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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND TECHNET AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JAMES E. BERGER
CHARLENE C. SUN
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, NY 10020

JONATHAN D. URICK
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, SW
Washington, DC 20024

ILANA H. EISENSTEIN
Counsel of Record
DLA PIPER LLP (US)
1650 Market Street,
Suite 5000
Philadelphia, PA 19103
(215) 656-3300
ilana.eisenstein@dlapiper.com

JOSHUA S. WAN
DLA PIPER SINGAPORE PTE. LTD.
80 Raffles Place
UOB Plaza 1, #48-01
Singapore, 048624

Counsel for Amici Curiae

Additional Counsel Listed on Inside Cover

March 13, 2025

379269

Drew Hudson
TechNet
1420 New York Avenue, NW,
Suite 825
Washington, DC 20005

Ben C. Fabens-Lassen
DLA Piper LLP (US)
2000 Avenue of the Stars,
Suite 400
Los Angeles, CA 90067

Erica Klenicki
Michael A. Tilghman II
NAM Legal Center
733 10th Street, NW,
Suite 700
Washington, DC 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

Amicus curiae Business Roundtable represents the chief executive officers of America's leading companies. The CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable

---

[1] Pursuant to Supreme Court Rule 37.2, ten days before this brief was due, *amici* notified counsel of record for the parties of its intention to file this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

participates in litigation as *amicus curiae* when important business interests are at stake.

Amicus curiae the National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million men and women in the United States, contributes $2.93 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amicus curiae TechNet is a national, bipartisan network of technology industry CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet. These companies represent more than 4.5 million employees and countless customers in the fields of information technology, biotechnology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

Amici have a substantial interest in the issues presented in this case. Their members transact

business across the world, and many have been and continue to be named as defendants in suits predicated on expansive theories of liability under the Alien Tort Statute (ATS), 28 U.S.C. §1350, based on their foreign operations. In the past three decades, plaintiffs have filed over 200 ATS lawsuits against U.S. and foreign corporations doing business across industry sectors, including agriculture, financial services, manufacturing, and communications. *See* Jonathan Drimmer & Sarah Lamoree, *Think Globally, Sue Locally: Trends & Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460-62, 461 n.34 (2011). These suits frequently result in costly and protracted litigation (spanning nearly 15 years in Petitioners' case), imposing substantial legal and reputational costs on U.S. companies that do business abroad.

Amici have routinely participated in cases involving the scope of the ATS before this Court and other federal courts. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America et al. in Support of Petitioners, *Nestle USA, Inc. v. Doe*, 593 U.S. 628 (2021) (No. 19-416), 2020 WL 5501204 (Chamber and NAM); Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Neither Party, *Jesner v. Arab Bank, PLC*, 584 U.S. 241 (2018) (No. 16-499), 2017 WL 2806350; Brief for the National Foreign Trade Council et al. in Support of Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339),

2004 WL 162760 (Chamber and Business Roundtable).

Amici are well-positioned to offer a helpful perspective on the issues presented in this case, including specifically with respect to the harms American businesses face as a result of expansive liability under the ATS—liability that, in this case, conflicts with the purpose of the statute and this Court's precedents limiting the scope of liability under the ATS.

SUMMARY OF ARGUMENT

Despite being enacted by the First Congress as a means of "avoid[ing] diplomatic friction," *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 244 (2018), the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, has evolved in recent decades into a tool that is frequently deployed by foreign plaintiffs—driven increasingly by an active plaintiffs' bar—to hold U.S. businesses with multinational operations liable for asserted human-rights violations committed overseas by third parties. This case presents precisely that scenario.

The First Congress authorized district courts to recognize under the ATS three primary offenses that are a violation of the law of nations: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Notwithstanding this Court's clear warning in *Sosa* that courts must exercise "great caution" before recognizing any new causes of action under the ATS beyond the "very limited" categories envisioned by the First Congress, *id.* at 712, 729, the Ninth

Circuit has repeatedly—and significantly—expanded the scope of the ATS to include aiding-and-abetting liability. The decision below, which represents the Ninth Circuit's most recent effort to expand ATS liability, contravenes this Court's precedents while ignoring the far-reaching and damaging consequences of such a considerable expansion of ATS liability.

