NO. 10-1491

In the
Supreme Court of the United States

ESTHER KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* BP AMERICA, CATERPILLAR, CONOCO PHILLIPS, GENERAL ELECTRIC, HONEYWELL, INTERNATIONAL BUSINESS MACHINES, AND MONSANTO IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are corporations that have extensive operations around the world.[1] BP America, Inc. (on behalf of the global group of BP companies), Caterpillar, Inc., ConocoPhillips Company, General Electric Company, Honeywell International Inc., International Business Machines Corporation, and Monsanto Company are industry leaders in various business sectors, including energy, construction, agriculture, transportation, health care, and information technology.

Amici strongly condemn human rights violations and abide by detailed corporate social responsibility policies. Yet many *amici* have been and may continue to be defendants in suits predicated on expansive theories of liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, based on their operations—or, more often, those of their affiliates—in developing countries. Those suits impose severe litigation and reputational costs on corporations that operate in developing countries and chill further investment. *Amici* have a strong interest in ensuring that the ATS is applied in an appropriately circumscribed manner, consistent with its text and original purpose.

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[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The question on which this Court requested supplemental briefing—whether and under what circumstances the ATS applies to extraterritorial conduct—goes to the very heart of what has gone wrong with the ATS regime over the last 30 years.

Congress enacted the ATS in 1789 to achieve a rather modest goal—namely, easing diplomatic tension with other countries by ensuring that aliens injured in the United States (or on the high seas) would not be left without a judicial remedy. From those humble, friction-reducing origins, the ATS has been transformed into a roving mandate for federal courts to adjudicate alleged torts that occur all around the world and have no connection whatsoever to the United States. Far from reducing diplomatic tension, this extraterritorial projection of the ATS has prompted complaints from our closest allies as United States courts stand in judgment of the actions of foreign governments on foreign soil, in contravention of this Court's longstanding and oft-repeated proscription on such interference.

The resulting diplomatic friction would be regrettable, but unavoidable, if the extraterritorial application of the ATS were the considered and clearly articulated policy choice of Congress, but that is manifestly not the case. The ATS contains no indication at all—much less the *clear* indication required by this Court's precedents—that Congress intended the statute to apply extraterritorially. As a jurisdictional statute that requires courts to infer causes of action, the ATS falls far short of the

requisite clear indication that Congress intended to regulate conduct on foreign soil.

The United States and a number of *amici* insist that any limits on the extraterritorial scope of the ATS should apply only to foreign corporate defendants, and not to claims against U.S. citizens. But the relevant inquiry turns on the locus of the alleged injury, not the nationality of the defendant. For that reason, this Court has repeatedly applied the presumption against extraterritoriality in cases where U.S. corporations were defendants. A holding limited to foreign corporations would do nothing to eliminate the diplomatic friction caused by ATS claims that implicate the conduct or sovereign prerogatives of a foreign government. Nor would it alleviate the chill on investment abroad caused by ATS suits.

The plaintiffs' claims should also be dismissed for the separate and independent reason that the ATS does not confer jurisdiction over claims involving civil aiding and abetting liability. As with extraterritoriality, a cause of action for civil aiding and abetting liability is not cognizable unless *Congress* has clearly indicated its intent to create such liability. Such indications are utterly absent here. The fact that various sources of international law provide for *criminal* aiding and abetting liability is irrelevant. Congress has provided for aiding and abetting liability in the criminal sphere, but that cannot support the creation of an inferred right of action for *civil* aiding and abetting liability.

* * *

This Court in *Sosa* attempted to rein in ATS claims on a case-by-case basis by instructing lower courts to proceed with "great caution" before recognizing a federal common law right of action under the ATS. Unfortunately, the lower courts have disregarded that mandate, and have allowed ever-more-ambitious ATS claims to survive motions to dismiss. The result has been a steady stream of diplomatic complaints, as myriad countries—including staunch U.S. allies—object to the adjudication of matters that intrude upon their sovereignty and have no business being litigated in U.S. courts. It is now time for clear rules and sharp lines. Well-established precedents of this Court provide the basis for two clear lines: absent the kind of clear indications of congressional intent that are lacking here, the ATS neither applies to alleged injuries that occurred on foreign soil nor provides for civil aiding and abetting liability.

ARGUMENT

I. APPLYING THE ATS TO ALLEGED OFFENSES COMMITTED IN OTHER COUNTRIES CONTRAVENES THE ATS' ORIGINAL PURPOSE OF MINIMIZING DIPLOMATIC CONFLICTS

In a brief filed with this Court in February 2012, *amici curiae* described in detail the diplomatic friction caused by lower courts' unrestrained,

worldwide exercise of jurisdiction under the ATS.[2] Briefs subsequently filed by the United States, the United Kingdom, Germany, and the Netherlands confirm that the extraterritorial application of the ATS is the root cause of that diplomatic tension. Limiting the reach of the ATS to alleged injuries that occur in the United States or on the high seas would provide much-needed clarity to lower courts, and would "ensure that ATS litigation does not undermine the very harmony [among nations] that it was intended to promote." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

A. This Court in *Sosa* emphasized the need for "great caution" and restraint before expanding the reach of the ATS, in order to avoid "adverse foreign policy consequences" for the United States. 542 U.S. at 727-28. Unfortunately, lower courts largely have ignored this Court's admonition of restraint and have thereby precipitated the very diplomatic friction the ATS and *Sosa* sought to avoid.

