

No. 24-856

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IN THE  
**Supreme Court of the United States**

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CISCO SYSTEMS, INC., *et al.*,

*Petitioners,*

*v.*

DOE I, *et al.*,

*Respondents.*

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

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**BRIEF OF SCHOLARS OF FEDERAL  
JURISDICTION, FEDERAL COURTS,  
CONSTITUTIONAL LAW, INTERNATIONAL  
LAW, AND FOREIGN RELATIONS  
LAW AS *AMICI CURIAE* IN SUPPORT  
OF RESPONDENTS**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amici curiae* are law professors who teach and publish about federal jurisdiction, federal courts, constitutional law and history, international law, and foreign relations law. *Amici* thus have a professional interest in the proper understanding and interpretation of the Alien Tort Statute (“ATS”). 28 U.S.C. § 1350. Specifically, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), held that the ATS provides congressional authorization for courts to provide redress for certain, limited torts committed in violation of the laws of nations. *Amici* submit that: 1) there is no reason for the Court to overturn that holding; and 2) the possibility that some cases, but not this one, might raise foreign policy concerns provides no basis to create a blanket prohibition on aiding and abetting liability. A complete list of amici is provided in Appendix A.

## SUMMARY OF ARGUMENT

This Court held in *Sosa* and affirmed in three subsequent cases that the ATS authorizes federal courts to provide a remedy for certain international law violations, particularly where the failure to provide a remedy might cause foreign nations to hold the United States accountable. *See Sosa*, 542 U.S. at 724-25, 732; *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made any monetary contribution for the preparation or submission of this brief.

108, 115 (2013); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 631 (2021); *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 254-56 (2018). That disposes of Cisco's and their *amici*'s primary arguments: that the ATS is a dead letter, authorizing no modern claims and that, regardless, this Court should preclude aiding and abetting liability. Cisco proposes, under the guise of judicial discretion and separation-of-powers, to eviscerate or severely limit the ATS in ways that are contrary to its text and purpose.

I. Cisco invites the Court to overturn *Sosa* and its progeny. It asks the Court to hold that recent *Bivens* decisions should foreclose *any* claims under the ATS beyond the three violations recognized when the ATS was passed, no matter how well-established. Pet. Br. 17-21. But that would ignore the fact, repeatedly affirmed by this Court, that the ATS is a clear congressional grant of authority to recognize causes of action for a limited set of universally accepted international law norms. Congress reaffirmed this in enacting the TVPA, and it is similar to well-established authority in other areas of law. Unlike ATS claims, *Bivens* actions are judicially implied from the constitution itself and devoid of any congressional authorization. Extending precedents limiting *Bivens* relief to refuse to apply a statute Congress intended to authorize a claim would raise the very separation-of-powers concerns Cisco purports to avoid.

Regardless, while Cisco frames *Bivens* case law cautioning against judicially implied causes of action

as new, this Court took into account the long-standing principles reflected in those cases when it carefully crafted and repeatedly reaffirmed the test in *Sosa*. It should decline Cisco's invitation to overturn *Sosa*.

II. Cisco also says that because *some* aiding and abetting cases involve a foreign state and *could* raise foreign policy concerns, this Court should bar *all* aiding and abetting liability. Pet. Br. 33; U.S. Br. 24. That *non sequitur* conflicts with the statute's text and purpose.

There is no argument that this case interferes with our foreign policy. Nor does anyone deny that aiding and abetting a human rights violation is a human rights violation. States are responsible for the human rights abuses of their nationals, and owe a duty to all other States to prevent and remedy the most serious violations. If the United States refused to provide a remedy where, as here, Americans aid and abet egregious violations of universally recognized norms from the United States, other nations will hold the United States accountable. Cisco provides no reason to exclude cases like this one, which is exactly the type the Framers sought to permit.

Cisco's plea that this Court should nonetheless create a new, bright-line rule exempting aiders and abettors from liability proposes an overbroad "solution" in search of a problem. Such a rule would exclude cases that do not involve foreign states or have no conceivable effect on foreign policy, as well as cases that have the *positive* effect Congress intended:

the United States being seen complying with its obligations. And such a rule is unnecessary. This Court has already accounted for foreign policy concerns by limiting ATS claims to universally accepted norms, *Sosa*, 542 U.S. at 732; barring claims without an adequate connection to the United States, *Kiobel*, 569 U.S. at 124-25; *Nestlé*, 593 U.S. at 633-34; and precluding claims against foreign corporations. *Jesner*, 584 U.S. at 265. These limits prevent international discord in the vast majority of cases.