Amici agree with Petitioners that this Court's review is warranted to correct the Ninth Circuit's errors, including as to the closely related issue of aiding-and-abetting liability under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, which could be used as an end-run around limits on ATS liability by subjecting senior executives to the same claims that would (and should) be barred against the company under the ATS. *Amici* do not repeat Petitioners' persuasive arguments in this brief. Instead, *Amici* submit this brief to discuss the harms that U.S. businesses will suffer if aiding-and-abetting claims against businesses and senior executives are cognizable under the ATS and the TVPA.

In *Sosa* and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-17 (2013), this Court instructed courts to consider the practical, real-world consequences of ATS liability when applying common law to delineate the scope of the ATS. The international repercussions in this case are especially concerning. If allowed to stand, the decision below would harm American businesses with foreign operations in several consequential ways.

First, recognizing a cause of action under the ATS for aiding-and-abetting liability expands the ATS far beyond the party in violation of international law itself. And this in turn substantially increases the possibility of ATS claims against U.S. companies with any business dealings in foreign countries—especially developing countries—whose governments are alleged to have had questionable human rights records when the events giving rise to the lawsuit occurred (here, in the 1990s). The risk of these suits, which are expensive to defend and involve demands for large damages awards, threatens to chill foreign investment into those countries.

Second, the Ninth Circuit's opinion puts U.S. businesses at a competitive disadvantage, exposing them to expanded ATS liability while foreign competitors are protected by this Court's ruling in *Jesner*. This disadvantage is especially acute in developing digital and internet-based industries where competitors may be located anywhere in the world, as the risk of potential ATS claims threatens to chill U.S.-based companies from even attempting to compete internationally.

Third, the Ninth Circuit's expansive vision of accessorial ATS liability would subject U.S. businesses to even *more* ATS lawsuits. The history of ATS suits demonstrates that such litigation is extraordinarily burdensome. Such cases are not only extremely costly, but they are also stigmatizing and time-consuming—with lawsuits frequently spanning over a decade, as this case has. Even completely meritless claims impose substantial and unjustified

reputational and economic harm on corporate defendants. These cases, which often involve allegations that U.S. corporations have engaged in or facilitated serious human rights or other international violations, present a clear "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

The significant harm the Ninth Circuit's opinion will cause American businesses alone justifies the Court's review.

ARGUMENT

I. The Ninth Circuit's Decision Will Inflict Significant Harm on U.S. Businesses.

Despite this Court's warning in *Sosa* that ATS claims must be "subject to vigilant doorkeeping," 542 U.S. at 752, and the Court's subsequent rulings narrowing the scope of the ATS in *Kiobel*, *Jesner*, and *Nestle*, U.S. businesses continue to find themselves in the crosshairs of ATS plaintiffs.

The Ninth Circuit's recognition of a cause of action for aiding and abetting under the ATS is inconsistent with these precedents. It significantly expands the statute's reach, while exacerbating this regrettable trend and harming American businesses in the process. The decision below threatens to substantially harm American businesses by (i) discouraging U.S. corporations from investing in developing countries with controversial human rights records out of fear of subjecting themselves to ATS claims; (ii) placing American businesses at a disadvantage as compared to their foreign competitors, who are shielded from

ATS liability, particularly with respect to investment in developing economies; and (iii) threatening to amplify the financial and reputational harm imposed on U.S. businesses by encouraging more potential plaintiffs to direct ATS claims at U.S. corporations.

A. The Ninth Circuit's Decision Threatens to Chill Foreign Investment by U.S. Corporations in Developing Countries.

By expanding the ATS to encompass aiding-and-abetting claims, the Ninth Circuit's decision will deter U.S. businesses from investing overseas. That is because the decision exposes U.S. companies to greater risk of being targeted by potential ATS plaintiffs, which in turn poses a significant threat to foreign investment by U.S. companies, particularly in developing countries.

