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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR CHEVRON CORPORATION, DOLE FOOD CO., INC., INTERNATIONAL BUSINESS MACHINES CORP., AND MERCK & CO, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici—Chevron Corporation (Chevron); Dole Food Co., Inc. (Dole); International Business Machines Corp. (IBM); and Merck & Co., Inc. (Merck)—are global leaders in their respective industries. Their different fields of business span the gamut of American enterprise, yet *amici* share a strong interest in the proper interpretation of the Alien Tort Statute (ATS), 28 U.S.C. § 1350, as each has operations or affiliates around the world.

The petition presents the question whether the ATS allows a judicially implied private right of action for aiding and abetting covered offenses. Pet. i. *Amici* submit this brief to urge the Court to grant certiorari and answer that question "no" based on the lead rationale offered by Petitioners—namely, that *no* new claims should be judicially implied under the ATS beyond the three specific offenses that were known to Congress at the Founding and discussed by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Pet. 14-17.[1]

Corporations like *amici* have been subjected to novel, baseless ATS claims, including claims seeking enormous damages for aiding and abetting alleged wrongdoing in foreign countries by third parties—usually foreign governments. *See, e.g., Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) (claim

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[1] No party or counsel for a party authored this brief in whole or in part. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel for all parties were notified of *amici*'s intention to file a brief ten days in advance of the filing deadline pursuant to Rule 37.2.

based on Saddam Hussein's human-rights violations); *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015) (claim against IBM and others based on South Africa's apartheid government); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (claim against pharmaceutical company for alleged testing conducted in concert with Nigeria's government); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008) (claim against Dole and others based on alleged partnership with Ivory Coast governmental entity). The uncertainty over whether *Sosa* permits recognition of new ATS claims thus significantly burdens corporations like *amici* that have operations or affiliates overseas, particularly in developing countries.

Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080 (N.D. Cal. 2008), illustrates the problem. The plaintiffs there were Nigerian citizens who forcibly seized an oil platform in Nigeria operated by a Nigerian Chevron subsidiary, held the workers hostage, and were allegedly injured when Nigerian law-enforcement officers removed them. They sued Chevron under the ATS, on the ground that Chevron could be liable for aiding and abetting those officers' alleged human-rights violations. *Id.* at 1090.

Nine years of pretrial proceedings ensued, much of it spent trying to reconstruct what happened in Nigeria without discovery from the primary actors. The Nigerian government refused to participate, criticizing the suit as "contrary to all acceptable concepts of sovereignty" and "destined to undermine [its] mutually beneficial relationship" with the United States. Udoma Decl., Exh. A., *Bowoto v. Chevron Corp.*, No. 99-02506 (N.D. Cal. filed Jan. 13,

2006), ECF No. 867-1. After a five-week trial—which focused on whether Nigerian authorities' use of force against Nigerians in Nigeria was excessive—the jury found for Chevron on all claims. The litigation ended after 13 years when the Ninth Circuit affirmed the verdict and this Court denied certiorari. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), *cert. denied*, 566 U.S. 961 (2012).

Amici unequivocally condemn human-rights abuses, and they are committed to ensuring that the affairs of their global businesses are conducted in a lawful and responsible manner that is respectful of all persons. But *amici* also have a vital interest in ensuring that federal courts do not continue to indulge unduly broad applications of the ATS.

SUMMARY OF ARGUMENT

The decision below, which erroneously held that aiding and abetting claims can be pursued under the ATS, is the result of the Court's choice in *Sosa* to leave the "door … ajar" for potential judicial recognition of new ATS causes of action beyond the three specific offenses that Congress likely had in mind when it enacted the statute: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 724, 729. Consistent with *Sosa*'s admonition that "vigilant doorkeeping" was required, *id.* at 729, this Court has never recognized a new ATS cause of action. But some lower courts have flouted *Sosa*'s limitations and treated its unclosed door as a welcome sign, repeatedly recognizing novel ATS claims and requiring this Court's intervention. The Court should now put an end to this misadventure.

