof [BGH], Apr. 14, 1986, Neue Juristische Wochenschrift [NJW] 1883, 1986 (Ger.); Bundesgerichtshof [BGH], May 6, 2008, Neue Juristische Wochenschrift [NJW] 2266 (Ger.).

[26] Bundesgerichtshof [BGH], Dec. 13, 2001, Neue Juristische

collaborators acted with different purposes or internally disapproved the resulting harm. Bundesgerichtshof [BGH], Jan. 31, 1978, Neue Juristische Wochenschrift [NJW] 832 (Ger.).

In Italian civil law, Article 2043 of the Codice Civile states that "[*a*]*ny intentional or negligent act that causes an unjust injury to others obliges the one who committed it to provide compensation for the damage caused*." CODICE CIVILE [CIVIL CODE] art. 2043 (It.). Like the previous systems, this codifies a subjective liability regime.

The plurality of participants in civil wrongs is regulated in Article 2055 of the Codice Civile, which states that "[*i*]*f the harmful event is attributable to more than one person, all are jointly and severally liable for the compensation of the damage*." *Id.* at art. 2055. Italian judicial practice refers to these situations as "*concorso di cause*" (concurrence of causes) and understands that the only requirement is that the harmful event be attributable to several parties, even when the "[h]armful conducts are independent of each other and even if the grounds for liability are different." Cass. Civ., Sez. Un. [Court of Cassation] 04/27/2022, n. 13143, Rv. 664654-01 (It.).

The Supreme Court of Cassation (*Corte Suprema di Cassazione*) has emphasized this point, explaining that "[w]here acts attributable to several persons concur—whether simultaneous or successive—all

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Wochenschrift [NJW] 1042 (Ger.).

must be recognized as having causal efficacy, provided they created a situation such that, but for one or the other, the event would not have occurred." Cass. Civ., Sez. III civ. [Court of Cassation], 04/03/2024, n. 8778 (It.). Italian legal practice confirms that civil liability extends to those who intervene as "*aiders and abettors*."

This widespread trend providing for "*aiding and abetting*" liability is further illustrated in Latin American systems. These systems similarly follow the Continental European tradition.

In the Argentine civil system, extra-contractual liability is regulated under Title V of the Civil and Commercial Code of the Nation (*Código Civil y Comercial de la Nación*). CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CIVIL AND COMMERCIAL PROCEDURE CODE] arts. 1708, 1881 (Arg.). It establishes the duty to repair any unjustified damage that has an adequate causal link with the generating event. *Id.* at arts. 1716, 1717, 1726. Liability can be founded on objective or subjective factors, the latter defining subjective *fault* as the omission of due diligence required by the nature of the obligation and the circumstances of the persons, time, and place. *Id.* at art. 1724.).

Regarding the plurality of individuals in the perpetration of a harm, the Argentine Code adopts broad criteria within the regime of direct liability. Article 1749 of the Civil and Commercial Code stipulates that when several persons participate in

the production of a harm with a single cause, the rules of joint and several obligations apply. *Id.* at art. 1749. This includes not only the material perpetrators or wrongdoers but also those who intervene as co-participants or accomplices, whom the Code classifies as directly liable. 4 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO 469 (Marisa Herrera et al. dirs., 1st ed. 2015). Consequently, all of them—including those who would be held as "aiders and abettors"—are liable to the victim for the totality of the damage. ROBERT JOSEPH POTHIER, TRATADO DE LAS OBLIGACIONES [TREATY OF OBLIGATIONS] 138 (2d ed. 2007) (1761); Julián E. Jalil, *Daños causados por los grupos en el nuevo Código Civil* [*Damages caused by groups in the new Civil Code*], ELDIAL.COM (Nov. 19, 2014), https://www-2020.scba.gov.ar/leyorganica/CCyc30/pdfley/Jalil_Danios_causadosporlosgruposenelnuevoccyc.pdf.

This approach has been consistent in Argentinean legal practice, where it is recognized that liability for negligent acts extends jointly and severally to all participants in the harm—including direct perpetrators, advisors, and accomplices—equating it in this regard to liability derived from criminal acts. Cámara de Apelaciones en lo Civil y Comercial de San Nicolás [Cám. Apel. Civ. y Com. San Nicolás] [Civil and Commercial Court of Appeals of San Nicolás], 9/11/1993, "Gajate, Carlos Alberto y otra c. González, Gustavo Daniel y otros/ Daños y perjuicios," DJBA (147-5699), Id. SAIJ: FA93013088 (Arg.).