In the past decade, the governments of Australia, Canada, China, Colombia, El Salvador, Germany, Indonesia, Israel, Papua New Guinea, Nigeria, South Africa, Switzerland, and the United Kingdom have objected formally to the extraterritorial application of the ATS, including in cases involving

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[2] *See* Br. of Amici Curiae BP America *et al.*, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012). Monsanto joins *amici* in this Supplemental Brief.

amici as defendants.[3] And the list of foreign government protests continues to grow. In a brief recently filed in this case, Germany explained that extraterritorial "assertions of jurisdiction are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries." Ger. Br. 2. Such interference, Germany noted, "is unacceptable." *Id.* at 10. Likewise, the governments of the United Kingdom and the Netherlands "remain deeply concerned about the failure by some U.S. courts to take account of the jurisdictional constraints under international law when construing the ATS"—a failure that "create[s] a substantial risk of jurisdictional and diplomatic conflict." U.K. Supp. Br. 2, 3.

The United States, for its part, initially avoided discussing the diplomatic friction caused by modern ATS jurisprudence. U.S. Br. 6. However, in response to the Court's call for supplemental briefing on the issue of extraterritoriality, the United States acknowledged that "ATS suits have often triggered foreign government protests," including in this case from the government of Nigeria. U.S. Supp. Br. 17-18. Indeed, it is the "*inherent* potential to provoke international friction," the United States explained, that counsels dismissal of this case. *Id.* at 18 (emphasis added).

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[3] A partial compilation of publicly available government objections is available at http://www.courtappendix.com/kiobel/protests.

B. Diplomatic protests in ATS cases generally stem from three distinct, but often overlapping, aspects of modern ATS litigation.

First, ATS suits frequently impugn the actions of foreign sovereigns by accusing private actors of aiding and abetting the wrongful acts of a foreign government. Following this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that the ATS does not provide jurisdiction over foreign states, ATS plaintiffs have targeted "corporations as proxies for what are essentially attacks on [foreign] government policy." Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 102, 107. These attempts to condemn a foreign government's sovereign acts within its own territory have prompted vigorous objections from numerous countries, including China, Colombia, Indonesia, Israel, South Africa, and Nigeria.

In light of these and other diplomatic protests, the United States in 2008 asked this Court to end ATS suits that "challeng[e] the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments." Br. for the United States as Amicus Curiae at 5, *Am. Isuzu Motors v. Ntsebeza*, No. 07-919, 2008 WL 408389 (Feb. 11, 2008) ("U.S. *Ntsebeza* Br."). "Such lawsuits," the United States explained, "inevitably create tension between the United States and foreign nations." *Id.*

Second, the extraterritorial application of the ATS disrupts the ability and responsibility of other sovereigns to redress wrongful acts committed in their own territory as they see fit. For instance, plaintiffs have filed ATS suits to second-guess foreign nations' reconciliation measures, including decisions to grant amnesty. El Salvador, South Africa, and Colombia have all objected to ATS suits as an infringement of their rights to resolve territorial disputes. *See also* U.K. Supp. Br. 6 (extraterritorial ATS jurisdiction "interfere[s] with and complicate[s] efforts within the territorial State to remedy human rights abuses that may have occurred within its own territory").

Third, foreign governments have objected to ATS suits that attempt to regulate the conduct of their nationals outside the United States. Australia, Canada, Germany, the Netherlands, Switzerland, and the United Kingdom have each filed diplomatic protests to ATS suits in which claims were brought against their nationals for activity that occurred in other countries.

Some ATS cases, like this one, are brought by foreign plaintiffs against foreign corporations for aiding the acts of foreign governments in their own territories, and thus combine all three sources of diplomatic objections. The United States acknowledges that such cases are not permissible under the ATS. *See* U.S. Supp. Br. 21. However, it is clear that the root cause for protests in each of these categories is the misguided expansion of the ATS to adjudicate alleged misconduct occurring within the territory of other countries. "The risk of conflict with another sovereign nation is much less

likely where the U.S. is providing an ATS remedy for those injured by acts committed by individuals on U.S. soil (whether wholly or partially)." U.K. Supp. Br. 11.

These diplomatic protests will not abate if extraterritorial application of the ATS were limited to American corporations. Foreign governments will continue to object to suits that impugn their own conduct or that usurp their right to resolve wrongs committed within their territory. The sovereign infringements in such cases—like the doctrinal objections to extraterritoriality, *see infra* Part II.B—have nothing to do with the defendant's nationality.

C. The diplomatic friction that has become a hallmark of modern ATS litigation is contrary to the ATS' purpose of avoiding conflicts with foreign countries. In enacting the ATS, Congress provided a remedy in U.S. courts for international law violations for which the United States could be held responsible if it did not offer a forum for redress—namely, serious infractions of international law that occur within the United States. *See Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1099 (D.C. Cir. 2011) (Williams, J., concurring) (The ATS was meant to "ensure adequate 'vindication of the law of nations,'" caused by "incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system."). The exercise of jurisdiction over acts that occur in the sovereign territory of other countries, in contrast, jeopardizes the United States' relations with other governments. *See* Br. of United States as Amicus Curiae at 12, *Sarei v. Rio Tinto*, Nos. 02-56256 *et al.* (9th Cir. Sept. 28, 2006) ("[R]ecognition of [extraterritorial]

claims would directly conflict with Congress' purpose in enacting the ATS, which was to reduce diplomatic conflicts.").

As this Court has long recognized, the judicial branch should seek to avoid, whenever possible, disputes that might "imperil the amicable relations between governments and vex the peace of nations." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918). To this end, the Executive Branch has for many years discouraged the extraterritorial expansion of the ATS, criticizing the lower courts' disregard for the "serious risks to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy." U.S. *Ntsebeza* Br. 18.

