No. 24-856

IN THE

Supreme Court of the United States

CISCO SYSTEMS, INC.; JOHN CHAMBERS; AND FREDY CHEUNG,

Petitioners,

v.

DOE I; DOE II; IVY HE; DOE III; DOE IV; DOE V; DOE VI; CHARLES LEE; ROE VII; ROE VIII; LIU GUIFU; DOE IX; WEIYU WANG; AND THOSE INDIVIDUALS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

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

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

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears here as an amicus curiae to oppose judicially implied private rights of action under the Alien Tort Statute, 28 U.S.C. § 1350. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). WLF filed an amicus brief supporting certiorari in this case.

SUMMARY OF ARGUMENT

The Ninth Circuit held that a U.S. corporation alleged to have aided and abetted a human-rights violation overseas may be found liable in federal court under implied causes of actions in both the Alien Tort Statute (ATS) and the Torture Victim Protection Act of 1991 (TVPA). Because that decision skirts the crucial limits that both the Constitution and this Court have imposed on a federal court's ability to imply a new cause of action, the Court should reverse.

Enacted in 1789, the ATS grants a district court "jurisdiction" over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although the ATS is a "jurisdictional statute creating no new causes of action," this Court held in *Sosa v. Alvarez-Machain* that Congress enacted the statute

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* No party's counsel authored any part of this brief. No one, other than WLF and its counsel, helped pay for the brief's preparation or submission.

"on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time." 542 U.S. 692, 724 (2004). Even so, "separation-of-powers concerns * * * apply with particular force" to the ATS, and "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 265 (2018) (plurality opinion). At the very least, *Sosa* requires a federal court to exercise "great caution" before recognizing new forms of liability under the ATS. 542 U.S. at 728.

The Ninth Circuit's decision throws caution to the wind. First, the Ninth Circuit recognized aiding-and-abetting liability under the ATS based solely on a norm of international law against torture. But *Sosa* makes clear that courts, before they may ever imply a new cause of action under the ATS, must identify a universally recognized norm that not only prohibits the underlying conduct, but that extends liability "to the perpetrator being sued." *Id*. at 733 n.20. Simply put, there is no universal standard for civil aiding-and-abetting liability, much less one that is "accepted by the civilized world" and defined with the specificity *Sosa* requires. *Id.* at 725.

The Ninth Circuit's TVPA holding fares no better. True, the TVPA is "the only cause of action under the ATS created by Congress rather than the Courts." *Jesner*, 584 at 265 (plurality opinion). But nowhere does the TVPA provide for aiding-and-abetting liability. *See* 28 U.S.C. § 1350 *note*. While the statute covers anyone who "subjects an individual to torture," TVPA § 2(a)(1), that language does not reach aiders

and abettors. If any doubt remains, Congress's limiting the victims of "torture" to "individual[s] in *the offender's* custody or physical control" eliminates it. TVPA § 3(b)(1) (emphasis added). And the Ninth Circuit's analogs to vicarious-liability scenarios, like respondeat superior, are unconvincing and beside the point.

Nor is that all. There are "sound reasons to think Congress might doubt the efficacy or necessity" of aiding-and-abetting liability under the ATS and the TVPA. *Jesner*, 584 U.S. at 264 (plurality opinion) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 149 (2017)). Consistent with the Constitution's separation of powers, "Congress, not the Judiciary, must decide whether to expand the scope of liability." *Jesner*, 584 U.S. at 268 (plurality opinion). And even when Congress expressly creates a statutory cause of action, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

Blessing aiding-and-abetting liability would also expose American companies to costly, burdensome, and lengthy litigation. If U.S. companies can now find themselves liable for aiding and abetting simply for doing business with a foreign government or its go-between, many firms may well decide that such investments are a losing proposition. That would erode the global economy and hollow out overseas investment. Given secondary liability's potential for generating unintended consequences, including the upending of U.S. foreign policy, the Court should reverse.

