No. 24-856

IN THE

Supreme Court of the United States

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

Petitioners,

v.

DOE I, *et al.*,

Respondents.

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

BRIEF OF LAW PROFESSORS SAMUEL ESTREICHER AND MICHAEL D. RAMSEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

Amici curiae are law professors with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. *Amici* submit this brief because they believe that the instant case raises important issues of the appropriate rules of decision under the Alien Tort Statute (ATS), 28 U.S.C. §1350, an issue on which *amici* have expertise and interest and on which they have submitted *amici curiae* briefs in other cases. *See, e.g.*, *Presbyterian Church v. Talisman Energy (Talisman)*, 582 F.3d 244, 259 (2d Cir. 2009); *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021); *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018). These issues should be resolved in a coherent, uniform and predictable manner that reflects both concrete developments in customary international law and the limited role of federal courts in developing supplementary rules of federal common law in this area.

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[1] Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received timely notice of this filing. *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

This brief focuses on the second question presented by the petition for certiorari: the *mens rea* requirement for accessorial liability under customary international law, as applied by U.S. federal courts through the Alien Tort Statute (ATS), 28 U.S.C. § 1350.[2] *Amici* take no position on the first and third questions presented by the Petition.

The court below held that this *mens rea* requirement can be satisfied merely by allegations of knowing assistance to the principal wrongdoer, without further allegations that the accessory shared or intended to facilitate the purpose of the wrongdoer. *Doe v. Cisco Sys., Inc.,* 73 F.4th 700, 746 (9th Cir. 2023). In contrast, the Second and Fourth Circuits have held that accessorial liability under the ATS

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[2] This brief assumes *arguendo* that accessorial liability is sufficiently accepted as a matter of customary international law that it can form the basis for liability under the ATS; it addresses only the appropriate state-of-mind or *mens rea* standard for accessorial liability. It further assumes that the assessment of whether there is such liability can be made as a general matter rather than at an offense-by-offense level. The brief does not address, and expresses no opinion on, other issues raised by the Petition, including whether this Court should refrain from recognizing accessorial liability under the ATS for prudential reasons relating to U.S. foreign affairs and the role of U.S. federal courts. *See, e.g.*, *Doe v. Cisco Sys.*, *Inc.*, 73 F.4th 700, 746 (9th Cir. 2023), Pet. App. 85a (Christen, J., dissenting in part) (maintaining that "recognizing liability for aiding and abetting alleged human rights violations, committed in China and against Chinese nationals by the Chinese Communist Party and the Chinese government's Ministry of Public Safety, is inconsistent with the purpose of the Alien Tort Statute").

requires the additional allegation of shared purpose. *Presbyterian Church v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 398-401 (4th Cir. 2011).

The court below is mistaken. This Court's ruling in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and related cases make clear the constrained role of federal common law authority and the corresponding need to limit ATS claims to those founded upon undisputed and specifically defined rules of international law. As this Court stated in *Sosa*, "we have no congressional mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728. Rather, *Sosa* permits an ATS claim to rest only on a violation "of a norm that is specific, universal and obligatory." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 257-58 (2018) (plurality op.) (quoting *Sosa*, 542 U.S. at 732).

The Ninth Circuit's knowing assistance *mens rea* standard for accessorial liability is not universally accepted and does not provide a sufficiently definite command under customary international law, as required by *Sosa*. For example, the statute of the International Criminal Court (ICC), adopted by over 125 nations, requires a shared purpose for accessorial liability. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, Art. 25(3)(c). It is true that some nations and commentators, in the context of the ICC and elsewhere, have advocated for the lesser standard of knowing assistance, and some *ad hoc* international tribunals appear to have adopted it. But that position did not prevail among the

signatories to the Rome Statute, indicating that it lacks universal—or even broad-based—acceptance.[3]

The court below appeared to believe that it should attempt to determine which of these disputed *mens rea* standards is the most appropriate one as a matter of customary international law. *See Cisco*, 73 F.4th at 729-35. That, however, is not the inquiry this Court's decision in *Sosa* directs. Instead, as noted above, *Sosa* requires that only customary international law rules that reflect a universal consensus of nations are appropriately the basis of ATS liability. It is not within the federal courts' role to pick among contending standards.