Even at the time *Sosa* was decided, this Court's precedents made clear that judges have no power to create new causes of action where Congress has not done so. Although the Court used to freely recognize implied causes of action, it had long since abandoned that approach when *Sosa* was decided, just as it had more generally cut back on federal common-law-making power. *Sosa*'s decision to treat the ATS as a possible exception has led to harmful consequences, including forcing the judiciary to make complex foreign-policy decisions it is ill-equipped to render.

Developments since *Sosa* have only further eroded it. This Court has continued to reject judicial authority to create implied causes of action in both the statutory and constitutional contexts. And when faced with cases where lower courts have recognized novel ATS claims, it has consistently responded by further cabining the judicial lawmaking power nominally reserved in *Sosa*. Indeed, four sitting Justices have already expressed their discontent with the regime *Sosa* spawned—and an opinion for a Court majority has acknowledged that it may never be appropriate to recognize new causes of action under the ATS, given the heightened separation-of-powers concerns in the foreign-affairs context.

The Court should definitively close the door *Sosa* left ajar. It should grant certiorari and hold that courts lack authority to infer any new ATS causes of action beyond violation of safe conducts, infringement of the rights of ambassadors, and piracy. That bright-line rule better harmonizes *Sosa* with this Court's precedents. And while that rule is consistent with *Sosa*, insofar as the decision suggests otherwise, it should be narrowed or overruled.

ARGUMENT

Enacted by the First Congress, the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *See* 28 U.S.C. § 1350; *Sosa*, 542 U.S. at 712-13. In *Sosa*, this Court squarely held that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. But the Court was unwilling to treat "the ATS as a jurisdictional convenience" that lacks "a practical effect" unless and until "a future Congress or state legislature … authorize[s] the creation of causes of action" covered by the statute. *Id.* at 719.

The Court instead reasoned that, at the Founding, there were "three specific offenses against the law of nations"—*i.e.*, "violation of safe conducts, infringement of the rights of ambassadors, and piracy"—that were discussed by Blackstone, expressly criminalized by the First Congress, and likely what the First Congress implicitly expected would be covered by the ATS. *See id.* at 715, 719-20, 724. Whether or not that reasoning was correct on its own terms, if *Sosa* had stopped there, it would have created few problems.

Sosa, however, took one small step further, and lower courts have treated it as a giant leap for ATS plaintiffs. *Sosa* hypothesized that it might be appropriate for judges to recognize additional ATS claims "based on the present-day law of nations." *Id.* at 725. To be sure, the Court emphasized the need "for a restrained conception of the discretion a federal court should exercise in considering a new

cause of action of this kind." *Id.* *First*, the international-law norm must be "specific, universal, and obligatory"; and *second*, courts must exercise "judgment about the practical consequences" and consider any other "principle [for] limiting the availability of relief." *Id.* at 732-733 & n.21; *accord* *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 257-58 (2018) (plurality op.) (framing the ultimate inquiry as "whether caution requires the political branches to grant specific authority" for the claim at issue). Moreover, *Sosa* held that the claim raised there did not satisfy its newly minted test. 542 U.S. at 738. Nevertheless, while insisting on the importance of "vigilant doorkeeping," *Sosa* left "the door … ajar" for ATS plaintiffs to try to satisfy the test. *Id.* at 729.

That choice was misguided. Even at the time, it conflicted with this Court's precedents limiting implied causes of action. And the conflict has grown deeper in the intervening years, as this Court has further retrenched on implied causes of action. Yet lower courts continue to try to expand the ATS doorway—notwithstanding that the foreign-affairs context exacerbates the separation-of-powers concerns that have led this Court to repudiate implied causes of action more generally. This Court should grant certiorari to make clear that no new causes of action can properly be implied under the ATS, thus cabining *Sosa* to the three specific offenses recognized by the First Congress itself.

I. THE LAW AT THE TIME OF *SOSA* MADE CLEAR THAT COURTS SHOULD NEVER RECOGNIZE NEW CAUSES OF ACTION UNDER THE ATS

When *Sosa* was decided, this Court had long since gotten out of the business of creating causes of action based on general common-law authority or the desire to advance vague congressional objectives. Indeed, *Sosa* itself acknowledged the separation-of-powers problems with judicially implied causes of action, yet failed to justify treating the ATS differently. In leaving open the possibility that the ATS permits courts to recognize claims beyond the specific three contemplated by the First Congress, *Sosa* was contrary to first principles on the day it was decided.