If some rare aiding and abetting case that survived this Court's strict limits nonetheless raised foreign policy concerns, *Sosa's* suggested approach – addressing such concerns on a case-by-case basis – 542 U.S. at 733 n.21, is sufficient. Courts have well-established tools to evaluate the propriety of cases that may affect foreign affairs. These doctrines carefully balance respect for the political branches' foreign policy prerogatives with the Judiciary's duty to exercise statutorily-created jurisdiction. But this Court has long held that the mere fact that a case may affect foreign policy alone is insufficient to absolve courts of that duty. Thus, Petitioner's proposal to bar even the possibility of aiding and abetting liability in all cases is unnecessary to prevent specific problematic cases, would improperly preclude claims that present little or no possibility of interfering with U.S. foreign policy, and conflicts with both the statute's purpose and the Judiciary's obligation to exercise the jurisdiction the ATS affords.

This Court has strictly limited the ATS, but has carefully avoided excluding claims where a U.S. defendant violates universally accepted international law from the United States, since those claims are central to the statute's purpose. This Court should reject Cisco's request to defy Congress's intent and to cut away at the statute's heart.

### ARGUMENT

**I. This Court's *Bivens* precedents do not apply where Congress has passed a statute directing courts to create causes of action.**

The ATS applies to "tort[s] . . . , committed in violation of the law of nations." 28 U.S.C. § 1350. As *Sosa* recognized, Congress enacted this statute to provide federal courts with jurisdiction and the statutory authority to recognize a narrow class of federal common law claims for qualifying torts. 542 U.S. at 717, 724-25.

Cisco, however, argues that because the Court has expressed reluctance to expand federal courts' authority to imply private rights of action *directly from the constitution* under the line of cases stemming from *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court should rule that federal courts can no longer recognize any causes of action under the ATS other than the three that the First Congress may have had in mind. Pet. Br. 17-21; *see also* U.S. Br. 13-18. Such a holding would require ignoring the text of, and Congress's purpose in

enacting, the ATS, which provides a *congressional grant* of authority to recognize causes of action under the ATS. It would also require overturning *Sosa*, *Kiobel*, *Jesner*, and *Nestlé*, which have expressly confirmed this congressional grant of federal judicial authority. And it would *generate* the exact separation of powers concerns that Cisco’s proposal purports to avoid.

**A. Congress passed the ATS specifically so that courts would hear federal common law tort claims.**

The ATS grants district courts federal jurisdiction and the statutory authority to recognize causes of action for torts committed in violation of the law of nations. *Sosa*, 542 U.S. at 724-25. In empowering federal district courts to hear “civil action[s]” for “tort[s],” the plain statutory text explicitly endorses the provision of a remedy through a damages action. 28 U.S.C. § 1350. This Court held – and reaffirmed three separate times – that the ATS expressly authorizes federal courts to recognize certain claims under widely accepted international norms, as federal common law. *Sosa*, 542 U.S. at 724-25, 732; *Nestlé*, 593 U.S. at 631; *Kiobel*, 569 U.S. at 115; *Jesner*, 584 U.S. at 254-56.

Indeed, this Court emphasized that the “First Congress did not intend the [ATS] to be ‘stillborn,’” *Kiobel*, 569 U.S. at 115 (quoting *Sosa*, 542 U.S. at 714), or “to sit on a shelf awaiting further legislation.” *Jesner*, 584 U.S. at 254. It made clear that Congress enacted the ATS on “the underst[anding] that the

district courts would recognize private causes of action for certain torts in violation of the law of nations.” *Sosa*, 542 U.S. at 724. And it held that this grant of authority survived *Erie*, because *Erie* did not “bar [such] judicial recognition . . . no matter what the circumstances,” and “it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms.” *See id.* at 729-31.

The ATS grants courts authority to “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 §1350 was enacted.’” *Jesner*, 584 U.S. at 256 (quoting *Sosa*, 542 U.S. at 732). The First Congress was well aware that international law evolved, and would continue to evolve, over time. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 *Hastings Int’l & Comp. L. Rev.* 221, 241-43 (1996). No subsequent Congress has walked back this grant of authority. “Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.” *Sosa*, 584 U.S. at 725. Thus, by exercising jurisdiction over claims of international law violations, the courts *carry out* Congress’s legislative command.

**B. *Bivens* actions are implied from the Constitution and lack congressional authorization.**

Unlike ATS claims, “no statute expressly creates a *Bivens* remedy.” *Hernandez v. Mesa*, 589

U.S. 93, 100 (2020); *accord Ziglar v. Abassi*, 582 U.S. 120, 133 (2017) (“With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.”). “In *Bivens* . . . the Court [held] that . . . the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim.” *Hernandez*, 589 U.S. at 99.

This Court’s post-*Bivens* cases have long limited a court’s authority to imply a cause of action under the Constitution, in the absence of any congressional imprimatur. The Court has observed that *Bivens* extended the mid-20th century practice of providing statutory remedies not mentioned in statutory text but deemed necessary by courts to make a statute effective to the Constitution itself. *See Ziglar*, 582 U.S. at 132; *Hernandez*, 589 U.S. at 99. The practice in the statutory field was largely “abandoned” long ago in favor of “interpret[ing] the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy.” *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

In *Bivens* actions, this Court is asked to imply “a damages remedy” from “a provision that makes no reference to that remedy.” *Hernandez*, 589 U.S. at 100. The absence of congressional authorization for the Court to undertake that task has led it to observe that the “expansion of *Bivens* is a disfavored judicial activity,” and the Court “has been . . . reluctant to create new causes of action.” *Id.* at 101

(quotation marks omitted). But the ATS is entirely different. *Supra* § I.A.; *infra* § I.C.