The issue is an important one. Companies with international operations routinely do business in countries whose governments are known to commit human rights violations. Under the standard adopted by the Ninth Circuit, American companies (which are the only ones to which ATS liability potentially applies after this Court's decisions in *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 257-58 (2018), and *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 640-41, 652 n.4, 657 (2021)), may be exposed to suit merely for conducting such business in cooperation with the host government, even without any allegation of criminal intent or purpose to facilitate the alleged governmental wrongdoing. The effect of such a holding would be sweeping; almost any U.S. business

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[3] Although the United States is not a member of the ICC, as discussed below the Rome Statute accords with the U.S. Model Penal Code, which also requires shared purpose for accessorial liability. *See* Model Penal Code § 2.06(3)(a).

operations in such countries, if those operations include nontrivial planning or operational decision-making in the United States, would risk ATS liability.

We urge the Court to grant review.

ARGUMENT

I. A Defendant's Liability under the Alien Tort Statute is Governed by Customary International Law and is Subject to the Limiting Principles Recognized in *Sosa*.

A. An ATS Plaintiff Must Show that the Defendant's Conduct Violated International Law.

An essential element of any ATS claim is a showing that the particular defendant's conduct violated international law. This element is grounded in the text of the ATS, which gives federal courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS is purely jurisdictional and does not directly establish a cause of action. *Sosa*, 542 U.S. at 712-14. Yet, this Court has recognized that, in passing the ATS in 1789, Congress tacitly acknowledged judicial authority to recognize a limited subset of causes of action founded upon international law violations, subject to stringent conditions. *See id.* at 724 (ATS envisioned that the "common law would provide a cause of action for [a] modest number of international law violations with a potential for personal liability at the time"). Accordingly, while the recognition of a cause of action under the ATS is a question of federal

law, an international law violation by the defendant remains a necessary (but not sufficient) predicate for such a cause of action.

Moreover, "if the defendant is a private actor such as a corporation or individual," courts must specifically determine "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." *Sosa*, 542 U.S. at 732 n.20[4]; *see also id*. at 760 (Breyer J., concurring in part and concurring in the judgment) (holding that, under the Court's approach, "to qualify for recognition under the ATS a norm of international law … must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue.").

This approach is consistent with the purpose of the ATS to punish violations of international law where failure to do so might lead to a diplomatic crisis. *See Sosa*, 542 U.S. at 715-19; *Jesner*, 584 U.S. at 277-78 (Alito, J., concurring in part and concurring in the judgment). As Edmund Randolph stated at the outset of the Constitutional Convention in 1787, a key "defect" of the system under the Articles of Confederation was that Congress "could not cause infractions of treaties or of the law of nations, to be

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[4] As Judge Katzmann noted in his concurring opinion in *Khulumani v. Barclay National Bank Ltd.*: "While this footnote specifically concerns the liability of non-state actors, its general principle is equally applicable to the question of where to look to determine whether the scope of liability for a violation of international law should extend to aiders and abetters." 504 F.3d 254, 269 (2d Cir. 2007). We would add that the *mens rea* standard helps define the scope of liability.

punished." The Records of the Federal Convention of 1787, at 19 (Max Farrand ed. 1966). After the Constitution gave more power to the national government, the ATS was one way Congress sought to protect American interests internationally, by demonstrating that the United States could be counted on to act against violators of international law in cases where failure to do so would disrupt foreign relations. *See Sosa*, 542 U.S. at 715-719; *Jesner*, 584 U.S. at 255.[5]

The objectives of the ATS are not advanced by recognizing claims against classes of defendants who are not alleged to have violated international law because foreign nations would not think the United States is obliged to act against such persons. And because *Sosa* tied modern federal courts' authority to recognize ATS causes of action to Congress' purposes and assumptions in enacting the ATS, there is no warrant for courts to create ATS liability beyond what international law unequivocally recognizes.

B. *Sosa* Directs that Only a Small Class of Undisputed International Law Violations Are Suitable as a Basis for Recognizing Causes of Action under the ATS.