Over the last three decades, various plaintiffs have filed over 200 ATS lawsuits against U.S. and foreign corporations for business activities in a wide range of industries and more than sixty countries. Oona Hathaway, *Replication Data for "Does the Alien Tort Statute Make a Difference?,"* HARVARD DATAVERSE (2022), https://doi.org/10.7910/DVN/DUPKPA; Oona Hathaway, Christopher Ewell & Ellen Nohle, *Has the Alien Tort Statute Made a Difference? A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1239 (2022); John B. Bellinger, III & R. Reeves Anderson, *Whither to "Touch and Concern": The Battle to Construe the Supreme Court's Holding in Kiobel v. Royal Dutch Petroleum*, FEDERAL CASES FROM FOREIGN PLACES (U.S. Chamber Inst. for Legal Reform), Oct. 2014, at 22; Donald E. Childress III, *The*

Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation, 100 GEO. L.J. 709, 713 (2012).

Corporate defendants in ATS cases, however, are rarely alleged to be the direct (or even indirect) wrongdoers. Instead, plaintiffs have made a practice of targeting corporations for violations of international law committed by other parties; frequently, as here, the conduct at issue is alleged to have been perpetrated by foreign governments who are protected by sovereign immunity, or by local nongovernmental actors that are difficult to subject to suit. It is unsurprising that ATS plaintiffs have sought to find corporate defendants with deep pockets that are subject to the jurisdiction of U.S. courts—a result this Court predicted in *Jesner*. 584 U.S. at 269 (noting that if ATS claims are permitted against foreign corporations, "plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities").

As a result, the U.S. corporations targeted in these suits are often blamed for conduct committed by the foreign governments of the countries in which they operate. *See, e.g.*, *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1120 (9th Cir. 2010) (involving allegations that American parent corporation of foreign subsidiary aided and abetted human rights violations committed by Nigerian military during operation designed to protect oil facilities against attack); *Turedi v. Coca-Cola Co.*, 460 F. Supp. 2d 507, 509-10 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009) (dismissing allegations that U.S. company aided and abetted

violations by local police clearing a sit-in by drivers of company hired by local bottler to deliver product).

Other ATS claims have sought to hold U.S. corporations responsible for the actions of third parties that are involved in those corporations' foreign business, such as local suppliers. *See, e.g.*, *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 628 (2021) (seeking to hold food manufacturers liable for aiding and abetting child slavery in Côte d'Ivoire by purchasing from cocoa producers that allegedly utilized child slave labor); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 679 (9th Cir. 2009) (seeking to hold retailer liable for working conditions at suppliers' garment factories in China, Bangladesh, Indonesia, Swaziland, and Nicaragua).

As these cases illustrate, ATS claims very frequently involve U.S. corporations' business dealings in countries with questionable human rights records or weak legal protections, which are often the developing countries most in need of foreign direct investment. If faced with the increased risk of being targeted in ATS lawsuits—which impose enormous costs and reputation risks to U.S. corporations, as discussed—many companies may very sensibly determine that they are better off not operating in jurisdictions that increase their litigation risk and exposure. American businesses are harmed when foreign investment is chilled: direct foreign investment by U.S. businesses opens access to foreign markets, enables sales to customers that U.S. manufacturers and other businesses could not otherwise reach, and generates revenues that can be re-invested domestically. *See* National Association of Manufacturers, Comment

Letter on Promoting Supply Chain Resilience 3-4 (Apr. 22, 2024), https://perma.cc/527Z-YR3X (NAM comments submitted to Office of the U.S. Trade Representative on promoting supply chain resilience).

Expansive ATS liability on U.S. companies adversely affects not only U.S. businesses with overseas operations and investments but also deprives the people of those countries of the much-needed economic benefits of such foreign investment. *See, e.g.*, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 297 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (noting the "chilling effect that actions of this kind may have on future foreign investment in developing countries"), *aff'd sub nom.*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 102 (2008); GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 40 (2003) ("Conservatively we calculate that $55 billion of U.S. [foreign direct investment] could be deterred by ATS suits.").

The Executive Branch—which has also consistently taken the position that aiding-and-abetting liability is not cognizable under the ATS in light of this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)—has echoed the same concerns. Petition at 17-19; Brief for the United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (07-919), 2008 WL 408389, at 8-11. As noted in its submission to this Court in *American Isuzu*, the State Department rightly observed that the threat of ATS claims against corporations operating abroad creates "uncertainty

for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." 2008 WL 408389, at 20. Moreover, by "hinder[ing] global investment in developing economies, where it is most needed," extraterritorial ATS litigation against corporations "inhibit[s] efforts by the international community to encourage positive changes in developing countries." *Id*. Indeed, private foreign investment is often the only means by which certain developing countries can achieve economic growth. *See Swimming Against the Tide: How Developing Countries are Coping with the Global Crisis* 6-7 (World Bank, Working Paper No. 47780, 2009).