**C. The congressional grant of authority in 28 U.S.C. § 1350 distinguishes ATS claims from judicially implied causes of action under *Bivens*.**

*Sosa* specifically rejected the notion that courts lack congressionally-granted authority to hear ATS claims. 542 U.S. at 724-25, 729-31. Post-*Bivens* cases “in no way foreclose[]” ATS claims precisely because while *Bivens* actions lack any statutory basis, the ATS expressly provides a “firm statutory basis.” *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 55 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013) (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) and *Sosa*, 542 U.S. at 724)); *supra* § I.A-B.

Unlike the Constitution and statutes that are silent on such matters, the ATS is “a statute that ‘makes [] reference to [a] remedy.’” *Nestlé*, 593 U.S. at 652 (Sotomayor, J., concurring) (quoting *Hernandez*, 589 U.S. at 100). “The ATS expressly contemplates that federal courts will hear ‘civil action[s]’ for ‘tort[s].’” *Id.* (quoting 28 U.S.C. §1350). Thus, “a federal court’s authority to recognize a damages remedy’ under the ATS very much ‘rest[s] at bottom on a statute enacted by Congress.” *Id.* (quoting *Hernandez*, 589 U.S. at 100). This Court does not need to ask whether courts are “better positioned than Congress to create a damages action,” *Egbert v. Boule*,

596 U.S. 482, 492 (2022), because Congress has already authorized one.

Indeed, as *Sosa* recognized, the ATS enacts a congressional policy of using tort law to redress widely accepted international wrongs through federal common law. 542 U.S. at 717, 719, 724-25. Recognizing actionable international norms subject to *Sosa*'s two-step framework thus effectuates that congressional policy, which is this Court's "function" when fashioning federal common law. *See Jesner*, 584 U.S. at 277 (Alito, J., concurring) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979)). And courts are up to this congressionally assigned task: identifying actionable norms under the ATS is consistent with federal courts' historic competence to adjudicate claims involving international law. *See Sosa*, 542 U.S. at 729-30 (collecting cases); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice."). Courts do so all the time. *E.g. F.R.G. v. Philipp*, 592 U.S. 169, 176-80 (2021). Consequently, limits on *implying* constitutional torts have little application to a statute under which Congress *expects* federal courts to adjudicate torts; applying such limits would conflict with Congress's will. Indeed, the usual rule is that once jurisdiction is established, federal courts have a "virtually unflagging" obligation to exercise it. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Congress's passage of the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note, reaffirmed its understanding and agreement that the ATS authorizes federal courts to recognize claims for violations of modern-day international law. The TVPA supplements the ATS given the latter statute's restriction of common law remedies to "aliens"; the TVPA is designed to "enhance the remedy *already available* under" the ATS by "extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad." *See* H.R. Rep. No. 102-367, 4 (1991) (emphasis added). And Congress intended that the ATS "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." *Id.*; *see also id.* at 3 ("Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing").

*Sosa* recognized that in passing the TVPA, Congress "not only expressed no disagreement" with the judicial determination that the ATS authorized "judicial recognition of actionable international norms," but "seem[s] to have shared" this view because it "responded to its most notable instance" – recognition of a cause of action for torture under the ATS by the Second Circuit in *Filártiga* – "by enacting legislation supplementing [that] judicial determination in some detail." 542 U.S. at 729-731 (discussing *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)). A refusal to apply the ATS would violate rather than respect the separation of powers.

**D. There is no basis to overturn *Sosa*.**

Cisco urges that the Court's *Bivens* precedents decided since *Sosa* should foreclose any causes of action under the ATS, other than those cognizable at the Founding. Pet. Br. 20-21. But that would overturn *Sosa*'s holding that certain limited claims based on well-established modern international law principles are actionable. As noted, the post-*Sosa Bivens* cases addressing implied constitutional torts absent congressional authorization are inapplicable to the ATS's grant of authority.

Regardless, there is no basis to overturn *Sosa*. *Stare decisis* has "special force" in statutory cases, since "Congress remains free to alter what [courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). And the *Bivens* cases announced no new principles unknown to this Court when it decided *Sosa* or when it ruled on the ATS's contours three times in the last dozen years. *See id.* at 173 (declining to overturn prior decision because it had "not been undermined by subsequent changes or development in the law."); Resp. Br. 37-39.