Although necessary, a plausible violation of international law is insufficient to justify creating a cause of action under the ATS. As this Court stated in *Sosa*, "we have no congressional mandate to seek

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[5] *See also* Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 Notre Dame L. Rev. 1645 (2014).

out and define new and debatable violations of the law of nations." 542 U.S. at 728. Rather, this Court cautioned, "federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Id.* at 732; *see also id*. at 727 (noting "high bar to new private causes of action for violating international law"). Therefore, in addition to showing that defendant's conduct violated a rule of international law, *Sosa* requires that ATS plaintiffs show that: (1) the rule is indisputably and universally acknowledged, not one whose existence is controversial; and (2) the rule's broad acceptance includes a definition at a level of specificity that encompasses defendant's conduct. *Id*. at 728.

Under this rubric, a U.S. court is not to choose among competing versions of what international law requires or should require. In *Sosa* itself, the plaintiff proffered a United Nations working group's determination that his arbitrary detention violated customary international law. 542 U.S. at 738 n.30. The Court dismissed this evidence, pointing out that it was "not addressed … to our demanding standard … which must be met to raise even the possibility of a private cause of action." *Id.* Even though many observers thought international law had been violated in that case, the conclusion was not sufficiently free from doubt that it could support a cause of action under the ATS. By contrast, cases such as *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which *Sosa*

noted with some approval, stood on firm ground in that they applied undisputed international law rules (prohibiting genocide and torture by the particular defendants, respectively).

Even where an international law rule obtains undisputed universal acceptance as a general matter, *Sosa* mandates that it be defined at a level of specificity sufficient to support the application of the rule to the particular defendant's conduct. *See* 542 U.S. at 732-33 and n.21 (describing "requirement of clear definition."). It is not adequate that the plaintiff establish uncontroversial agreement to an abstract rule; there must also be uncontroversial agreement that the defendant's specific conduct (as alleged by the plaintiff) violated that rule. In *Filartiga* and *Kadic*, for example, there was general agreement not only that torture and genocide violated international law, but also that the particular acts the defendants allegedly committed were specifically proscribed under international law. In *Sosa*, by contrast, the Court acknowledged that a rule against arbitrary detention in some forms might command universal agreement, but concluded that there was no widespread agreement that the specific conduct alleged by the defendant (detention for a short period of time) constituted a violation of that rule under international law. 542 U.S. at 737.

The Court's insistence on specificity comports with its interpretation of the ATS as establishing jurisdiction for only those causes of action founded upon undisputed, binding rules of international law. International law principles may be widely agreed

upon in the abstract while many specific applications remain hotly disputed. Requiring that general acceptance extend to the specific applications at issue in the case ensures that the court is recognizing existing international law, not progressively developing it by extending abstract principles to new situations or picking sides in international law debates.

In sum, then, *Sosa* imposes substantial limits upon the recognition of causes of action for international law violations. It is not sufficient, under *Sosa*'s approach, for a court to determine that, on balance, international law appears to prohibit the defendant's conduct, or that international law contains a universally-recognized general principle that arguably extends to the defendant's conduct. Rather, the inquiry is whether international law contains an undisputed rule defined specifically and uncontroversially to include defendant's alleged conduct.

II. This Court Should Clarify the Proper State-of-Mind Standard for Accessorial Liability under the ATS.

Even if accessorial liability as a general principle is sufficiently well-established in international law to satisfy *Sosa*'s requirements, *Sosa* further requires an international consensus on the *scienter* or *mens rea* standard for such liability. Without such consensus, it cannot be said that the international law of accessorial liability is defined at such a level of specificity as to clearly encompass the conduct alleged by the plaintiff. The analytical approach taken by

the Ninth Circuit panel majority below sharply diverged from the one adopted by the Second and Fourth Circuits. The divergence mattered here: the Ninth Circuit adopted a low *mens rea* standard that extended accessorial liability to defendants who lend knowing assistance to the wrongdoers, but without a purpose to facilitate it. There is no international consensus in support of this position. This Court should grant the Petition to clarify the proper *mens rea* for holding accessories liable under the ATS.

A. The Second and Fourth Circuits Require Evidence of Purpose, While the Ninth Circuit Only Requires Evidence of Assistance and Knowledge.