A. Judicially Implying Causes Of Action Threatens The Separation Of Powers

In holding that courts retain authority to recognize new causes of action under the ATS, *Sosa* relied on the view that the First Congress presumed when enacting the ATS that "torts in violation of the law of nations would have been recognized within the common law of the time." 542 U.S. at 714. But regardless of how expansive courts' general common-law powers were understood to be in 1789, no such sweeping power existed by the time of *Sosa*. The Court was thus mistaken to suggest that additional causes of action can be created under the ATS today.

1. To be sure, this Court once believed that the Judiciary possesses not only the power but the "duty … to provide such remedies as are necessary to make effective the congressional purpose" behind a statute. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). For a time—especially in the 1960s—the Court thus

freely recognized implied causes of action based on statutes whose terms provided no such thing. *See, e.g., id.; Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414-15 (1968).

But decades ago, the Court's approach began to shift. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court acknowledged that its recent cases had adopted a "decidedly different approach" to implying causes of action: "giv[ing] careful attention to claims that a private remedy should be implied in statutes which omit any express remedy," rather than simply assuming such a remedy must exist. *Id.* at 698 n.24 (citing examples).

Moreover, dissenting in *Cannon*, Justice Powell would have gone further, urging that *any* judicial power to create a cause of action where Congress had not done so "cannot be squared with the doctrine of the separation of powers." *Id.* at 730. He reasoned that Congress alone, not the Judiciary, has the competence and authority to create causes of action. *Id.* at 730-32. Justice Powell also tied his reasoning to the Court's landmark disavowal of general common-law power in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). As he noted, "the unconstitutionality of the course [previously] pursued has now been made clear," meaning the Constitution "compel[led] [the Court] to abandon the implication doctrine" it had previously embraced. 441 U.S. at 742 (Powell, J., dissenting) (quoting *Erie*, 304 U.S. at 77-78).

Justice Powell's even-more-restrictive approach eventually prevailed in *Alexander v. Sandoval*, 532

U.S. 275 (2001). In an opinion by Justice Scalia, the Court interred the "*ancien regime*" of judicial implication of private rights of action based on congressional purposes. *Id*. at 287. No longer could courts take it upon themselves to imply rights of action to enforce statutory rights: "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id*. at 286. In other words, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id*. Absent such manifested intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 287. Thus, "the interpretive inquiry begins with the text and structure of the statute, and ends once it has become clear that Congress did not provide a cause of action." *Id*. at 288 n.7 (citation omitted).

2. A similar evolution occurred for constitutional claims. In that context, this Court first recognized an implied cause of action for damages against federal officers in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), during the heyday for implied statutory causes of action. And it based the new cause of action on the same conception of robust judicial lawmaking power that animated the then-current statutory regime. *Id*. at 395-97. In the decade following *Bivens*, the Court embraced the power to recognize implied constitutional damages claims against federal officers in two more decisions: *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980).

Despite the decisions in *Davis* and *Carlson*, however, the tide was already turning by the end of the 1970s, as presaged by then-Justice Rehnquist's dissent in *Carlson* on separation-of-powers grounds. 446 U.S. at 34. As he explained, "infer[ring] a private civil damages remedy from the Eighth Amendment or any other constitutional provision" is "an exercise of power that the Constitution does not give" the judiciary. *Id*. That conclusion, his dissent continued, followed naturally from "the notion that federal courts do not have the authority to act as general courts of common law absent congressional authorization." *Id*. at 37.

Following *Carlson*, the Court never again recognized a *Bivens* cause of action. By the time of *Sosa*, the Court had rejected proposed *Bivens* actions six times in a row. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

The Court's reasoning in these cases tracked the evolution in implied causes of action for statutory claims. In *Malesko*, for example, the Court explained that it had "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," "abandoned" the free-wheeling approach that prevailed in an earlier era, and "repeatedly declined to 'revert' to 'the understanding of private causes of action that held sway 40 years ago.'" 534 U.S. at 67 n.3 (quoting *Sandoval*, 532 U.S. at 287).