Several Justices explicitly acknowledged this risk in *Jesner*, stating that, among other consequences, extending ATS liability to foreign multinational companies "could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts." 584 U.S. at 270 (plurality op.). This would, as a plurality of the Court went on to observe, "deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Id*. Although *Jesner* specifically addressed whether ATS liability should apply to foreign corporations, the same logic (and outcome) applies here to the expansion of ATS liability to cover aiding-and-abetting claims.

These concerns are exactly what happened in the case of Talisman Energy, a Canadian oil company that was sued for allegedly conspiring with, or for aiding and abetting, the Sudanese government to commit human rights abuses. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 639 (S.D.N.Y. 2006). Talisman strongly denied the allegations, stating that it "operated in both an ethical and transparent fashion with a genuine desire to improve the lives of the Sudanese people." TALISMAN ENERGY, INC., 2006 CORPORATE RESPONSIBILITY REPORT 2 (2006). Although Talisman was ultimately vindicated after years of litigation, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 639 (S.D.N.Y. 2006), *aff'd*, 582 F.3d 244 (2d Cir. 2009), the damage was done. As a result of negative publicity arising from the claim, Talisman divested its interest in Sudan shortly after the litigation was filed. *See* Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 426, 430 (2004).

B. The Ninth Circuit's Decision Disadvantages U.S. Corporations as Compared to Their Foreign Competitors

If allowed to stand, the decision below will also place U.S. corporations at a disadvantage compared to their foreign competitors, particularly with regards to investment in developing countries.

In *Kiobel*, this Court dramatically restricted the scope of the ATS, holding that the statute does not extend to suits against foreign corporations when "all the relevant conduct took place outside the United

States." 569 U.S. at 124. The Court in *Jesner* went further, holding that "foreign corporations may not be defendants in suits brought under the ATS." 584 U.S. at 243.

But by expanding the ATS to encompass aiding-and-abetting claims against only U.S. corporations, the Ninth Circuit's decision increases the risk of ATS litigation for U.S. businesses—which increases the costs and reputational risks to those companies and incentivizes them to withdraw from high-risk jurisdictions—while their foreign competitors are free to capitalize on those investment opportunities and potential customers.

The disadvantage faced by U.S. corporations under an expanded ATS would only grow as more industries rely on digital and internet-based products, which are "now affecting every business sector" and increasingly involving "everyone in every industry and every aspect of our life." Mark Minevich, *20 Leading Social Impact Platforms Making a Difference with Digital Potential*, FORBES (Aug. 3, 2021), https://tinyurl.com/457cj83d. As digital products and services are typically offered online, U.S. corporations would face pressure to limit their offerings as compared to their foreign competitors for fear of liability for the product's misuse by a foreign customer.

According to one empirical study, this distinction has already resulted in practical consequences. *See* Darin Christensen & David K. Hausman, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J. L. ECON. & ORG. 794, 794-815 (2016). In that study, the authors specifically examined "*Kiobel*'s different

implications for foreign and domestic firms to estimate its economic effects." The authors found that extractive industry firms with headquarters abroad experienced larger cumulative abnormal returns following *Kiobel*. By contrast, similar U.S.-based firms—which generally remain subject to ATS liability—did not benefit from the decision. The study therefore confirms that U.S. corporations already face a measurable competitive disadvantage when compared against foreign corporations—a disadvantage that will only be compounded if the broad expansion of ATS liability under the Ninth's Circuit's decision is permitted to stand.

C. The Ninth Circuit's Decision Amplifies the Financial and Reputational Harm to U.S. Businesses, Which Have Increasingly Become Targets of ATS Plaintiffs.

The recent increase in ATS claims against corporations has inflicted enormous and unjustifiable financial and reputational harm to U.S. businesses, and the Ninth Circuit's expansion of ATS liability threatens to exacerbate this concerning trend.