To be sure, U.S. courts may sometimes be called upon by statute to resolve disputes over heinous acts committed abroad, notwithstanding the potential for adverse diplomatic consequences. However, the decision to embroil the United States in diplomatically sensitive disputes should not be made by the judiciary in the first instance. That responsibility remains with the Legislative and Executive branches, which are constitutionally tasked with conducting our nation's foreign affairs. As demonstrated by the Torture Victim Protection Act, P.L. 102-256, 106 Stat. 73 (1992), the political branches can and will open U.S. courts to human rights causes in appropriate cases—but they will do so explicitly, and in a carefully circumscribed manner.

II. THE ATS DOES NOT APPLY TO CONDUCT IN OTHER COUNTRIES

Nothing in the text, purpose, or history of the ATS comes close to rebutting the well-established presumption against extraterritorial application of federal statutes. The ATS was carefully crafted to provide a remedy for aliens injured on U.S. soil or the high seas, and has no application whatsoever to injuries suffered by foreign citizens that occurred in a foreign nation, often as a result of a foreign government's alleged misconduct.

A. The Presumption Against Extraterritorial Application of Federal Law Applies with Full Force to the ATS

1. Congress "ordinarily legislates with respect to domestic, not foreign matters." *Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2877 (2010). And, while Congress unquestionably has "the authority to enforce its laws beyond the territorial boundaries of the United States," whether it has done so "is a matter of statutory construction." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). Since the early 1800s, this Court has applied a presumption against extraterritorial application of federal law, holding that "the legislation of every country is territorial," and that "the pacific rights of sovereignty must be exercised within the territory of the sovereign." *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808).

It is thus well established that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco*, 499 U.S. at 248 (quoting

Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)). While this presumption is as old as the Republic, this Court recently has been particularly emphatic in applying it: when a statute "gives no *clear indication* of an extraterritorial application, it has none." *Morrison*, 130 S. Ct. at 2878 (emphasis added).[4]

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." 28 U.S.C. § 1350. Nothing in this one sentence of text gives any indication—let alone a clear one—that the statute extends to conduct on foreign soil.

The references to "aliens" and the "law of nations" are plainly insufficient to rebut the presumption against extraterritoriality.[5] Millions of

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[4] When Congress *does* intend for a statute to apply extraterritorially, it speaks clearly and generally takes this unusual step in a targeted and limited manner. *See* 15 U.S.C. § 78dd-2(i)(1) (prohibiting foreign companies listed on an American stock exchange from "corruptly do[ing] any act *outside the United States* in furtherance" of the bribery of a foreign official) (emphasis added); P.L. 102-256, § 2(a) (1992), *codified at* 28 U.S.C. § 1350 note (granting jurisdiction over claims for torture and extrajudicial killing that were committed "under actual or apparent authority, or color of law, of any foreign nation," but providing various limiting rules, including an exhaustion requirement).

[5] *See*, *e.g.*, *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 19 (1963) (finding the NLRA's reference to "foreign" commerce to be insufficiently "specific" to rebut the presumption); *New York Central Railroad v. Chisholm*, 268 U.S. 29, 31 (1925) (holding

aliens live within and visit the United States, and those individuals can suffer torts in violation of the law of nations while present here. Congress may have chosen the word "alien" in order to *require* that an ATS plaintiff have a nexus to the United States. *See* Black's Law Dictionary (9th ed. 2009) (defining "alien" as "[a] person who resides *within the borders of a country* but is not a citizen or subject of that country" (emphasis added)). Indeed, it was unremedied violations of international law occurring *within the United States* that led Congress to enact the ATS in 1789. *See Sosa*, 542 U.S. at 716-17; *John Doe VIII v. ExxonMobil*, 654 F.3d 11, 76-77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

2. Petitioners seek to escape the presumption against extraterritoriality by arguing that this rule applies only to "substantive" proscriptions, and not to jurisdictional statutes such as the ATS. *See* Pet. Supp. Br. 34-35. That effort to convert a weakness into strength is flawed on several levels.

It is unsurprising that Petitioners cite no authority in support of their argument, as there is none. This Court has applied the presumption against extraterritoriality numerous times, and has never once suggested that the rule is limited to "substantive" enactments. To the contrary, the Court has made clear that the presumption applies in "*all cases*," in order to "preserv[e] a stable background against which Congress can legislate

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that FELA does not extend to torts that occurred in Canada, even though it applies to "interstate or foreign commerce").

with predictable effects." *Morrison*, 130 S. Ct. at 2881 (emphasis added).

If anything, the presumption against extraterritoriality should apply *a fortiori* to jurisdictional statutes that do not provide any substantive law, let alone clearly direct that law to apply extraterritorially. Such a jurisdictional statute is at least two steps removed from the requisite clear indication that Congress has considered and weighed the implications of extending our laws to foreign soil.

An artificial distinction between "jurisdictional" and "substantive" statutes would be flatly inconsistent with the core purpose of the presumption against extraterritoriality—namely, "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248; *see also F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 164 (2004) (the Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations"); *Sosa*, 542 U.S. at 727-28. In the ATS context, this diplomatic friction arises not from the label placed on the statute, but from the fact that federal courts are adjudicating disputes that arose in foreign countries and often involve the conduct of foreign governments. *See supra* Part I.