ARGUMENT

I. The ATS Supplies No Cause of Action for Aiding and Abetting.

Although the era of federal common law is over, *Sosa* held that federal courts may, in narrow cases, recognize a private cause of action under the ATS to remedy a violation of an international norm that is "specific, universal, and obligatory." *Sosa*, 542 U.S. at 724. The Ninth Circuit's holding cannot satisfy those demanding criteria.

Ordinarily when Congress wants to "create new rights enforceable under an implied private right of action," it "must do so in clear and unambiguous terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002). The judicial "task" is "limited solely to determining whether Congress intended to create the private right of action asserted." *Abbasi*, 137 U.S. at 133 (cleaned up). And "as with any case involving the interpretation of a statute, [that] analysis must begin with the language of the statute itself." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

But the ATS is a special case. While it creates federal-court jurisdiction to hear a tort claim by an alien alleging a violation of the law of nations, it creates no cause of action. Yet it is unlikely, in the Court's view, that "Congress would have enacted the ATS only to leave it lying fallow indefinitely." *Sosa*, 542 U.S. at 719. The First Congress surely "assumed that federal courts could properly identify some international norms as enforceable" under the ATS, *id.* at 730, or so the theory goes.

So while Congress still bears primary responsibility for deciding which causes of action an alien may bring under the ATS, federal courts may, in very narrow instances, "recognize private causes of action [under the ATS] for certain torts in violation of the law of nations." *Sosa*, 542 U.S. at 724. But before a court may do so, it must exercise "great caution" by undertaking a two-step process. *Id.* at 728. First, it must ensure that the proposed cause of action reflects an international norm that is "specific, universal, and obligatory." *Id.* at 732. Second, even if that high threshold is met, the court still must rule out any reason to limit "the availability of relief." *Id.* at 733 n.21.

Not only have respondents here failed to identify a violation of an international norm that is "specific, universal, and obligatory," but they cannot show that the "scope of liability" for violating that norm extends "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, 733 n.20.

Because the "decision to create a private right of action is one better left to legislative judgment," *Sosa* stresses the need for "judicial caution" given the "possible consequences of making international rules privately actionable." *Id.* at 727. Only a "very limited" subset of all potential law-of-nations violations may be actionable. *Sosa* identifies just three: "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. None of those offenses is at issue here.

Whatever residual common law discretion the ATS may impart to the judiciary, it does not include the

ability to impose secondary statutory liability on alleged aiders and abettors. By pressing this novel cause of action under the ATS, the respondents ask this Court to go far "beyond any residual common law discretion" the federal courts may enjoy. *Sosa*, 542 U.S. at 738.

"International law is not silent on the question of the *subjects* of international law"—i.e., those who "have legal status, personality, rights, and duties under international law and whose acts and relationships are the principal concerns of international law." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013). "Nor does international law leave to individual States the responsibility of defining those subjects." *Id.* Petitioners are not remotely among the traditional subjects of international law, let alone any international law that reaches aiding and abetting.

Aiding and abetting is an ancient concept in *criminal* law. *See* 1 Matthew Hale, *History of Pleas of the Crown* 615 (1736) (discussing the distinction in Roman law between "manifest" and "non-manifest" theft, which turned on the thief's proximity, when caught, to the crime scene). And while the concept finds some support in international criminal tribunals outside the United States, *see, e.g.*, Rome Stat. of the Int'l Criminal Court, art. 25, 37 I.L.M. 1002, 1016 (July 17, 1998) (not ratified by U.S.); Stat. of the Int'l Criminal Trib. for Rwanda, S.C. Res. 955, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994), even these sources cannot agree on the *mens rea* and *actus reus* required for a conviction, *see Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1080–87 (C.D. Cal. 2010).

Even so, citing its en banc opinion in *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 765–66 (9th Cir. 2011) (en banc), *judgment vacated*, 569 U.S. 945 (2013), the Ninth Circuit declared that "[c]ustomary international law" permits "aiding-and-abetting ATS claims," *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014). But *Sarei*'s analysis of that question is virtually nonexistent. True, "[t]he ATS itself does not bar aiding and abetting liability." *Sarei*, 671 F.3d at 749. But that's awfully thin gruel. The mere absence of a prohibition cannot confer a statutory cause of action. *See Gonzaga Univ.*, 536 U.S. at 290. To suggest otherwise gets it backwards, both as a matter of separation of powers and basic statutory interpretation. And even if "customary international law gives rise to a cause of action for aiding and abetting a war crime under the ATS," *Sarei*, 671 F.3d at 765, the respondents allege no war crime here.