In Chilean law, extra-contractual liability is regulated in Title XXXV of Book IV of the Civil Code, which establishes that whoever commits an illicit act that causes harm to another is obliged to indemnify them, regardless of potential criminal consequences. CÓDIGO CIVIL [CIVIL CODE] art. 2314 (Chile).

When several persons intervene in the commission of a harm, the Code establishes that all are jointly and severally liable for the total damage. *Id.* at art. 2317. This includes those acting jointly as well as those contributing to the harm through their own conduct. Thus, the degree of participation of each intervener does not affect the victim's right to claim the full amount from any of them. ARTURO ALESSANDRI RODRÍGUEZ, DE LA RESPONSABILIDAD CIVIL EXTRACONTRACTUAL EN EL DERECHO CIVIL CHILENO [ON NON-CONTRACTUAL CIVIL LIABILITY IN CHILEAN CIVIL LAW] 41 (2005); Pamela Mendoza-Alonzo, *Pluralidad de causantes de un mismo daño: Régimen jurídico aplicable en Chile* [*Multiple causes of the same damage: The applicable legal regime in Chile*], 41 REV. DERECHO PRIVADO 213 (2021); Sebastián Antonio Barrios Guerra, *Del reparto de responsabilidades en casos de pluralidad de actores en la responsabilidad civil extracontractual* [*On the allocation of liability in cases involving multiple parties in non-contractual civil liability*], 40 REV. ESTUDIOS JUSTICIA 107, 107 et seq (2024). The Chilean Supreme Court has specified that this solidarity requires the existence of a single common illicit act. Corte Suprema de Justicia [C.S.J.]

[Supreme Court], Primera Sala, 25/09/2023, "Guzmán y otros con Esval S.A. y otros," Rol No. 21439-2022 (Chile).

In Brazilian law, extra-contractual liability is regulated in the Civil Code, which defines an illicit act as a negligent action or omission that causes harm, CÓDIGO CIVIL [CIVIL CODE] art. 186 (Braz.), and establishes the duty to repair it. *Id.* at art. 927. When there is more than one responsible party, the Code indicates that co-principals and accomplices in the illicit act are jointly and severally liable for the totality of the damage. *Id.* at art. 942. This rule includes direct perpetrators and those who contribute to the harmful result through their own faulty conduct.

Brazilian judicial application has consistently applied these criteria, affirming that joint and several liability reaches all those who contribute causally to the harm, even if their conducts are not identical. Superior Tribunal de Justiça [STJ] [Superior Court of Justice], Agravo Interno no Agravo em Recurso Especial No. 997.278/PR, Relator: Ministro Francisco Falcão, 24/05/2021 (Braz.).

In Colombian law, extra-contractual liability stems from the general principle established in Article 2341 of the Civil Code, which states that anyone who causes harm through a crime or fault is obliged to repair the damages. CÓDIGO CIVIL [CIVIL CODE] art. 2341 (Colom.). Colombian legal practice applies the "*theory of adequate causation*," focusing on the

suitability of each individual's conduct to determine a result based on logic and probability. *See* Rodrigo Fuentes Guiñes, *Las teorías tradicionales sobre la causalidad* [Traditional Theories on Causality], 14 REV. DERECHO Y CIENCIAS PENALES 23, 27 (2010); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, M.P. Ariel Salazar Ramírez, 14/12/2012, Expediente 11001-31-03-028-2002-00188-01 (Colom.). Furthermore, the Colombian system is a mixed liability system, starting from subjective fault but creating cases of strict liability for "*dangerous activities*" through judicial rulings. GILBERTO MARTÍNEZ RAVE & CATALINA MARTÍNEZ TAMAYO, *RESPONSABILIDAD CIVIL EXTRACONTRACTUAL* [EXTRACONTRACTUAL CIVIL LIABILITY] (2003).