The fact that any claim under the ATS must arise under a judge-made inferred cause of action further weakens the case for extraterritorial application. *See Sosa*, 542 U.S. at 732 (noting that ATS claims must arise "under federal common law"). Inferred

rights of action are always frowned upon, *see Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), and should be doubly disfavored when they also implicate sensitive foreign policy issues, *see Sosa*, 542 U.S. at 727 (emphasizing that "the possible collateral consequences of making international rules privately actionable argue for judicial caution"). It is difficult enough for courts to fill in the gaps—such as statutes of limitations and contribution rules—when it comes to a judicially inferred domestic cause of action. *See*, *e.g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354-62 (1991) (inferring a uniform federal statute of limitations for Rule 10b-5 actions despite substantial circuit precedent borrowing state-law rules). But courts simply have no tools to infer the kind of exhaustion rules or other limitations that Congress has imposed to minimize diplomatic friction on the rare occasions it has expressly applied causes of action to foreign conduct.

Finally, the jurisdictional nature of the ATS hardly means that it should be applied in the broadest manner constitutionally permissible. Quite the opposite. This Court has long "adhered to a policy of construing jurisdictional statutes narrowly." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 408 (1959); *see also Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction."). The Court has thus interpreted 28 U.S.C. § 1331 as requiring a well-pleaded federal claim on the face of the plaintiff's complaint, even though the almost-identically worded constitutional grant of

jurisdiction has been construed to sweep more broadly and reach any case in which a federal claim is an "ingredient" of the action. *See Louisville & N.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824).

This Court has also refused to adopt expansive interpretations of jurisdictional grants where doing so would interfere with an important countervailing interest. For example, the Court has held that a "strict construction" of the removal statute is needed to avoid undue interference with the jurisdiction of state courts. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Here, too, in light of the significant potential for diplomatic friction, the Court should not presume from congressional silence that the ATS grants federal courts sweeping jurisdiction to adjudicate controversies that arise all around the world and have nothing more than a tangential connection to the United States.

B. The Extraterritorial Reach of the ATS Should Not Turn on the Nationality of the Defendant

Any holding about the extraterritorial reach of the ATS should apply with full force to claims against U.S. corporations. The presumption against extraterritoriality turns on the locus of the alleged injury, not on the nationality of the defendants, and this Court has applied the presumption in many cases where U.S. corporations were defendants. The United States and a number of other *amici* nonetheless argue that any holding about the extraterritorial scope of the ATS should be limited to foreign corporations, and that "[t]he Court need not

decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation." U.S. Supp. Br. 21; *see also* Supp. Br. of Genocide Victims of Krajina 11 ("to hold United States law inapplicable to the conduct of United States nationals outside the United States would violate the doctrine of nationality jurisdiction"). This Court should reject these attempts to carve out claims against U.S. corporations from a broader holding about the extraterritorial reach of the ATS.

1. This Court has repeatedly applied the presumption against extraterritoriality in cases where U.S. citizens were defendants. In each case, the critical inquiry was not the nationality of the defendant, but the location where the alleged injury occurred. For example, in *New York Central Railroad v. Chisholm*, 268 U.S. 29 (1925), the decidedly domestic railroad was involved in an accident in Canada, just 30 miles from the U.S. border. Even though *both* the plaintiff and the defendant were U.S. citizens, this Court held unanimously that the injured worker could not bring a FELA claim because the statute "contains no words which definitively disclose an intention to give it extraterritorial effect." *Id.* at 31.

Similarly, in *Aramco*, the Court concluded that Title VII should not be construed to reach claims against "two Delaware corporations" for alleged discrimination that occurred in Saudi Arabia. *Aramco*, 499 U.S. at 247-49. Once again, the citizenship of the defendant was irrelevant to the analysis. The presumption against extraterritoriality is a rule about likely congressional

intent. It reflects the reality that extending United States law to foreign soil raises diplomatic concerns and is disfavored, without regard to the nationality of the parties. It is not prompted by concerns about fairness to foreign defendants. Thus, the sole inquiry is whether there was an "affirmative intention of the Congress, clearly expressed" to give the statute extraterritorial effect. *Id.* at 248; *see also Morrison*, 130 S. Ct. at 2875, 2884-85 (applying presumption in case where defendants included executives of a U.S. mortgage servicing company). Given the focus on likely congressional intent, it seems particularly unlikely that Congress would want to disfavor U.S.-based defendants, as opposed to perhaps providing a special cause of action for U.S.-based plaintiffs. But, in all events, such considerations are clearly for Congress and governed by a clear statement rule that turns on the locus of the injury, not the nationality of the parties.

2. Moreover, any distinction between U.S. and foreign corporations would simply invite ATS plaintiffs to ignore corporate structures and plead around the limits on the extraterritorial reach of the statute. In particular, if the acts in question involve extraterritorial conduct by a foreign subsidiary of a U.S. corporation, plaintiffs will surely attempt to bring "headquarters," "alter ego," or agency claims against the parent corporation. The Ninth Circuit has explicitly endorsed this theory of ATS liability, holding that Unocal—an American corporation—could be held liable for its subsidiaries' actions in Burma. *See Doe v. Unocal*, 395 F.3d 932, 953 n.30 (9th Cir. 2002) (finding that the foreign subsidiaries were "alter egos" of the U.S. corporation and that

their actions were "attributable" to the parent); *see also Bauman v. DaimlerChrysler*, 644 F.3d 909 (9th Cir. 2011), *cert pending* No. 11-965 (finding ATS jurisdiction over the German company Daimler AG for alleged torts committed by its South American subsidiary based on the presence of a *different* subsidiary in California).