Of course, the ATS is not a criminal statute. *See* 28 U.S.C. § 1350 (granting jurisdiction over "civil action[s] by an alien for a tort only"). More to the point, *Sarei* identifies no source of international law that provides a *civil* remedy for any international crime, let alone one that permits secondary civil liability for that crime. And no nation has, to WLF's knowledge, adopted a general aiding-and-abetting statute for remedying "a tort only." 28 U.S.C. § 1350. The Ninth Circuit's holding thus transforms the ATS into a global anomaly in the law.

In short, the Ninth Circuit identifies no source of international law for *civil* aiding-and-abetting liability, far less one defined with the universality and precision that *Sosa* demands. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004)

(refusing to recognize aiding-and-abetting liability under the ATS because it "would not be consistent with the 'restrained conception' of new international law violations that [*Sosa*] mandated for the lower federal courts").

II. The TVPA Supplies No Cause of Action for Aiding and Abetting.

The TVPA, Pub. L. No. 102-256, 106 Stat. 73, is "the only cause of action under the ATS created by Congress rather than the Courts." *Jesner*, 584 U.S. at 265 (plurality opinion) (citation omitted). Yet while it provides a right of action against any "individual," who, under color of foreign law, "subjects" another to "torture" or "extrajudicial killing," *id.*, several textual, structural, and historical factors confirm that the TVPA does not provide for aiding-and-abetting liability. *See* 28 U.S.C. § 1350 *note*.

For starters, Congress knows how to impose aiding-and-abetting liability when it wants to. *Central Bank*, 511 U.S. at 181–82. That is why this Court rightly presumes that statutes will include the words "aid" and "abet" in their text when Congress "intend[s] to impose aiding and abetting liability." *Id.* at 177. As with the ATS, those words are not found in the TVPA.

Instead, the TVPA's core liability provision uses the phrase "subjects an individual to torture," § 2(a)(1), which implies direct, primary involvement by the defendant rather than indirect assistance. This language means that the defendant must personally cause or inflict the harm, not merely aid another party.

What's more, Congress defined "torture" as an intentional act "directed against an individual in *the offender's* custody or physical control." TVPA § 3(b)(1) (emphasis added). By limiting the victims of torture to only those within the *offender*'s custody or physical control, Congress took secondary liability off the table. If Congress had intended secondary liability, it would have broadened the definition to include those who enable or assist without custody or physical control, but it did not. Extending the TVPA to aiding and abetting would thus be to imply terms that Congress omitted, which is precisely why the Ninth Circuit's decision should be reversed.

The TVPA's legislative history confirms this reading. Congressional reports focus on providing a civil remedy for victims against direct offenders, with no mention of secondary actors. For example, the House Report states the bill "authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent authority, or color of law, of any foreign nation, subjects a person to torture or extrajudicial killing." It stresses governmental involvement but ties it to act of torture itself, not to indirect support. H.R. Rep. No. 102-367, at 3 (1991) (discussing the TVPA's purpose and scope).

The Senate Report similarly describes the TVPA as codifying a specific cause of action to implement U.S. obligations under the Convention Against Torture, without expanding liability to aiding or abetting. S. Rep. No. 102-249 (1991). This history shows that Congress intended to supplement the ATS for U.S. citizens and specific torts, not to create broad corporate accessory liability.

Because Congress enacted the TVPA partly in response to the dramatic rise in ATS litigation, it used narrower language in crafting the statute. And unlike the ATS, the TVPA supplies an express (not implied) cause of action, which leaves even less room for implying causes of action. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n* 453 U.S. 1, 18 (1981) (holding that express statutory remedies create a strong presumption against implying additional causes of action).