The Second and Fourth Circuits limit ATS accessorial liability to situations where the alleged accessory is aware of the criminal purpose of the perpetrator and acts with the intention of facilitating or otherwise furthering that purpose. *See Talisman*, 582 F.3d at 259 ("Even if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law.") (citing Judge Katzmann's and Judge Korman's concurring opinions in *Khulumani v. Barclay National Bank Ltd,* 504 F.3d 254, 276, 233 (2d Cir. 2007)) (emphasis in original); *Aziz*, 658 F.3d at 398 ("We are persuaded by the Second Circuit's

Talisman analysis and adopt it as the law of this circuit").

The Second and Fourth Circuits arrived at the purpose standard having regard to Article 25(3)(c) of the Rome Statute, which authorizes the ICC to punish aiders and abettors only when they act "[f]or the purpose of facilitating the commission of such a crime…"[6] The Second Circuit observed that the standard articulated by Article 25(3)(c) was consistent with "international law at the time of the Nuremberg trials[, which] recognized aiding and abetting liability only for purposeful conduct." *Talisman*, 582 F.3d at 259. The purpose standard, the Second Circuit continued, "has been largely upheld in the modern era, with only sporadic forays in the direction of a knowledge standard." *Id*. The court concluded: "Only a purpose standard … has the requisite 'acceptance among civilized nations.'" *Id*. (quoting *Sosa*, 542 U.S. at 732). The Fourth Circuit agreed with the purpose standard announced in *Talisman*, stating: " While we

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[6] Article 25(3)(c) provides:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> …
> (c) *For the purpose of facilitating the commission of such a crime*, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission ….

Rome Statute, Art. 25(3)(c) (emphasis supplied).

agree with the premise that the Rome Statute does not constitute customary international law… adopting the specific intent *mens rea* standard for accessorial liability explicitly embodied in the Rome Statute hews as closely as possible to the *Sosa* limits..." *Aziz*, 658 F.3d at 398, 399-400 (citing *Sosa*, 542 U.S. at 725).

The Ninth Circuit panel majority, by contrast, rejected the purpose standard in favor of a knowing assistance requirement, citing in support certain decisions of the Nuremberg tribunals and the ad hoc tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The court below also disagreed with the Second Circuit's interpretation of certain Nuremberg tribunal decisions. *See Cisco*, 73 F.4th at 729-30, 729 n.16; Pet. App. 49a n.16, 50a. To be sure, certain international ad hoc tribunal decisions could be read to indicate a permissive *mens rea* standard for accessorial liability along the lines of the standard the Ninth Circuit adopted. But they cannot supply the evidence of a customary international law standard with the universal acceptance and definitiveness that *Sosa* requires.

B. The Ninth Circuit's Knowing Assistance Standard is Not Specific, Universal and Obligatory.

The court below erred in adopting a knowing assistance standard for accessorial *mens rea* for several reasons. To begin, the ad hoc international tribunal decisions cited by the panel majority below were rendered under particular instruments that did not define aiding and abetting liability, thus leaving

the judges with considerable latitude to supply their own definitions. Moreover, as Judge Katzmann noted in his concurring opinion in *Khulumani*, the ad hoc tribunal decisions "arise out of completely distinct factual contexts and often involve defendants who might have been convicted on alternative theories of liability." 504 F.3d at 278.

More fundamentally, as the Second Circuit stated in *Flores v. Southern Peru Copper Corp.*, "the usage and practice of States—as opposed to judicial decisions or the works of scholars—constitute the primary sources of customary international law." 414 F.3d 233, 250 (2d Cir. 2003). And as the Fourth Circuit explained in *Aziz*, "the Rome Statute constitutes a source of the law of nations, and, at that, a source whose mens rea articulation of aiding and abetting liability is more authoritative than that of the ICTY and ICTR tribunals." 658 F.3d at 400.

We agree that the Second and Fourth Circuit's analytical approach more closely adheres to this Court's jurisprudence and that the Ninth Circuit's knowing assistance standard fails to meet *Sosa*'s strictures. *See, e.g.*, *Jesner*, 584 U.S. at 262 (holding that a collection of judicial decisions, including those of the Special Tribunal for Lebanon, "fall[] far short of establishing a specific, universal, and obligatory norm of corporate liability").