This Court has rejected similar maneuvers in the past, and it should do so again here. For example, the Federal Tort Claims Act contains an exception to the government's waiver of sovereign immunity for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). In *Sosa*, the plaintiff's primary claim involved an alleged false arrest by DEA agents in Mexico, which was clearly barred by the FTCA exception. 542 U.S. at 700-01. The plaintiff nonetheless invoked the so-called "headquarters doctrine," and sought to bring claims against the United States for "acts of planning and direction by DEA agents located in California." *Id.* at 702.

The Court emphasized that "this sort of headquarters analysis flashes the yellow caution light," because virtually any claim that arises in a foreign country can be "repackaged as [a] headquarters claim[] based on a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy." *Id.* The Court squarely rejected the headquarters doctrine because allowing it would "threaten[] to swallow the foreign country exception whole, certainly at the pleadings stage." *Id.* at 703.

Just so here. The focus of the extraterritoriality inquiry must remain on the locus of where the

alleged injury was suffered, not on corporate nationality. A contrary rule would open U.S. corporations to suits based on actions of subsidiaries around the globe. As then-Judge Scalia has explained, "it will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection, or supervision—or even less than that, lack of careful training, selection, or supervision—in the United States." *Beattie v. United States*, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting). Justice Ginsburg has similarly emphasized that there is "good reason to resist the headquarters doctrine," which would "risk[] swallowing up the foreign-country exception" to the FTCA. *Sosa*, 542 U.S. at 758 (Ginsburg, J. concurring in part and concurring in the judgment). The Court should accordingly hold that the ATS does not reach *any* alleged injuries suffered within the territory of a foreign nation, regardless of the nationality of the defendant.

3. A carve-out for U.S. defendants would also do nothing to alleviate the primary source of diplomatic friction arising from ATS litigation: claims that turn on alleged misconduct by a foreign government. As this Court has explained, "[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Sosa*, 542 U.S. at 727.

Nearly all ATS claims against corporations (foreign or domestic) allege exactly that. The Second Circuit has allowed ATS claims to proceed against dozens of major U.S. corporations for allegedly aiding and abetting the South African apartheid regime—even though *both* the United States government and the South African government argued that these claims interfere with South Africa's sovereignty and reconciliation process. *See Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007), *affirmed by an equally divided Court lacking a quorum*, *American Isuzu Motors v. Ntsebeza*, 553 U.S. 1028 (2008).[6]

Other examples abound. The plaintiffs in *Doe v. ExxonMobil* allege that Exxon's subsidiaries hired members of the Indonesian army as security forces, and that those soldiers subsequently committed human rights abuses. 654 F.3d 11 (D.C. Cir. 2011). And the plaintiffs in the *Unocal* case alleged that the Myanmar military committed human rights abuses while providing security for a subsidiary of a U.S. oil

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[6] In the South Africa case, the United States argued that the Second Circuit's decision allowing the plaintiffs' claims to proceed was "a dramatic expansion of U.S. law that is inconsistent with well-established presumptions that Congress does not intend to authorize civil aiding and abetting liability or extend U.S. law extraterritorially." U.S. *Ntsebeza* Br. 5. Now, however, the United States "urges the Court not to adopt such a categorical rule." U.S. Supp. Br. 21-22 n.11. That change of position is surprising, given that the only material intervening development since 2008 was this Court's decision in *Morrison*—which only underscores that the ATS should not be interpreted to apply extraterritorially.

company. *See* 395 F.3d at 937-38. Even though the defendants in each of these cases include U.S. corporations, adjudication of these claims would require a federal court to sit in judgment of the actions of a foreign government within its own territory.

4. ATS litigation involving extraterritorial conduct also poses severe logistical difficulties, regardless of whether the defendant is a foreign corporation or a U.S. corporation. The discovery process, for example, is costly, time-consuming, and complicated under the best of circumstances. Those inherent difficulties are greatly magnified when the requested discovery involves actions that occurred in a country halfway around the world. Many key witnesses will be government or military officials, who may assert immunity from suit or refuse to cooperate altogether. Documents written in foreign languages will need to be reviewed and translated. Subpoenas and other compulsory process may not be available in foreign courts. And even threshold jurisdictional issues may take years to resolve. As a result, many corporations—both U.S. and foreign—end up settling dubious ATS claims rather than face the prospect of years of expensive and complicated transnational discovery.

Finally, a holding limited to foreign corporations would do nothing to address another problem that arises from extraterritorial application of the ATS—namely, deterrence of foreign investment by U.S. corporations. *See* Chamber of Commerce Br. 14-29. Under the expansive theories of ATS liability that have been condoned by the lower courts, any company that does business in a developing

country—or even has a supply chain that reaches into such a country—will face a serious risk of being sued under the ATS. *Id.* at 22-24. Moreover, it is highly implausible that Congress would have created a scheme in which U.S. corporations could incur substantial liability for alleged extraterritorial torts while foreign corporations were immune from such claims. Congressional intent is always the touchstone, *see Morrison*, 130 S. Ct. at 2877, and a rule that asymmetrically burdens U.S. corporations vis-à-vis their foreign competitors would seem to reflect highly dubious assumptions about Congress' intent.

* * *

In sum, any holding about the extraterritorial scope of the ATS that does not extend to U.S. corporations would do little to resolve the many problems that have been spawned by aggressive ATS litigation over the last three decades. Cases involving alleged misconduct that took place in a faraway country, often at the hands of a foreign government, simply do not belong in U.S. courts, regardless of the nationality of the defendants.