The history of ATS litigation clearly demonstrates the extraordinary burden imposed on corporate defendants by such claims. This case, which was filed in 2011, remains at the pleadings stage nearly 15 years later, and is emblematic of the lengthy and laborious process of defending ATS claims, which have been notoriously difficult for courts to handle and have frequently taken over a decade to resolve. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 141

(2014) (rejecting claims for lack of jurisdiction after this Court reversed the Ninth Circuit's expansive jurisdictional holding after 10 years of litigation); *Mujica v. AirScan Inc.*, 771 F.3d 580, 593 (9th Cir. 2014) (rejecting ATS claims after 11 years of litigation); *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013) (rejecting ATS claims after 13 years of litigation); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010) (rejecting ATS claims after 11 years of litigation).

This trend has persisted in recent cases notwithstanding this Court's decisions limiting the scope of the ATS. For example, in *Doe v. Nestle*, it took nearly 16 years between the filing of the complaint and this Court's decision holding that plaintiffs sought an impermissible extraterritorial application of the ATS, with the case never having proceeded past the pleadings stage. *Id.* at 1933; *see also Doe v. Exxon Mobil Corp.*, 391 F. Supp. 3d 76, 93 (D.D.C. 2019) (rejecting ATS claims after 18 years of litigation). The Ninth Circuit's recognition of a cause of action for accessorial liability under the ATS will only magnify the already extraordinary costs and delays of ATS litigation. Even if claims are ultimately unsuccessful, discovery multiplies the costs and extends the length of proceedings. And particularly where claims are based on aiding-and-abetting liability, the court's inquiry into the merits of the claim will inevitably involve assessing evidence of the conduct of the primary tortfeasor, which in ATS cases will almost always be based abroad. As a result, document production and depositions will necessarily target evidence and witnesses located abroad, in this case

involving the Chinese government and its officials. Under such circumstances, litigants must seek discovery—assuming discovery is even possible to obtain—through letters rogatory, a notoriously slow and unpredictable process, *see* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1025 (5th ed. 2011). Responses to letters rogatory might arrive—if they ever arrive at all—only after months or even years of waiting. *See Tiffany (NJ) LLC v. Forbse*, No. 11-cv-4976-NRB, 2012 WL 1918866, at *10 (S.D.N.Y. May 23, 2012), *aff'd in part, vacated in part on other grounds sub nom.*, *Tiffany (NJ) LLC, Tiffany & Co. v. China Merchants Bank*, 589 F. App'x 550 (2d Cir. 2014), as amended (Sept. 23, 2014) (ordering plaintiff to direct its discovery requests to two Chinese banks through the Hague Convention).

Therefore, even unmeritorious claims are, and under the Ninth Circuit's decision will continue to be, exceedingly costly and lengthy. The cost and length of ATS litigation involving aiding-and-abetting theories is exacerbated by involvement in these cases of foreign conduct (which creates enormous challenges in obtaining discovery, as discussed above), the generous 10-year statute of limitations for ATS claims, and the complexity of the jurisdictional, merits, and damages issues involved. All of the ATS claims discussed above were ultimately dismissed, but not before the defendants were forced to spend considerable resources and to endure, in each of those cases, over a decade of litigation. And in fact, the litigation costs, which are enormous in these cases, do not even begin to account for the costs imposed on

U.S. companies in terms of resources that litigation diverts from research and development and other productive activities that could potentially lead to innovation and job creation.

What is more, because ATS claims seek to hold corporate defendants liable for grave international law violations, such as human rights abuses, defendants suffer substantial reputational damages simply by being named as defendants in these cases. Regardless of the merits or outcome of the case, these reputational harms can be difficult to remedy, even if the claims are ultimately dismissed. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 L. & SOC'Y REV. 271, 290-91 (2009) (noting activist organization's observation that defendant corporation's "preoccupation with defending its Burmese investments to shareholders indicated the importance of negative publicity from the case").