The *Sosa* Court was well aware that *Bivens* actions were already "a relic of the heady days in which this Court assumed common-law powers to create causes of action." 542 U.S. at 742 (Scalia, J., concurring) (quotation marks omitted). And the *Sosa* Court itself explained that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727 (citing *Malesko*, 534 U.S. at 68 and *Sandoval*, 532 U.S.

at 286-87). Nonetheless, examining the ATS's text which provides that federal courts will hear "civil actions[s]" for "tort[s]," 28 U.S.C. § 1350, and its history, *Sosa*, 542 U.S. at 712-24, the Court found 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." *Id.* at 724.

Consequently, the Court established a test tailored for the ATS's specific context, adopting a cautious approach to crafting judicial remedies, while still effectuating Congress's mandate. Since *Sosa*, courts first ask "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory'" and then ask "whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion." *Jesner*, 584 U.S. at 257-58 (quoting *Sosa*, 542 U.S. at 732). In prompting federal courts to recognize causes of action while still exercising "judicial caution" and "vigilant doorkeeping," *Sosa*, 542 U.S. at 727, 729, the Court carefully crafted a balanced test that this Court has reaffirmed three times over two decades. This Court should not now jettison that test in favor of standards based on precedents of which it was and continues to be well aware, developed to address fundamentally different contexts.

*Amicus* CACI claims *Jesner* "applied the same rule to *Bivens* claims and judge-made ATS claims" because it quoted *Ziglar*. CACI Br. 6-7 (discussing *Jesner*, 584 U.S. at 264 (quoting *Ziglar*, 582 U.S. at

137)). But *Jesner* held that “federal courts must apply the test announced in *Sosa*.” 584 U.S. at 257.<sup>2</sup> And far from conflicting with *Bivens* case law, this Court noted that “*Sosa* is consistent with this Court’s general reluctance to extend judicially created private rights of action.” *Id.* at 264-65. In any event, this Court “does not normally overturn, or [] dramatically limit, earlier authority *sub silentio*.” See *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 18 (2000).

That *Jesner* quoted one of this Court’s recent *Bivens* decisions addressing judicially implied causes of action and recognized that the “general principles” animating those cases applied to the question before it is unsurprising, since *some* of the concerns animating both lines of cases are similar. 584 U.S. at 264-65. But the *Bivens* and the ATS frameworks are not coterminous, nor could they be, because of the fundamental difference: *Bivens* claims are *implied* from the Constitution, and therefore lack the congressional authorization that the ATS provides. It is that absence of any congressional authorization to

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<sup>2</sup> Nor, as CACI argues, has this Court held that a “single sound reason to defer to Congress is enough” to bar ATS claims. CACI Br. 7 (quotation marks omitted). This phrase is *dicta* from a part of *Nestlé* that did not garner a majority. 593 U.S. at 635 (Thomas, Gorsuch, Kavanaugh, JJ.). *Jesner*, by contrast, suggested courts should refrain only “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy.” 584 U.S. at 264 (quotation marks omitted). But the claims here are at the center of the ATS’s purpose.

the judiciary to recognize claims that has brought heightened skepticism to *Bivens*.<sup>3</sup>

Indeed, separation-of-powers concerns are particularly acute in the *Bivens* context because the judiciary is authorizing lawsuits for money damages against employees of a co-equal branch that has not authorized such suits. *See Ziglar*, 582 U.S. at 133-35. (“Congress . . . has a substantial responsibility to determine whether . . . monetary and other liabilities should be imposed . . . on employees of the federal government.”)

In fact, recognizing actionable international law norms under the ATS’s congressional grant of authority is similar, not to implying causes of action under *Bivens*, but to the well-established authority federal courts have to hear claims in the admiralty context. There, federal courts’ authority to adjudicate claims is derived from the grant of admiralty jurisdiction in Article III, § 2, cl. 1, of the Constitution, which Congress implemented via 28 U.S.C. § 1333. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960-61 (4th Cir. 1999). This statute “confer[s] on district courts exclusive, original jurisdiction of ‘any civil case of admiralty or maritime jurisdiction’ and ‘any prize brought into the United States and all proceedings for

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<sup>3</sup> For the same reasons, CACI’s observation that some *Bivens* cases reference ATS cases does not support its argument that the *Bivens* cases foreclose ATS claims. CACI Br. 7. This Court’s ATS cases have never held ATS claims are foreclosed, and its *Bivens* cases do not suggest otherwise. *Hernández*, 589 U.S. at 101, 103; *Egbert*, 596 U.S. at 491.

the condemnation of property taken as prize.” *Id.* at 960 (quoting 28 U.S.C. § 1333).

As with the ATS, the body of admiralty law applied by the courts is the “law of nations -- the *jus gentium*,” which the “framers [of] Article III” had “clearly in view” and expected the federal courts to “draw upon” in the “development of the substantive, common law of admiralty when exercising admiralty jurisdiction.” *Id.* (citing *The Lottawanna*, 88 U.S. 558, 572-78 (1874)). This exception to *Erie*’s proclamation that there “is no federal general common law” is the “most firmly entrenched.” *See Sosa*, 542 U.S. at 741-42 (Scalia J., concurring) (quotation marks omitted). Adjudicating an ATS federal claim looks much more like an exercise of this well-established authority than the judicial implication of *Bivens* actions. In fact, both statutes empower federal courts to hear “civil action[s]” or “civil case[s],” but section 1331 only allows for cases of “admiralty jurisdiction,” while the ATS specifically authorizes “tort” claims; its grant of authority is arguably *clearer*. That favors recognizing actionable international law norms under the ATS, subject to *Sosa*’s carefully crafted framework, and refutes any suggestion this Court should overturn *Sosa*.