C. International Law Does Not Require the United States To Exercise Jurisdiction over U.S. Citizens' Extraterritorial Torts

Several of Petitioners' *amici* presume that ATS suits against U.S. defendants for conduct occurring in other countries would not violate international law because a State may exercise general jurisdiction over its nationals anywhere in the world. But this is an incomplete description of international law's jurisdictional limits.

"[T]he sufficiency of grounds for jurisdiction is an issue normally considered relative to the rights of other states and not as a question of basic competence." Sir Ian Brownlie, Principles of Public International Law 297-98 (6th ed. 2003). In other words, even if the exercise of jurisdiction over U.S. nationals for overseas conduct ordinarily is permissible, the United States "should defer to [another] state if that state's interest is clearly greater." Restatement (Third) of Foreign Relations Law § 403(3) (1987); *id*. cmt. a (observing that a defendant's nationality is "not in all instances sufficient … for the exercise of such jurisdiction"). As a result, the United States can "govern[] the conduct of its own citizens upon the high seas or even in foreign countries," but only "when the rights of other nations or their nationals are not infringed." *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941).

Conflicts can arise when multiple countries have concurrent jurisdictional interests implicated by the same conduct. To minimize the "practical inconvenience, and sometimes injustice, that can result" from competing claims to jurisdiction, "most states do not exercise to the full their right" to regulate the conduct of their nationals abroad. 1 Oppenheim's International Law 463 (9th ed. 1996). *See also* Lee A. Steven, *Genocide and the Duty to Extradite or Prosecute: Why the United States Is in Breach of Its International Obligations*, 39 Va. J. Int'l L. 425, 432-33 (1999) (Because "[t]he nationality principle is often in direct conflict with the territorial principle[,] … many states limit their exercise of jurisdiction on [the nationality] basis or defer to the state who has territorial jurisdiction."). Such self-

restraint shows respect for other countries' territorial sovereignty and ensures that the adjudicating state has a *bona fide* interest in the dispute.

When "good sense and reasonableness" are insufficient to resolve the jurisdictional conflict, the hierarchy of jurisdictional bases in international law determines the propriety of each State's exercise of jurisdiction. 1 Oppenheim's International Law at 463. In this regard, territoriality remains "the primary basis for jurisdiction," *id*. at 458, whereas "jurisdiction based upon nationality is properly regarded as subsidiary to the territorial jurisdiction of the State where the crime was committed." Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime: Draft Convention with Comment*, 29 Am. J. Int'l L. 435, 531 (Supp. 1935); *accord* Restatement (Third) § 402, cmt. b ("Territoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction."). Thus, "even if another state has a concurrent basis for jurisdiction, its right to exercise it is limited if to do so would conflict with the rights of the state having territorial jurisdiction." 1 Oppenheim's International Law at 463.

Based on these principles, the extraterritorial application of the ATS to the conduct of U.S. nationals abroad inevitably risks being "considered a violation of international law; states are supposed to respect each other's exclusive authority to regulate behavior within their territorial boundaries." *Developments in the Law: Extraterritoriality*, 124 Harv. L. Rev. 1226, 1280 (2011). Indeed, the usurpation of territorial jurisdiction has prompted

numerous objections from foreign governments, including in cases involving U.S. defendants. *See supra* Part I. As the governments of Australia and the United Kingdom recently explained, "the ATS creates differences with other sovereigns whose courts exercise civil jurisdiction on the primary basis recognized by international law—that is, territorial jurisdiction—and which are politically and legally responsible for dealing with a particular situation." Br. of Australia and United Kingdom as Amici Curiae at 10, *Rio Tinto v. Sarei*, No. 11-649 (Dec. 28, 2011).

A holding that the ATS does not reach alleged offenses committed within a foreign country would avoid the jurisdictional disputes that inevitably arise from worldwide application of the ATS. The decision to authorize lawsuits that inherently interfere with the territorial jurisdiction of other countries should be made, if at all, by Congress, which is not only in a better position to assess diplomatic consequences but also can ameliorate those consequences through exhaustion requirements and other devices.

D. This Court's Longstanding Refusal To Judge Other Governments' Sovereign Acts Supports a Territorial Limit on the ATS

The extraterritorial application of the ATS in this case, and most others, is incompatible with the Court's pronouncement in *Underhill v. Hernandez*, 168 U.S. 250 (1897), that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of

another, done within its own territory." *Id.* at 252. "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Oetjen*, 246 U.S. at 304 (internal quotation marks omitted). The Court has reaffirmed these principles more than a dozen times over the last century, and as recently as 2010 in *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010).[7]

From its inception, the rule prohibiting courts from judging the sovereign acts of foreign governments outside the United States was rooted in "'the highest considerations of international comity'" and "respect for the sovereignty of foreign nations." *W.S. Kirkpatrick*, 493 U.S. at 404, 408 (quoting *Oetjen*, 246 U.S. at 303-04). The rule is also "a consequence of domestic separation of powers," recognizing that the political branches—not the judicial branch—are responsible for our nation's foreign affairs. *Id.* at 404. Like the presumption against extraterritoriality, it "serves to protect against unintended clashes between our laws and

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[7] *See, e.g.*, *W.S. Kirkpatrick & Co. v. Env'l Tectonics Corp.*, 493 U.S. 400 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Shapleigh v. Mier*, 299 U.S. 469 (1937); *see also United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns.").

those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.[8]

The long-standing principle prohibiting judgment of other governments' sovereign acts supports limiting the extraterritorial scope of the ATS. As this Court warned in *Sosa*, federal courts should not "consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727.