Given Congress's refusal to create civil aiding-and-abetting liability under the ATS in the TVPA, *Sosa*'s caution—that the decision to create a private cause of action for law-of-nations violations is "one better left to legislative judgment," 542 U.S. at 727—applies with special force here. "Absent a compelling justification, courts should not deviate from that model." *Jesner*, 584 U.S. at 266 (plurality opinion).

III. Federal courts may not extend ATS and TVPA liability to aiders and abettors.

The "U.S. Constitution explicitly disconnects federal judges from the legislative power and, in doing so, undercuts any judicial claim to derivative lawmaking authority." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 59 (2001). This "sharp separation of legislative and judicial powers was designed, in large measure, to limit judicial discretion—and thus to promote governance according to known and established laws." *Id.* at 61.

Judges do not wield the statutes they want; they must faithfully apply the statutes Congress gives them. "The duty of the court," Chief Justice Marshall

explained, is "to effect the intention of the legislature," which must "be searched for in the words which the legislature has employed to convey it." *The Paulina*, 1 U.S. (7 Cranch) 52, 60 (1812).

Yet for a few decades in the last century, this Court assumed it was "a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Abbasi*, 137 U.S. at 132 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)). As "a routine matter with respect to statutes, the Court would imply causes of action not explicit in the statutory text itself." *Id.*

This stark departure from the Court's traditional, constitutional role did not survive. The high-water mark for implied causes of action occurred in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which held that Congress intended to provide a private remedy for Title IX of the Civil Rights Act, even though the statute itself manifests no such intent. Today *Cannon* is perhaps best known for Justice Powell's robust dissent, grounded in concern for the judiciary's properly limited role in a democratic society.

Whether to create a cause of action, Justice Powell insisted, cannot "properly be decided by relatively uninformed federal judges who are isolated from the political process." 441 U.S. at 731 (Powell, J., dissenting). Rather, "respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision." *Id.* By departing from that approach, Justice Powell warned, the *Cannon* majority had crossed the line into "independent judicial lawmaking." *Id.* at 740.

Justice Powell's view eventually became the Court's view. In a string of decisions culminating in *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001), this Court "abandoned" its older understanding of implied causes of action and "ha[s] not returned to it since." So now when a party "seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Abassi*, 137 U.S. at 133. In the mine-run case, therefore, the "decision to create a private right of action is one better left to legislative judgment." *Jesner*, 584 U.S.at 264 (plurality opinion).

Even if it were an open question whether civil aiding-and-abetting liability is a universal norm of international law (it isn't), there are "sound reasons to think Congress might doubt the efficacy or necessity" of allowing aiding-and-abetting liability under the ATS and the TVPA. *Jesner*, 584 U.S. at 264 (plurality opinion) (citation omitted). Among other defects, the Ninth Circuit's decision cannot be squared with *Central Bank of Denver*, which confirms that a cause of action for aiding and abetting will not lie without clear "congressional direction." 511 U.S. at 183.

Consistent with the Constitution's separation of powers, whether aiders and abettors should be subject to suit is for Congress, not the judiciary, to decide. *Id.* Although it has enacted a general aiding-and-abetting statute for all federal criminal offenses, 18 U.S.C. § 2, Congress has never adopted a general aiding-and-abetting statute for *civil* actions.

Yes, Congress authorized a form of secondary liability in the Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 et seq., but that statute is not

analogous to the ATS. If anything, the fact "that Congress chose to impose some forms of secondary liability" in one statute but not in another reflects "a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184.

Aiding-and-abetting liability is the exception, not the rule. When Congress enacts a statute allowing a plaintiff to sue and recover damages "for the defendant's violation of some statutory norm," there is "no general presumption that the plaintiff may also sue aiders and abettors." *Cent. Bank*, 511 U.S. at 182. Several sound reasons commend this approach.

First, aiding-and-abetting liability "exacts costs that may disserve the goals" of federal law. *Id.* at 188. Litigation under the ATS, for example, "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 189 (quotation and citation omitted). What's more, smuggling concepts of secondary culpability from the criminal law into the ATS would allow private plaintiffs and their attorneys to threaten secondary liability "without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727.