This Court has previously recognized a cause of action for violations of the law of nations in another context too. In *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983), the Court upheld a counterclaim for the expropriation of property by the Cuban government in Cuba. As

here, the claim “ar[ose] under international law,” and the Court applied standards common to federal common law and international law. *Id.* at 621-23.

Cisco’s position would likely render the ATS a nullity. Cisco asserts that there should be no right of action for claims based on modern international law norms, but suggests there would be for norms recognized at the Founding. Pet. Br. 17–21. That proposed distinction is atextual. The First Congress “assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction.” *Sosa*, 542 U.S. at 730. And it did so for all “tort[s] [], committed in violation of the law of nations,” 28 U.S.C. § 1350, an evolving body of law. If, as Cisco argues, courts today cannot recognize a cause of action, it is hard to see how they could do so even for the three historical norms.

Here, Respondents’ claims for aiding and abetting torture and other serious crimes are at the heart of this Court’s ATS jurisprudence. *Jesner*, 584 U.S. at 262 (quoting *Sosa*, 542 U.S. at 732) (“International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators ‘enem[ies] of all mankind.’”). Congress designed the ATS to vindicate these types of international wrongs to comply with the United States’ obligation to provide a remedy, particularly against a U.S. national. *See infra* § II. The Court should not now ignore Congress’ will and the United

States' international obligations by treating the ATS as if it were never enacted.

**II. Precluding aiding and abetting liability in cases where U.S. nationals abet abuses from the United States would conflict with the ATS's text and purpose and this Court's separation of powers jurisprudence, and is unnecessary.**

As Respondents show, and Cisco and the Government do not dispute, aiding and abetting an egregious violation of a universally recognized prohibition such as torture is a “tort [], committed in violation of the law of nations.” 28 U.S.C. § 1350; Resp. Br. at 18-21. Nonetheless, they ask the Court to exclude *all* aiding and abetting claims on grounds that *some* might lead to diplomatic strife at odds with the First Congress's original goals in enacting the statute. Pet. Br. 34-35; U.S. Br. 24-27. They have it backwards.

At a minimum, the First Congress wanted to avoid the foreign-relations problems that would arise if the international community perceived the United States to be providing safe harbor, free from judicial liability, for its own nationals when they violated international law.

Here, U.S. nationals, acting from the United States, allegedly aided and abetted violations of universally recognized norms. Since the international community would consider the U.S. accountable if it

did not provide a remedy, this is precisely the type of case the Framers sought to enable.

The Government does not argue that *this* case will interfere with our foreign relations, nor could it. Resp. Br. 23. And Cisco and the Government provide no persuasive reason why the Court should exclude cases like this one that raise no foreign policy concerns. Doing so would create the international friction the Framers sought to avoid.

Indeed, after this Court's limits on ATS claims in *Sosa*, *Nestlé*, *Kiobel*, and *Jesner*, the foreign policy concerns animating those limits will be present in few if any cases, and will apply rarely, if at all, to suits against U.S. nationals aiding and abetting abuses from the United States.

There is a better way. In *Sosa*, this Court suggested that courts should consider foreign policy effects on a "case-specific" basis. 542 U.S. at 733 n.21 (2004). That is enough to handle any foreign policy concerns that might arise. By contrast, Cisco's proposed exclusion is overbroad, would conflict with the ATS's text and purpose, and is at odds with this Court's separation of powers jurisprudence requiring courts in virtually all cases to exercise the jurisdiction Congress grants. Foreign policy concerns should be addressed case-by-case, not by inventing a bright line rule barring aiding and abetting liability.

**A. The First Congress enacted the ATS to vindicate the law of nations and ensure that the United States would not be a safe harbor for its nationals who violate international law.**

As the Court has recognized, agreeing with the first Trump Administration, the First Congress passed the ATS “to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.” *Jesner* 584 U.S. at 270 (citing Brief for United States as *Amicus Curiae* 7).

Before the ATS, “the inability . . . to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems.” *Jesner*, 584 U.S. at 253. Indeed, the United States was “embarrassed by its potential inability to provide judicial relief.” *Kiobel*, 569 U.S. at 123. Concern about “the inadequate vindication of the law of nations,” and the desire for the United States to prove its credibility as a new nation, thus led the First Congress to enact the ATS. *See Sosa*, 542 U.S. at 715-19. The statute discharged the new nation’s legal and moral duty to comply with international law. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int’l. L.* 461 (1989). This duty included ensuring that those “who flouted international law would find no quarter in the United States.” *Id.* at 487.