The Colombian Supreme Court of Justice has applied these principles to impose corporate liability for harm arising from avoidable risks. In the case known as Machuca, an armed group bombed a pipeline, triggering a fire that devastated the village of Machuca and caused numerous fatalities. The Colombian Supreme Court of Justice held the oil company Ocensa civilly liable on the ground that it had created a risk that could have been avoided through the exercise of due diligence, particularly in light of its knowledge of the potential impact on third parties. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil, M.P. Margarita Cabello Blanco, 19/12/2018, Sentencia SC5686-2018, Expediente 2004-00042-01 (Colom.).

Regarding multiple participants, Article 2344 of the Colombian Civil Code establishes a regime of joint and several liability when two or more persons contribute to the harm: "*each shall be jointly and severally liable for all damage proceeding from the same fault*." CÓDIGO CIVIL [CIVIL CODE] art. 2344 (Colom.). This notion of joint causation allows the injured party to sue any of the responsible parties for the total obligation. Tribunal Superior de Bogotá [Trib. Sup. Bogotá] [Superior Tribunal of Bogotá], Sala Civil, M.P. Luis Roberto Suárez González, 12/07/2015, Expediente 11001-31-03-007-2010-00567-02 (Colom.). From this, it is clear that the Colombian civil liability regulations extend even further the spectrum of liability, including to "aiders and abettors."

Finally, in the Mexican legal system, extra-contractual liability is primarily subjective (based on fault). According to Article 1910 of the Federal Civil Code "*anyone who, acting unlawfully or against good customs, causes damage to another, is obliged to repair it, unless he proves that the damage was produced as a result of inexcusable fault or negligence of the victim*." CÓDIGO CIVIL FEDERAL [FEDERAL CIVIL CODE] art. 1910 (Mex.).

According to Article 1830 of the Mexican Federal Civil Code, an act is illicit if it is contrary to public order laws or good customs. *Id.* at art. 1830. This includes infringing upon a generic duty of care expected by one's role or activity. EKATERINA

ARISTOVA & CATHERINE O'REGAN, CIVIL LIABILITY FOR HUMAN RIGHTS VIOLATIONS: A HANDBOOK FOR PRACTITIONERS 423 (2022).

Mexican law does not distinguish between principal actors and accessory or auxiliary actors for the purposes of determining civil liability; it is sufficient to prove that the conduct of multiple persons was causally related to the harm. In these cases, Article 1917 of the Federal Civil Code specifies that "*persons who have caused a harm in common are jointly and severally liable to the victim for the reparation*." CÓDIGO CIVIL FEDERAL [FEDERAL CIVIL CODE] art. 1917 (Mex.). This ensures that anyone who participates or assists—including "aiders and abettors"—is fully responsible to the injured party.

In summary, from a systematic and comparative perspective, there is no conceptual vacuum or obstacle preventing the affirmation that one who contributes significantly to the production of a harm must be capable of being held civilly responsible. The uniformity of these systems of Continental law, founded on the principles of full reparation and adequate causation, consistently extend liability to any individual whose conduct facilitated or made the harmful result possible. This includes those considered "*aiders and abettors*" in the Common law tradition. Denying this would introduce an unjustified zone of non-liability incompatible with the preventive and compensatory functions of tort law and with the common practice of civilized nations.

CONCLUSION

The answer to whether nations within the Continental legal tradition impose civil liability on those who would be characterized as *aiders and abettors* is unequivocally yes. Continental legal systems do not condition civil liability on criminal law categories such as principals and accomplices. Rather, they apply general principles of subjective imputation and causation to hold liable any person whose conduct contributed to the harm.

The development of Continental Law, from Roman law to the most recent rulings of Supreme Courts in Europe and Latin America, confirms that any person who facilitates, instigates, or materially assists the commission of a harmful act may be held civilly liable for the resulting injury, typically under a regime of joint and several liability. Although the distinction between a principal and an aider and abettor is central in criminal law, it fades in the context of extra-contractual liability where the analysis turns on the defendant's contribution to the harm and the breach of the applicable duty of care. Therefore, the civil liability of those who assist, encourage or enable a wrongful act is not exceptional but rather reflects a well settled and shared general principle within Continental legal systems.

Accordingly, recognizing aiding and abetting liability under the Alien Tort Statute, 28 U.S.C. §

1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 note, in this case would not constitute a legal anomaly in comparative perspective. To the contrary, it would ensure that those who participate in the infliction of harm may be held accountable in the United States just as they are under Continental legal systems.

For these reasons, this Court should affirm the decision of the Ninth Circuit.

Respectfully submitted,

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