B. *Sosa* Noted The Separation-Of-Powers Problem But Failed To Solve It

Sosa acknowledged that, under *Erie*, federal courts now "den[y] the existence of any federal 'general' common law," and that under cases like *Sandoval* and *Malesko*, the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. at 726-27. Yet while acknowledging that "these reasons argue for great caution in adapting the law of nations to private rights," the Court stated that it remained possible that "some norms of today's law of nations may … be recognized legitimately by federal courts in the absence of congressional action." *Id.* at 728-29. The Court reasoned that the First Congress itself contemplated that the three specific offenses identified by Blackstone would be cognizable under the ATS, and that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize [additional] enforceable international norms." *Id.* at 729-30. From a separation-of-powers perspective, however, judicially implying an ATS claim for the three historical offenses is fundamentally different than doing so for allegedly comparable new ones.

As to the former, *Sosa* relied on the conclusion that the First Congress enacted the ATS expecting it would have some immediate practical effect and that criminal statutes passed by the First Congress indicated that it likely intended courts to recognize ATS claims for the equivalent civil offenses of violation of safe conducts, infringement of the rights of ambassadors, and piracy. *See supra* at 5. Whether right or wrong, that reasoning at least

rested on "the text and structure of the [ATS]," as informed by parallel, contemporaneous statutes. *Sandoval*, 532 U.S. at 288 n.7.

Nothing of the sort occurs when courts further inquire whether there are additional "norm[s] of international character" that are "accepted by the civilized world," and "defined with … specificity," to a degree that is "comparable to the features of the 18th-century paradigms." *Sosa*, 542 U.S. at 725. *Sosa* itself admitted that it "ha[d] found no basis to suspect [the First] Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses." *Id.* at 724. Nor can that gap be filled by making "assum[ptions]" about which additional offenses "the First Congress would have expected federal courts" to deem comparable. *Id.* at 730. That is the precise type of reliance on "expectations" based on "contemporary legal context" that this Court, pre-*Sosa*, repudiated as insufficient to infer a cause of action "shorn of text." *Sandoval*, 532 U.S. at 287-88.

Justice Scalia's separate writing in *Sosa* identified these flaws. Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia explained that the majority's opinion had gone astray by "reserv[ing] … a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms." 542 U.S. at 739 (opinion concurring in part and in the judgment). After *Erie*, courts "must possess some federal-common-law-making authority before undertaking" to create causes of action. *Id.* at 741. Absent such authority, recognizing a new cause of action is judicial lawmaking that violates core separation-of-

powers principles—and doing so in the ATS context also trespasses on the foreign-relations arena committed to the political branches. *See id*. at 746–47. Such "considerations," Justice Scalia concluded, "are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law." *Id*. at 747. And he presciently warned that "[o]ne does not need a crystal ball to predict" that "holding open the possibility" of new ATS claims would soon lead to "judicial occupation of a domain that belongs to the people's representatives." *Id.*

II. POST-*SOSA* CASES CONFIRM THAT COURTS SHOULD NEVER RECOGNIZE NEW CAUSES OF ACTION UNDER THE ATS

Sosa "assume[d] … that no development" since the ATS's enactment "ha[d] categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law." 542 U.S. at 724-25. Developments since *Sosa*, however, now refute that assumption. In the past two decades, this Court has even more unequivocally renounced any authority to imply causes of action—and expressed deep skepticism about *Sosa*'s suggestion that new ATS claims may be an exception. Meanwhile, lower courts have repeatedly made a mockery of the caution called for by *Sosa*, creating predictable separation-of-powers problems in the particularly sensitive foreign-affairs context. All this confirms the folly of *Sosa*'s keeping the ATS door propped open.

A. This Court's Approach To Implied Causes Of Action Has Become Even More Restrictive Since *Sosa*

Start with the statutory context, where this Court has repeatedly refused to imply new causes of action absent support in the statute itself. For example, in *Stoneridge Investment Partners v. Scientific Atlanta*, 552 U.S. 148 (2008), the Court declined to recognize a new private right of action under the securities laws. *Id.* at 164-65. As it explained, "it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." *Id.* at 164. That is, "[t]he decision to extend the cause of action is for Congress, not for us." *Id.* at 165. Similar reasoning motivated the rejection of an implied statutory private right of action in *Astra USA v. Santa Clara Cnty.*, 563 U.S. 110 (2011). As the Court reaffirmed, "[r]ecognition of any private right of action for violating a federal statute … must ultimately rest on congressional intent to provide a private remedy." *Id.* at 117.