The duty applied with perhaps greatest force with respect to the actions of U.S. nationals, as the United States was, (and is) internationally responsible for the torts of its nationals. As Justice Gorsuch explained in *Jesner*, “[t]he law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants,” including through a civil remedy. *Jesner*, 584 U.S. at 289 (Gorsuch, J., concurring). A leading Founding-era treatise stated that nations “ought not to suffer” their subjects to harm the subjects of another state. *Id.* at 288 n.3 (quoting E. de Vattel, 1 *The Law of Nations*, bk. II, §76, p. 145 (1760)). “Instead, the nation ‘ought to oblige [its] guilty [subject] to repair the damage’; a nation that “refuses to cause a reparation to be made . . . or to [otherwise] punish the guilty, . . . renders [it]self in some measure an accomplice in the injury, and becomes responsible for it.” *Id.* Blackstone concurred: a sovereign that failed to provide redress for its citizen’s acts would itself be considered an abettor. 4 W. Blackstone, *Commentaries on the Laws of England*, 67-68 (1791).

**B. States are responsible to all other states if their nationals aid and abet torture and other human rights violations.**

As in the Founding era, nations today are still “obliged not to provide safe harbors for their own nationals who commit [] serious [international law violations] abroad.” *Kiobel*, 569 U.S. at 136 (Breyer, J., concurring). If the United States fails to provide a

remedy for torture and other serious human rights violations by a U.S. national that has aided and abetted such violations, it would be responsible to *all* other nations.

Universally recognized human rights norms, including torture, are obligations *erga omnes partes* – obligations of such universal concern that they are owed to all states – and thus all states may seek a remedy for their violation.<sup>4</sup> Every nation has an interest in every others’ respect for fundamental rights. *Jesner*, 584 U.S. at 259-60 (Kennedy, J.) (opinion). And violators of at least some norms, including torture, have become, “like the pirate and slave trader before [them,] *hostis humanis generis*, an enemy of all mankind.” *Sosa*, 542 U.S. at 732 (quotation marks omitted); *accord* Restatement § 404, Reporters’ Note 1.

Here, any state could invoke the United States’ responsibility for its failure to prevent its corporations from aiding and abetting torture, and to provide

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<sup>4</sup> Restatement (Third) of the Foreign Relations Law of the United States (“Restatement”) § 702 cmt. o & § 703 cmt. b (A.L.I. 1987); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. Reports, p. 449 ¶¶ 68-69 (July 20); Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session*, 48(1)(b), UN Doc A/56/10(SUPP) (2001) (“ILC Articles”). The ILC Articles are commonly recognized as customary international law. See, e.g., Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 THE INT’L & COMP. L. Q. 535, 536 (2014).

access to a remedy when it did. Foreign governments have already affirmed before this Court their expectations that the United States provide a remedy for such conduct.<sup>5</sup> These obligations apply with particular force here because the United States has ratified the Torture Convention, which explicitly precludes “complicity” in torture and requires parties to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” Torture Convention, art. 4(1), art. 14(1).

While Congress may not have intended to “make the United States a uniquely hospitable forum for the enforcement of international norms,” *Kiobel*, 569 U.S. at 123, it clearly sought to ensure that a U.S. forum *did* exist for claims against U.S. nationals and/or arising from conduct in U.S. territory. *See Kiobel*, 569 U.S. at 120 (discussing “prominent contemporary examples” both “immediately before and after passage of the ATS”). Where a U.S. national is responsible for violations of universally-recognized human rights, the United States is responsible too.

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<sup>5</sup> Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, at 35-36, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013) (No. 10-1491) (“Netherlands & U.K. *Kiobel* Br.”) (“Importantly, in many circumstances, international human rights law imposes a positive obligation on States to regulate corporations within their territory so they are prevented from committing human rights abuses. . . .”) And again, abetting a violation of a universally recognized human rights norm itself violates international law. Resp. Br. 19.

This is, in part, why the United States previously argued against a complete bar on extraterritorial claims<sup>6</sup> and against corporate immunity.<sup>7</sup> And it is why other nations have told this Court that it is “entirely appropriate and desirable” for the United States “to provide legal sanctions and remedies for human rights victims in its national courts” against its own nationals or where wrongful conduct has taken place in its territory. *Netherlands & U.K. Kiobel* Br. 35-36. If the U.S. were to preclude a remedy against U.S. nationals who aided and abetted human rights violations from the United States, “this country [might] be perceived as harboring the perpetrator.” Supp. U.S. *Kiobel* Br. 4. Addressing claims against U.S. nationals is “important work” that the ATS was designed to perform. *Jesner*, 584 U.S. at 288 (Gorsuch, J., concurring).

This case is thus a paradigmatic example of the type of action the First Congress sought to permit. This Court should apply the statute consistent with that purpose and our international obligations. See *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (statute “ought never to be construed to

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<sup>6</sup> See Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, at 4-9, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013) (No. 10-1491) (“Supp. U.S. *Kiobel* Br.”).