The drafters of the Rome Statute were quite clear that, by the "For the purpose of facilitating" element, they were:

> introduc[ing] a subjective threshold which goes beyond the ordinary *mens rea* requirement within

> the meaning of article 30. [The expression "for the purpose of facilitating"] is borrowed from the [U.S.] Model Penal Code. While the necessity of this requirement was controversial within the American Law Institute, *it is clear that 'purpose' generally implies a specific subjective requirement stricter than mere knowledge*. The formula, therefore, *sets aside the … jurisprudence of the ICTY and ICTR*, since this jurisprudence holds that the aider and abetter [*sic*] must only show that his or her acts will assist the principal in the commission of an offense.

Kai Ambos, *Article 25: Individual Criminal Responsibility, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1009 (Otto Tiffterer & Kai Ambos eds. 2016) (emphasis supplied).[7]

The Rome Statute, as the quoted commentary indicates, built on the approach of the U.S. Model Penal Code:

> Only after an intervention by Judge Learned Hand, one of America's most prominent judges, did

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[7] Under Article 25(3)(c), then, "the mere knowledge that the accomplice aids the commission of the offence" is not sufficient; "rather he must know as well as wish that his assistance shall facilitate the commission of the crime…[T]he aider and abettor must have '*double intent*' both with regard to the intentional commission by the principal and the requisite elements of his assistance." Albin Eser, *Individual Criminal Responsibility in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 801 (Antonio Cassese et al. eds., 2002) (emphasis in original).

> the American Law Institute reject the drafters' proposal to extend accomplice liability, and therefore full punishment as a principal, to a person who was merely aware of his contribution to the principal's criminal act. The code instead requires that the accomplice act "with the purpose of promoting or facilitating the commission of the offense."

Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 New Crim. L. Rev. 319, 337 (2007) (quoting Model Penal Code §2.06 (1985)).

The Model Penal Code, in turn, reflects how U.S. courts generally regard the scope of aiding and abetting liability. As this Court observed in *Twitter, Inc. v. Taamneh*, "The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue." 598 U.S. 471, 506 (2023). Courts have construed the federal aiding and abetting statute, 18 U.S.C. § 2, similarly. *See, e.g.*, *United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006) (the government must prove that "the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime") (quotation marks omitted).

The Ninth Circuit panel majority below recognized that the drafters of the Rome Statute expressly rejected the "knowing assistance" standard. It believed it could set the Rome Statute aside, however—and criticized the Second and Fourth Circuit's reliance on its definition of accessorial liability—on the ground that the Statute is a treaty

that did not purport to restate customary international law and embodied compromises struck in negotiations among the member states. *See Cisco*, 73 F.4th at 729-734; Pet. App. 52a-56a. But the fact that the Statute reflects a compromise "reached after prolonged negotiations among delegates from over 100 signatory nations" (*Aziz*, 658 F.3d at 400 n.12) is not a reason to dismiss it as a reflection of international law. To the contrary, the fact that it was a compromise among differing views of international law indicates that the international law rule is unsettled.

Moreover, the Ninth Circuit's approach mistakes the *Sosa* inquiry. The question is not whether the Rome Statute itself reflects a universal consensus within international law on the scope of aiding and abetting liability—though, as noted above, the usage and practice of States on such questions are more probative than the decisions of ad hoc tribunals. *See Khulumani*, 504 F.3d at 278 (Katzmann J., concurring) (noting that the *ad hoc* tribunal decisions "arise out of completely distinct factual contexts and involve defendants who might have been convicted on alternative theories of liability.") The point is that the Rome Statute makes it impossible to maintain that the more capacious *mens rea* standard the Statute's drafters rejected constitutes a norm that could be said to be "specific, universal and obligatory." *Jesner*, 584 U.S. at 257-58.

In short, applying *Sosa*, the Ninth Circuit's decision does not adopt an undisputed view of the customary international law of accessorial liability.

In light of the deep contrast between the Ninth Circuit's position and the positions of the Second and Fourth Circuits, the need is great for this Court to resolve the division so that lower courts have appropriate guidance about how to properly apply *Sosa*'s strictures.

CONCLUSION

We respectfully urge the Court to grant review of the second question presented to address the appropriate scienter standard for accessorial liability under the ATS.

Respectfully submitted,

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