In the constitutional context, moreover, this Court's rejection of implied rights of action has been especially emphatic. In *Ziglar v. Abassi*, 582 U.S. 120 (2017), the Court announced that any judicial "expan[sion]" of *Bivens* is "disfavored." *Id.* at 135. It thus mandated a more stringent approach in "any new context" besides *Bivens*, *Davis*, and *Carlson*, *id.* at 136, and it broadly defined that category by holding that "even a modest extension" beyond those three cases "is still an extension," *id.* at 147. In new contexts, an implied remedy is now foreclosed if there is *any* "special factor[] counselling hesitation." *Id.* at 136. So long as "there are sound reasons to

think Congress *might* doubt the efficacy or necessity of a damages remedy …, the courts *must refrain* from creating the remedy." *Id.* at 137 (emphases added). *Abbasi* even noted that *Bivens*, *Davis*, and *Carlson* "might have been different if they were decided today." *Id*. at 134.

In *Hernandez v. Mesa*, 589 U.S. 93 (2020), the Court applied *Abbasi* and declined to extend *Bivens* to create a cause of action against a U.S. Border Patrol agent who shot a Mexican child on the Mexican side of the U.S.-Mexico border. The Court reiterated that "*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated." 589 U.S. at 99 (quoting *Abbasi*, 582 U.S. at 132). Now that the Court has "c[o]me to appreciate more fully" both "the Constitution's separation of legislative and judicial power" and *Erie*'s emphasis on legitimate sources of judicial authority, the Judiciary's power "to recognize a damages remedy must rest at bottom on a statute enacted by Congress." *Id*. at 100-01. And of particular relevance here, the "factors that counsel[led] hesitation" in *Hernandez* all reduced to respect for Congress's "authority in the field of foreign affairs" and deference to its "cho[ice] not to create liability" for the claim at issue. *Id.* at 113.

Most recently, in *Egbert v. Boule*, 596 U.S. 482 (2022), the Court rejected a *Bivens* claim against a U.S. Border Patrol agent for excessive force and retaliation. It doubled down on the rationales of *Abbasi* and *Hernandez*, stressing that, "[a]t bottom, creating a cause of action is a legislative endeavor," *id.* at 491, and that "absent utmost deference to

Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power,'" *id.* at 492.

Accordingly, whether to recognize a new *Bivens* action now boils down to a "single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* And as Justice Gorsuch stressed in his *Boule* concurrence, "if the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will *always* be no." *Id.* at 504 (emphasis added). That conclusion applies *a fortiori* to judicially implying new ATS claims given the foreign-affairs context, as demonstrated below.

B. This Court Has Repeatedly Narrowed The ATS—And Already Recognized That New Causes of Action May Never Be Appropriate

This Court has considered the scope of permissible ATS actions under *Sosa* three times: *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018); and *Nestlé USA, Inc. v. Doe*, 593 U.S. 628 (2021). Each time, it rejected the ATS claim and narrowed *Sosa*'s scope.

In *Kiobel*, the Court rejected any potential ATS claims "for violations of the law of nations occurring outside the United States." 569 U.S. at 124. As the Court explained, "far from avoiding diplomatic strife, providing [an extraterritorial] cause of action could have generated it." *Id.* Thus, "the presumption against extraterritoriality applies to claims under the ATS, and … nothing in the statute rebuts that presumption." *Id.* *Nestlé* then expanded on *Kiobel*,

clarifying that the rule against extraterritorial ATS claims could not be overcome by pointing to "mere corporate presence" or "general corporate activity" in the United States. 593 U.S. at 634.

Jesner, meanwhile, held that "foreign corporations may not be defendants in suits brought under the ATS." 584 U.S. at 272. In so holding, the Court's opinion contained an entire section relying on its cases narrowing *Bivens* actions. That section cited *Abbasi*'s rule that "courts must refrain from creating [a] remedy" "if there are sound reasons to think Congress might doubt [its] efficacy or necessity," and also invoked *Malesko*'s holding rejecting *Bivens* liability for "corporate defendants." *Id.* at 264.