<sup>7</sup> Brief for the United States as *Amicus Curiae* Supporting Petitioners at 22, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013) (No. 10-1491) (“U.S. *Kiobel* Br.”); Brief for the United States as *Amicus Curiae* Supporting Neither Party at 6, 8, *Jesner v. Arab Bank, PLC.*, 584 U.S. 241 (2018) (No. 16-499) (“U.S. *Jesner* Br.”).

violate the law of nations if any other possible construction remains.”)

**C. Cisco’s call for wholesale repeal of aiding and abetting liability is overbroad.**

Even if some claims that a defendant aided and abetted a foreign state’s atrocities from the United States might, on balance, interfere with foreign policy, wholesale repeal of aiding and abetting liability would bar *other* cases where “the potential implications for the foreign relations of the United States” are nonexistent. *See Sosa*, 542 U.S. at 727. Thus, a blanket rule would exclude cases the First Congress sought to allow, and conflict with Congress’s will.

First, at least some claims involving aiding and abetting foreign state abuses do not remotely interfere with U.S. foreign policy. Under U.S. law, “a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.” 22 U.S.C. § 2304(a)(1) (1994). Certainly this case does not conflict with our foreign policy, and the Government does not argue otherwise. Resp. Br. 23.

Second, other ATS aiding and abetting cases do not even involve assistance to foreign states’ abuses. Abuses may occur entirely in U.S. territory. *See, e.g., Kiobel*, 569 U.S. at 120. And some universally recognized prohibitions, like those on slavery, human trafficking, piracy, war crimes, and genocide, do not

require state action, and thus may be committed by private parties. *Sosa*, 542 U.S. at 732 n.20; *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 685-86 (S.D.Tex. 2009). In these cases, the United States will owe a duty to the victim's home state, in addition to the community of nations, to permit redress, which Congress enacted the ATS to provide.

Petitioners present no reason to effectively immunize those who, from U.S. territory, aid and abet state actors, human traffickers, or genocidal rebel groups in cases that raise no foreign policy concerns. Indeed, barring such cases threatens foreign relations; the United States has a strong interest in not being seen by the international community as an oasis from which abettors can safely assist those who commit the worst kinds of abuses. *Supra* § II.B.

Thus, the Executive might sometimes *prefer* such claims proceed, because they support U.S. foreign policy. The Government has previously argued that allowing ATS suits where the defendant is a U.S. resident “is consistent with [U.S.] foreign relations interests . . . including the promotion of respect for human rights.” U.S. Supp. *Kiobel* Br. at 4-5; *see also id.* at 13. Petitioner's plea for blanket impunity thus undermines the very Executive flexibility it purportedly promotes. Far better to stick to the case-by-case approach *Sosa* envisioned.

**D. The possibility of foreign policy concerns in other cases provides no basis to create a bright-line rule excluding aiding and abetting liability.**

Given the Founders' goal of providing federal jurisdiction for violations of the law of nations and the important purposes that the ATS advances, the appropriate means of managing ATS litigation is to utilize the tools already available to courts rather than to create a new liability limitation that conflicts with international and U.S. law and the ATS's text and purpose.

1. This Court's strict limits on ATS jurisdiction are specifically designed to avoid foreign policy problems. These limits radically reduce potential conflicts with U.S. foreign policy, since cases that satisfy them will rarely raise foreign policy concerns.

First, *Sosa* ensures cases proceed only for violations of a "narrow class" of universally recognized human rights, like torture, summary execution, and genocide, subject to "vigilant doorkeeping." 542 U.S. at 729, 732. Where all nations, including the U.S., have agreed that a right reflects humanity's shared values and interests, there is less risk of a case improperly "claim[ing] a limit on the power of foreign governments over their own citizens," that such government has not already accepted. *Id.* at 727. The United States fulfills its obligations to all other nations by providing a judicial remedy for such abuses. *Supra* § II.B.

Second, *Kiobel* and *Nestlé* preclude unduly extraterritorial applications of the ATS. *Kiobel*, 569 U.S. at 124-25; *Nestlé*, 593 U.S. at 633-34. This avoids “unintended clashes between our laws and those of other nations which could result in international discord.” *Kiobel*, 569 U.S. at 108 (quotation marks omitted). But where the claim has sufficient connection to the United States – such as here, where U.S. citizens commit actionable conduct in the United States – “the case involves a permissible domestic application, even if other conduct occurred abroad.” *Nestlé*, 593 U.S. at 633.

*Kiobel* and *Nestlé* thus ensure that surviving ATS claims fit squarely within universally accepted nationality or territoriality bases for jurisdiction. Restatement (Third) of Foreign Relations Law of the United States § 402 (1987). Where such basis exists, other nations recognize it is “appropriate and desirable for a State to provide legal sanctions and remedies for human rights victims.” *Netherlands & U.K. Kiobel Br*, 35-36.