Notwithstanding this Court's guidance, ATS lawsuits continue to have the effect—and often the express goal—of impugning the acts of foreign governments. Here, for example, "adjudication of the suit would necessarily entail a determination about whether the Nigerian Government or its agents have transgressed limits imposed by international law" with respect to events that occurred wholly within Nigeria. U.S. Supp. Br. 17. The sovereign disrespect inherent in judging another government's acts is the same regardless of the nationality of the alleged aider-and-abettor, and there is no principled reason to treat American defendants any differently from foreign defendants under this rule.

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[8] The Court's non-judgment principle in *Underhill* is now recognized as the foundational underpinning of the act of state doctrine. *Sabbatino*, 376 U.S. at 416. The act of state doctrine is "a substantive defense on the merits" that applies in addition to existing jurisdictional restraints. *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004).

The Founders surely did not intend the ATS to be used as a tool to "sit in judgment" of the foreign controversies of the era. The notion of the fledgling republic's courts adjudicating the human rights excesses of the French Revolution is simply absurd. But by extending the ATS to alleged offenses committed on foreign soil, some lower courts have invited suits impugning the sovereign acts of close allies (such as Colombia) and critical partners (such as China) for conduct wholly within those nations' territories. In contrast, limiting the ATS to injuries that occur within the territory of the United States or on the high seas would show proper "respect [for] the independence of every other sovereign state." *Underhill*, 168 U.S. at 252.

Petitioners contend that judicially crafted "case-specific doctrines" like the act of state doctrine are sufficient to address the mischief that results from the ATS' worldwide application. Pet. Supp. Br. 2. But as the Court noted in *Sosa*, "judicial rules of decision … such as the act of state doctrine" do not obviate the need "to look for legislative guidance before exercising innovative authority over substantive law." *Id.* at 726. Among the considerations that call for judicial caution before expanding the ATS, the Court listed the need to avoid suits "that would go so far as to claim a limit on the power of foreign governments." *Id.* at 727. The subsequent "Cf." cite to *Sabbatino* indicates that the Court recognized that the principles underlying the act of state doctrine separately justify "a high bar to new private causes of action for violating international law." *Id.* The availability of an affirmative defense certainly is no substitute for a

clear mandate from Congress authorizing the extraterritorial reach of the ATS.

III. PLAINTIFFS CANNOT STATE A CLAIM UNDER THE ATS FOR AIDING AND ABETTING LIABILITY

This Court should also affirm the judgment below on the alternative basis that the ATS does not support a common law cause of action for aiding and abetting liability. The United States has previously advanced that argument before this Court, *see* U.S. *Ntsebeza* Br. 8-11, although it has declined to take a position in its *amicus* brief in this case, *see* U.S. Supp. Br. 21 n.10.

Regardless, the scope of aiding and abetting liability is squarely encompassed within the supplemental question presented of "[w]hether *and under what circumstances*" the ATS allows courts to recognize a cause of action for extraterritorial conduct. Order of Mar. 5, 2012 (emphasis added). Even if the Court concludes that the ATS reaches some extraterritorial conduct, it should hold that this does not include aiding and abetting claims.

A. The creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor. This Court has thus emphasized that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182 (1994); *see also id.* ("Congress . . . has taken a statute-by-statute

approach to civil aiding and abetting liability"). Because Congress has been "quite explicit in imposing civil aiding and abetting liability"—and because any recognition of civil aiding and abetting liability is a "vast expansion of federal law"—courts may not recognize an aiding and abetting cause of action in the absence of "congressional direction to do so." *Id.* at 183. That rule applies with even greater force where, as here, the expansion of civil liability would raise significant "risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728.

The ATS' sparse text includes no "congressional direction" to federal courts to recognize civil aiding and abetting liability. As with the extraterritorial application of the statute, that should be the end of the matter. *See*, *e.g.*, *Freeman v. DirecTV*, 457 F.3d 1001, 1004-05 (9th Cir. 2006) (rejecting civil aiding and abetting liability under the Electronic Communications Privacy Act because the statute applied only to a "person or entity providing an electronic communication service," and did not mention secondary liability). Congress knows how to provide for civil aiding and abetting liability, but simply did not do so in the ATS.

Judge Hall has concluded that there is "no bar" to aiding and abetting liability under the ATS because there is "inconclusive evidence of Congress's intent to include or exclude aiding and abetting liability." *Khulumani*, 504 F.3d at 288 n.5 (Hall, J., concurring). But that analysis is exactly backwards. Under *Central Bank*, if the evidence of congressional intent is "inconclusive," the statute must be construed as excluding, not including, civil aiding and abetting liability.

Indeed, while Congress has enacted a general aiding and abetting statute applicable to all federal *criminal* offenses, *see* 2 U.S.C. § 2, it has not enacted any comparable provision in the civil context. That omission makes good sense. In the criminal context, prosecutorial discretion can help divide the sheep from the goats. But there are no comparable checks on private litigants' ability to bring civil aiding and abetting claims. *See Sosa*, 542 U.S. at 727 (judicial caution required because a private cause of action under the ATS "permit[s] enforcement without the check imposed by prosecutorial discretion"); *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008) (noting that, in the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78t(e), Congress "directed prosecution of aiders and abettors by the SEC," but did not provide for private civil liability).[9] Thus, the fact that some purported norms of international law recognize *criminal* aiding and abetting liability provides no support for inferring a private right of action for civil aiding and abetting.[10]

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[9] *See also* Br. of United States at 10, 26-30, *Stoneridge Inv. Partners v. Scientific-Atlanta*, No. 06-43, 2007 WL 2329639 (Aug. 15, 2007) (emphasizing that Congress struck a "careful and deliberate balance" by allowing the SEC, but not private litigants, to address aiders and abettors).