Indeed, the Court in *Jesner* expressly called *Sosa* into question. It acknowledged that its "recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law," because "the Legislature is in the better position" to make such determinations. *Id.* And it found that "[n]either the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context." *Id.* To the contrary, "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS," given the "foreign-policy concerns." *Id.* at 264-65. The Court thus concluded that "there is an argument that a proper application of *Sosa* would preclude courts from *ever* recognizing *any new* causes of action under the ATS." *Id.* at 265 (emphases added). But the Court decided it "need not resolve that question in this case." *Id.*

Four sitting Justices, moreover, have expressed interest in pursuing that argument against any new ATS claims under *Sosa*. Three of them did so in *Jesner* itself. Justice Gorsuch's concurrence detailed the reasons he "would end ATS exceptionalism" and "refuse invitations to create new forms of legal liability" under the ATS. *Id.* at 281-85. Justice Thomas's concurrence agreed with those reasons why "[c]ourts should not be in the business of creating new causes of action under the [ATS]," *id.* at 274, while Justice Alito noted he was "not certain that *Sosa* was correctly decided" for the same reasons, *id.* at 276. Then in *Nestlé*, Justices Thomas and Gorsuch amplified their positions, joined by Justice Kavanaugh. In a portion of his opinion for those three members of the Court, Justice Thomas explained that "there will always be a sound reason for courts not to create a cause of action for violations of international law," and thus "federal courts should not recognize private rights of action [under the ATS] beyond the three historical torts identified in *Sosa*." 593 U.S. at 637-38. Justice Gorsuch's concurrence likewise declared the door left open by *Sosa* "is a door [that] *Sosa* should not have cracked" and that the Court should now slam shut. *Id.* at 644-45. And Justice Alito highlighted these "strong arguments that federal courts should never recognize new claims under the ATS," but declined to reach the issue only because it "was not raised by petitioners' counsel" there. *Id.* at 658 (dissenting opinion).

C. Lower Courts Have Exacerbated The Separation-Of-Powers Problem By Broadly Expanding *Sosa*

Although *Sosa* claimed that it merely left the door to new ATS claims "ajar subject to vigilant doorkeeping," 542 U.S. at 729, lower courts have authorized a plethora of ill-defined claims extending far beyond the three offenses known to Blackstone and the First Congress. *See, e.g.*, Stephen Breyer, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 156 (2015) ("Many lower courts seemed to find in *Sosa* a green light, not a note of caution.").

After *Sosa*, courts recognized claims for, among other things, "intentionally inflicted emotional[] pain and suffering" (as a form of torture), *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1253 (11th Cir. 2005), and nonconsensual medical testing of an experimental antibiotic, *Abdullahi*, 562 F.3d at 169. And even where courts ultimately decline to recognize a novel ATS claim, they often do so only after years of litigation and extensive discovery. *See, e.g., Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1024 (7th Cir. 2011) (affirming grant of summary judgment to defendants, after six years of litigation, on claim of encouraging use of child labor). Thus, while recognition of such novel claims has slowed somewhat after *Kiobel* and *Jesner*, *Sosa*'s unclosed door continues to impose real costs. Most significantly, plaintiffs have tried to use aiding-and-abetting claims to end-run *Kiobel*'s extraterritoriality holding, as in this case, *Nestlé*, and others. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 684 F. Supp. 3d 481, 485 (E.D. Va. 2023) (denying motion to

dismiss claim of aiding and abetting "physical and psychological abuse" in Iraq).

Moreover, in evaluating novel causes of action under the ATS, courts have repeatedly been forced into spheres reserved exclusively for the political branches. As Justice Gorsuch's *Jesner* concurrence explained, *Sosa* itself required courts to exercise "judgment about the practical consequences" of recognizing a new ATS claim, but that judgment will almost always present "questions of foreign affairs and national security" that "implicate neither judicial expertise nor authority." 584 U.S. at 284. Thus, as Justice Alito's *Jesner* concurrence observed, while "[t]he ATS was meant to help the United States avoid diplomatic friction," ATS suits "may provoke—and, indeed, frequently *have* provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS." *Id.* at 278. Not only does this set the ATS at war with itself, but it is a direct assault on the separation of powers. "Congress and the Executive Branch may be willing to trade off the risk of some diplomatic friction in exchange for the promotion of other objectives," but courts "have neither the luxury nor the right to make such policy decisions." *Id*. at 280.