Third, *Jesner* precludes claims against foreign corporations, finding they “create unique [foreign policy] problems.” 584 U.S. at 272. But other nations agree the United States has a right to adjudicate a U.S. corporation’s conduct. It remains “uncontroversial” that the “United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals . . . consistent with international law.” *Kiobel*, 569 U.S. at 136

(Breyer, J., concurring) (quoting Brief for European Commission as *Amicus Curiae* 11).

2. Very few ATS cases can satisfy *Sosa*, *Kiobel*, *Nestlé*, and *Jesner*, and very few of those will involve a foreign state's abuses. American companies do not often aid and abet state atrocities from our shores.

Any cases that could conceivably interfere with U.S. foreign policy are properly addressed on a case-by-case basis. *See Sosa*, 542 U.S. at 733 n.21. Federal courts have a variety of doctrines that are specifically designed to manage such issues. Where their requirements are met, they permit courts to dismiss specific ATS cases deemed harmful to U.S. foreign policy.

For example, foreign sovereign immunity bars suits against foreign governments and their agents or instrumentalities unless a strict statutory exception applies. *E.g. F.R.G.*, 592 U.S. at 175-76, 182.

The *forum non conveniens* doctrine permits dismissal where a foreign forum is adequate and "more appropriate and convenient." *Sinochem Int'l Co. v. Malaysian Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). That analysis considers factors such as local interest in deciding the case. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981).

The international comity doctrine permits abstention to defer to a foreign tribunal's proceedings regarding the same issue; courts weigh, on a case-by-case basis, our government's, the foreign forum's, and the international community's interests, as well as

the foreign forum's adequacy. *E.g. Ungaro Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–39 (11th Cir. 2004).

The “act of state doctrine” precludes courts “from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory” in the absence of “unambiguous agreement regarding controlling legal principles.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 428 (1964).

And the political question doctrine prevents courts from “supplant[ing] a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy . . . should be,” rather than applying law. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

Courts have dismissed ATS cases implicating particular foreign policy concerns under these doctrines.<sup>8</sup> While *Sosa*, *Kiobel*, *Nestlé*, and *Jesner* will dispose of most potentially problematic cases as a threshold matter, these doctrines still exist to address the rare case unduly threatening foreign policy interests.

3. These established doctrines carefully balance the Executive’s foreign policy prerogatives and the Judiciary’s duty to exercise jurisdiction and the

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<sup>8</sup> See, e.g., *Corrie v. Caterpillar*, 503 F.3d 974, 980-84 (9th Cir. 2007); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 49-53. (D.C. Cir. 2005).

authority Congress granted. By contrast, wholesale repeal of abetting liability to avoid hypothetical, case-specific foreign policy concerns would upset that balance by abdicating the Judiciary's duty. Nothing in the ATS permits, let alone requires this.

The ATS provides jurisdiction to hear aiding and abetting claims. Resp. Br. 30-31. Federal courts have a “virtually unflagging obligation” to exercise jurisdiction Congress has created. *Colo. River Water Conservation Dist.*, 424 U.S. at 817. A court may not “shirk this responsibility” and refuse to adjudicate a dispute “merely because [a] decision may” affect “the conduct of this Nation’s foreign relations,” *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1985), or embarrass a foreign government. *W.S. Kirkpatrick & Co., Inc. v. Env’t Tectonics Corp., Int’l*, 493 U.S. 400, 409-10 (1990).<sup>9</sup> It is “error to suppose,” as Cisco implies, “that every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker v. Carr*, 369 U.S. 186, 211 (1962).

The political branches’ responsibility to undertake foreign policy does not vitiate the judiciary’s constitutional obligation to determine legal questions. Applying law, even to cases involving foreign policy, is “a familiar judicial exercise.” *Zivotofsky*, 566 U.S. at 196. More specifically, courts may hear claims involving international law where the norms at issue enjoy wide consensus, which *Sosa*

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<sup>9</sup> Indeed, since our Republic’s beginning, this Court has heard cases challenging the legality of even *government action* involving foreign affairs. *E.g. Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-79 (1804); *Zivotofsky*, 566 U.S. at 189, 193, 201.

requires in an ATS case; this “reflect[s] the proper distribution of functions between the judicial and political branches.” *Sabbatino*, 428 U.S. at 427-28.

All kinds of cases may affect foreign policy. There is no reason to adopt broad, new, ATS-specific liability limits rather than simply applying this Court’s long-established doctrines. “[T]he preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in Section 1350, without compromising the primacy of the political branches in foreign affairs.” *Kadic*, 70 F.3d at 249.

### CONCLUSION

Congress specifically authorized the federal courts to hear claims that involve egregious violations of universally recognized norms by Americans acting in the United States. This includes where, as alleged here, U.S. citizens aid and abet abuses from our territory. Precluding relief for these claims would transgress our international obligations, harm our foreign policy, and directly conflict with the statute’s text and the Framers’ vision. The Court should affirm.

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