The threat of costly and protracted litigation, combined with the risk of reputational damage associated with allegations of serious human rights violations, impose significant settlement pressure on U.S. corporate defendants. Plaintiffs' lawyers have openly taken advantage of such pressures to bring actions against, and to extract settlements from, "deep pocket" corporations. *See id.*; *see also Khulumani*, 504 F.3d at 295 (Korman, J., concurring in part and dissenting in part) (describing the South Africa apartheid litigation as "a vehicle to coerce a settlement").

In fact, in many cases, drawing negative attention to corporate defendants is clearly the goal of the litigation. In one case, plaintiffs sued a U.S. beverage company, alleging that it was complicit in human rights violations in Colombia. *See* Complaint, *Sinaltrainal v. Coca-Cola Co.*, No. 01-3208 (S.D. Fla. July 20, 2001). According to one of plaintiffs' counsel in that case, the plaintiffs were "not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media." Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts* (April 25, 2002).

In some cases, these coercive litigation tactics have ultimately proven successful in securing large settlements. *See, e.g.*, Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 809-10 (2005) (discussing $30 million settlement). By expanding the ATS to cover accessorial-liability claims, the Ninth Circuit's decision only increases the likelihood that plaintiffs' lawyers will continue to follow this playbook to target U.S. corporations' reputations as a means of extracting large settlements.

Put simply, these cases show that the longer plaintiffs can avoid dismissal, the stronger the "in terrorem increment of the settlement value." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). Notwithstanding this Court's rulings restricting the scope of the ATS, as Petitioners have observed, plaintiffs have found new ways to plead around this Court's limitations—for example, by converting their allegations of foreign human rights violations to

allegations of domestic conduct to circumvent this Court's extraterritoriality holdings in *Nestle* and *Kiobel*. Petition at 23. The Ninth Circuit's expansion of the scope of ATS to include aiding-and-abetting claims will therefore give opportunistic plaintiffs even more latitude to creatively plead their cases to avoid dismissal, thus exposing U.S. businesses with foreign operations to extraordinary and unjustifiable litigation costs and reputational damage.

II. The Same Practical Consequences and Concerns Extend to Expanded Liability Under the TVPA

Amici further agree with Petitioners that this Court should grant certiorari to correct the Ninth Circuit's erroneous decision that the TVPA implicitly authorizes aiding-and-abetting claims.

As Petitioners aptly note, it is "not uncommon for plaintiffs to assert ATS and TVPA claims together" based on the same underlying facts, Petition at 32 (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1269 (11th Cir. 2009))—as plaintiffs have done in this case by naming a highly regarded former CEO of a U.S. corporation as a defendant.

Amici do not repeat all of Petitioners' persuasive arguments here but instead simply observe that many of the same concerns raised above regarding the practical impact and the international repercussions of recognizing accessorial liability under the ATS apply equally to the TVPA. Indeed, exposing all senior executives of U.S. corporations that conduct business abroad to potential accessorial liability for actions

taken by foreign actors will have an enormous chilling effect on U.S. commerce abroad.

Amici further echo Petitioners' well-reasoned concern that by opening the door to accessorial liability under the TVPA, plaintiffs could easily circumvent the limits on ATS liability imposed by this Court's recent decisions by simply re-pleading the same claims against corporate executives that would be barred against the company. *Amici* therefore agree with Petitioners that it is sensible for this Court to review both issues in tandem.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ILANA H. EISENSTEIN
Counsel of Record
DLA PIPER LLP (US)
1650 Market Street, Suite 5000
Philadelphia, PA 19103
(215) 656-3300
ilana.eisenstein@dlapiper.com

JAMES E. BERGER
CHARLENE C. SUN
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, NY 10020

BEN C. FABENS-LASSEN
DLA PIPER LLP (US)
2000 Avenue of the Stars, Suite 400
Los Angeles, CA 90067

JOSHUA S. WAN
DLA PIPER SINGAPORE PTE. LTD.
80 RAFFLES PLACE
UOB Plaza 1, #48-01
Singapore, 048624

JONATHAN URICK
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, SW
Washington, DC 20024

DREW HUDSON
TECHNET
1420 New York Avenue, NW
Suite 825
Washington, DC 20005

ERICA KLENICKI
MICHAEL TILGHMAN II
NAM LEGAL CENTER
733 10th Street, NW
Suite 700
Washington, DC 20001

Counsel for Amici Curiae

March 13, 2025