[10] In recognizing a cause of action for aiding and abetting under the ATS, the Second Circuit and D.C. Circuit relied exclusively (and mistakenly) on principles drawn from international criminal tribunals, such as the Nuremberg war crimes tribunals, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for

B. Even if the Court concludes that the ATS supports a cause of action for civil aiding and abetting liability, the Court should make clear that "the *mens rea* standard for aiding and abetting liability in ATS actions is *purpose* rather than knowledge alone." *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009) (emphasis added); *but see Doe VIII*, 654 F.3d at 39 (rejecting the Second Circuit's "purpose" standard in favor of a more-lenient "knowledge" standard).

As Judge Leval has explained, "for a complaint to properly allege a defendant's complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 188 (2d Cir. 2010) (Leval, J., concurring in the judgment). There is no international consensus "for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." *Talisman Energy*, 582 F.3d at 259; *see also Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring) (concluding that a defendant may be held liable for aiding and abetting, but only if he acted "with the purpose of facilitating the commission of that crime").

There are good reasons for applying a heightened standard of *mens rea* for aiding and abetting claims

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Rwanda, and the International Criminal Court. *See Doe VIII*, 654 F.3d at 30-32; *Khulumani*, 504 F.3d at 270-79 (Katzmann, J., concurring).

under the ATS. When American corporations or their foreign subsidiaries do business in developing countries, they inevitably will have contacts with government or military entities in those countries. But that fact provides no basis for holding the *company* liable for alleged wrongdoing by the foreign government or military. For example, where a company "requires protection in order to be able to carry out its operations, its provision of assistance to the local government in order to obtain the protection, even with knowledge that the local government will go beyond provision of legitimate protection . . . does not without more support the inference of a purpose to advance or facilitate the human rights abuses." *Kiobel*, 621 F.3d at 193-94 (Leval, J., concurring in the judgment).

Indeed, the official foreign policy of the United States often encourages commercial interaction with still-developing nations, in the hope of promoting change from within the system. For example, the United States has long encouraged "[c]onstructive economic engagement" with China, even as it seeks to encourage greater political freedom in that country. *See* Supp. Br. of United States at 12-13, *Doe I v. Unocal*, Nos. 00-56603 *et al.* (9th Cir. Aug. 25, 2005). Similarly, when the United States suspended sanctions against Burma in May 2012 to encourage further democratic reform, the Secretary of State declared, "[s]o today, we say to American

business: Invest in Burma,"[11] notwithstanding prior ATS suits against corporations that operated in that country. A purpose-based standard of *mens rea* would ensure that multinational corporations operating in developing nations are not faced with billion-dollar ATS claims based solely on their subsidiaries' incidental contacts with a government or military entity that has been accused of violating international law.

IV. A CLEAR RULE IS NEEDED FROM THIS COURT TO FORESTALL FUTURE WAVES OF ATS LITIGATION

In the years since *Sosa*, lower courts regrettably have not exercised the "vigilant doorkeeping" this Court expected for new ATS litigation. *Sosa*, 542 U.S. at 729. To prevent future erosion of the principles laid down in this case, the Court should establish clear conditions under which the ATS does—and does not—provide jurisdiction. The United States sees "no need" for the Court to articulate limiting principles applicable to future ATS cases. U.S. Supp. Br. 4. However, it is private parties like *amici* that bear the burden of litigating and resolving any remaining ambiguities. Moreover, the United States' amorphous suggestion that future ATS cases should turn on various "other circumstances," *see id.* at 21—such as the defendant's domicile and the Executive Branch's views—provides little, if any, guidance to lower

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[11] Hon. Hillary Rodham Clinton, *Remarks With Foreign Minister of Burma* (May 17, 2012), *available at* http://www.state.gov/secretary/rm/2012/05/190260.htm.

courts and likely will result in confused, conflicting decisions below.

Specifically, this Court should clarify that the ATS neither extends extraterritorially to injuries occurring in other countries nor reaches aiders and abettors. Rather, the ATS applies only when the injury occurred within the United States or upon the high seas. *See Sosa*, 542 U.S. at 705 n.3; Resp. Supp. Br. 13-14. In contrast, when the *locus delicti* is within the territory of another country, the ATS does not provide jurisdiction.[12] This formulation would provide lower courts with a straightforward rule to apply, would avoid creative efforts to adopt a "headquarters exception," would prevent diplomatic friction caused by overlapping jurisdictional claims, and would allow for quick disposition of improper cases.

Without clear direction from this Court, plaintiffs can be expected to "plead around" the territorial limits of the ATS by alleging some form of U.S.-based conduct, such as a parent company's authorization or failure to supervise the actions of a foreign subsidiary. *See supra* Part II.B. The Court in *Sosa* rejected a similar attempt to "repackage[]" foreign conduct as a U.S.-based claim in FTCA suits,

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[12] When a statute, like the ATS, "does not indicate where Congress considered the place of committing the crime to be, . . . *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). For ATS cases, the *locus delicti* almost always will be the place where the injury occurred—in this case, Nigeria.

and the Court should now take the same approach with the ATS. 542 U.S. at 702. As the Court explained in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S. Ct. at 2884 (internal citations omitted).

A clear and easily administrable rule from this Court is needed to limit the "judicial creativity" that has continued unabated in the aftermath of *Sosa*. 542 U.S. at 728.

CONCLUSION

For each of the foregoing reasons, the judgment of the court of appeals should be affirmed.

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