Second, expanding the scope of liability here would also inject "an element of uncertainty into an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). Indeed, the "rules for determining aiding and abetting liability are unclear." *Cent. Bank*, 511 U.S. at 188. "The issues would be hazy, their litigation protracted, and their resolution unreliable." *Id.* at 189 (cleaned up). That is why this Court has refused to inject notions of criminal aiding

and abetting into a federal civil statute that is silent on that matter. *See id.* at 181–82.

Indeed, the need to respect Congress's prerogatives in creating statutory rights and remedies is "magnified" when, as here, "the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116. Implying a cause of action for aiding and abetting where Congress has not would work "a vast expansion of federal law." *Cent. Bank*, 511 U.S. at 183. This Court should arrest that troubling trend by reversing the Ninth Circuit.

IV. Affirming the decision below would invite disastrous practical consequences.

Here the Ninth Circuit ignored "the practical consequences" of its decision to recognize a cause of action for aiding and abetting under the ATS and the TVPA. *Sosa*, 542 U.S. at 732–33. Among those, Congress's "principal objective" was to "avoid foreign entanglements." *Jesner*, 584 U.S. at 255 (plurality opinion). Holding Cisco liable for lawfully selling networking hardware and software to Chinese law enforcement agencies—under Commerce Department regulations—will have significant ramifications on U.S. foreign relations. *See Jesner*, 584 U. S. at 255 (plurality opinion). That should not be done without careful consideration by the democratically accountable constitutional branches.

As Judge Bumatay detailed in his cogent dissent from en banc denial, "[e]xtending aiding-and-abetting liability here raises foreign policy concerns as obvious as they are serious." Pet App. 130a. Allowing this suit to proceed "means that a federal court may participate

in declaring that the Chinese Communist Party and Ministry of Public Security violated international law in its treatment of Falun Gong practitioners." *Id*. at 131a. But again, that would surely inject the judiciary into matters of U.S. foreign policy where it does not belong. *See Jesner*, 584 U. S. at 255 (plurality opinion).

Apart from the disruption that such suits pose to U.S. foreign policy, the real-world consequences of recognizing aiding-and-abetting liability against multinational corporations would be calamitous. Blessing aiding-and-abetting liability would expose American companies to costly, burdensome, and lengthy litigation. Such a legal landscape would discourage perfectly lawful foreign trade and investment by U.S. companies.

The global economy offers the developing world "enormous opportunities for economic growth and sustainable development with potential benefits on a scale that is difficult to imagine." United Nations Conference on Trade and Development, *World Investment Report 2018* iv, https://perma.cc/J3ER-UMGS. Yet multinational firms cannot undertake major industrial or commercial investment in a developing country without cooperating with that country's government and business sectors.

It is a regrettable but undeniable fact that many nations' governments sometimes fail to respect the human rights of their citizens and employees. *See* Human Rights Watch, *World Report 2025* https://perma.cc/JLK6-QGAP (documenting human-rights abuses in nearly 100 countries). If U.S. companies can now find themselves liable for aiding and abetting torture simply for doing business with a

foreign government or go-between that violates international norms, many firms well decide that such a risk is not worth the candle. Talisman Energy, for example, abandoned energy exploration in South Sudan following adverse publicity from an ATS suit for which Talisman obtained summary judgment. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 262 (2d Cir. 2009).

As this case shows, a court that creates an extra-statutory cause of action to address a global problem acts in defiance of many blind spots. The "omnipresence of unintended consequences" can often be attributed to "the absence of relevant information." Cass R. Sunstein, *The Cost-Benefit Revolution* 79 (2018). Yet "the decisions that follow adjudication, involving a small number of parties," often "turn out to be inadequately informed." *Id.* at 86. In contrast, Congress is better able to "collect dispersed knowledge" and "bring it to bear on official choices." *Id.* at 88.

* * *

If this Court's crucial limits on judicially created causes of action are to continue to hold sway, the Ninth Circuit's decision cannot stand. "Having sworn off the habit of venturing beyond Congress's intent," this Court should "not accept respondents' invitation to have one last drink." *Sandoval*, 532 U.S. at 287. The Court should clarify that neither the ATS nor the TVPA permits claims for aiding and abetting.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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