Again, these concerns are far from hypothetical. Foreign governments have repeatedly objected to ATS suits as "'grave affront[s]' to [their] sovereignty." *Id*. at 271 (Jordanian government in *Jesner*); *see also*, *e.g.,* Brief for the Federal Republic of Germany as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, p. 1; *supra* at 2 (Nigerian Government in *Bowoto*). Yet courts have frequently dismissed such objections. In *Khulumani v. Barclay*

Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), for instance, the Second Circuit permitted class-action ATS claims against several corporations that supposedly had supported the old apartheid government in South Africa—despite the then-current South African government's view that the case "interfere[d]" with its own "approach" to redressing those harms. *Id.* at 296.

III. THIS COURT SHOULD GRANT REVIEW AND HOLD THAT COURTS MAY NOT RECOGNIZE ANY NEW ATS CAUSES OF ACTION BEYOND THE THREE THE FIRST CONGRESS EXPECTED

The time has come for this Court to close the door on *Sosa*'s speculation that there may be some new ATS claim that courts can recognize despite the separation-of-powers and foreign-affairs concerns. As in *Jesner*, the Court should apply the principles of its *Bivens* precedents and limit the ATS to the three Founding-era offenses identified in *Sosa*. *See supra* at 14-15, 17. Cabining the ATS to the violation of safe conducts, infringement of the rights of ambassadors, and piracy would give effect to the statute with arguable grounding in the actions and intent of the First Congress. *See supra* at 5, 11-12.

To be clear, that would not include *aiding and abetting* those offenses. There is "no basis to suspect Congress had … in mind" secondary civil liability for "Blackstone's three primary offenses." *Sosa*, 542 U.S. at 724. "[E]ven a modest extension is still an extension," and this Court "must refrain from creating th[at] remedy." *Abbasi*, 582 U.S. at 137, 147. "[T]here are sound reasons to think Congress might doubt the efficacy or necessity of" aiding-and-

abetting liability for ATS claims, *id.* at 137, and inferring such liability also flouts the lesson of *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180-85 (1994), that Congress acts expressly when it authorizes civil aiding-and-abetting liability. *See* Pet. 17-22.

Of course, this Court instead could continue as it has since *Sosa*—hypothesizing that lower courts may retain theoretical power to create some new ATS claims, while rejecting every novel cause of action that reaches it. But to what end? That never-say-never approach only creates jurisprudential confusion and wastes the resources of parties and courts alike in litigating ultimately futile claims. Making explicit what is implicit in this Court's precedents would thus have many "virtues," as Justice Gorsuch recited in his Nestlé concurrence:

> It would get this Court out of the business of having to parse out ever more convoluted reasons why it declines to exercise its assumed discretion to create new ATS causes of action. It would absolve future parties from years of expensive and protracted litigation destined to yield nothing. It would afford everyone interested in these matters clear guidance about whom they should lobby for new laws. It would avoid the false modesty of adhering to a precedent that seized power we do not possess in favor of the truer modesty of ceding an ill-gotten gain. And it would clarify where accountability lies when a new cause of action is either created or refused: With the people's elected representatives.

593 U.S. at 645-46.

For all the reasons discussed, limiting *Sosa* to the three Blackstone offenses would be consistent with the holding and core reasoning of that decision as well as the broader body of implied-cause-of-action precedent. But if there were any doubt in that regard, this Court should expressly narrow or overrule *Sosa* insofar as it provides otherwise.

Finally, as Petitioners well explain, this case is an excellent vehicle for the Court to limit the ATS to the violation of safe conducts, infringement of the rights of ambassadors, and piracy. Pet. 22-24. And importantly, unlike in *Jesner* and *Nestlé*, Petitioners expressly ask this Court to revisit *Sosa* and bar recognition of any new ATS claims. Pet. 14-17.

CONCLUSION

The Court should grant certiorari and reverse.

March 13, 2025

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