No. 07-919

IN THE

Supreme Court of the United States

AMERICAN ISUZU MOTORS, INC., *et al.*,
Petitioners,

v.

LUNGISILE NTSEBEZA, *et al.*,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in light of the opposition to this litigation expressed by the Executive Branch, by South Africa, and by other nations—because plaintiffs' suits effectively seek to overturn South Africa's post-apartheid policy of reconciliation as well as the policies of the United States and other nations—the cases should be dismissed on grounds of case-specific deference to the political branches, political question, or international comity.
2. Whether a private defendant may be sued under the ATS for aiding and abetting a violation of international law by a foreign government in its own territory.
3. Whether a private defendant may be held directly liable under the ATS for violating international law standards codified in a ratified treaty that Congress expressly provided does not create enforceable rights.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTORY AUTHORITIES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. It represents an underlying membership of more than three million business, trade and professional organizations of every size, sector and geographic region of the country.

The Chamber unequivocally has condemned—and here again condemns—the institution of apartheid. *See* Anthony Robinson, *U.S. Business Hits at Apartheid*, Fin. Times 4 (Mar. 21, 1985). Yet the cases underlying this petition are not about the appropriate remedy for that tragedy (a judgment that the democratically elected sovereign Government of South Africa already has made). Rather, they are about whether private plaintiffs may rely on an obscure jurisdictional statute and a judicially implied cause of action to commence litigation in an American court against dozens of United States and foreign companies, who are only alleged to have done business, even though such litigation offends the judgment of the South African Government, interferes with the foreign policy decisions of the United States Government and deters much-needed American business activity in certain parts of the world.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Many of the Chamber's members are named defendants in this case, and others have been named as defendants in other Alien Tort Statute ("ATS") cases relying on theories similar to that approved by the decision below. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business. It is those interests that the Chamber seeks to vindicate through the filing of this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

The Chamber fully supports Petitioners' view that the Court should grant *certiorari* on all three questions presented. The Chamber shares the Petitioners' belief that those questions implicate both disagreements among the lower courts and significant legal issues. The petition also raises matters of central importance to the American business community, which make *certiorari* appropriate for two additional reasons.

First, suits under the ATS such as the ones in this case undermine economic activities at the heart of both United States foreign policy and the development strategies of foreign governments. Commercial engagement with other nations plays a critical role in the execution of American foreign policy. For example, American business activity in South Africa during the apartheid era reflected the United States' policy of constructive engagement—conditioned economic interaction in the hope of spearheading political change within the country, a strategy that the United States has employed elsewhere. Similarly, American business activity can be a critical element in a strategy for economic development

in a foreign country—providing goods, services and capital. Suits such as the one here torpedo these diplomatic and development activities by allowing parties (with no incentive to consider the national interest) and judges (with only limited appreciation of the larger foreign policy objectives) to second-guess these delicate choices. Litigated under amorphous and conflicting standards, these lawsuits threaten to chill the business activity so central to these foreign policy strategies and economic development decisions. *Certiorari* is essential to provide clarity and predictability in this important field lying at the intersection of foreign relations and foreign commerce.

Second, ATS litigation against corporations also severely damages the business community. These suits stigmatize the corporate defendants as human rights violators, stigmas that linger even if the suits are dismissed. These suits impose direct financial costs on companies, embroiling them (and foreign governments) in complex and abusive discovery disputes. Other costs are less visible but no less acute. For example, the risk of ATS suits can drive up companies' insurance costs, expose a foreign sovereign to potential litigation and, thereby, place American corporations at a competitive disadvantage relative to their foreign counterparts. *Certiorari* is necessary to undo this damage to the American business community.

ARGUMENT

I. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE IMPORTANT QUESTIONS ABOUT CORPORATE LIABILITY IN CLAIMS ARISING UNDER THE ALIEN TORT STATUTE.

A. Unresolved Questions About Corporate Liability Under The Alien Tort Statute Threaten The Ability of American Businesses to Engage In Overseas Activities Affecting American Foreign Policy.

Growing uncertainty about the availability—and extent—of corporate liability under the ATS, 28 U.S.C. § 1350, requires this Court's immediate attention. The success of American foreign policy objectives and foreign countries' economic development initiatives depends on the willing engagement of American businesses. Such engagement requires clear and predictable standards about the availability and extent of liability. As the fractured decision below amply demonstrates, the law concerning corporate liability under the ATS lacks that necessary clarity.

1. *The engagement of the American business community in overseas activities with foreign policy implications depends on clear and predictable rules governing corporate conduct.*

The business community plays a central role in the effective execution of United States foreign policy. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363,

381 (2000) (The President's power to persuade other nations rests on his capacity "to bargain for the benefits of access to the entire national economy."). When the political branches decide whether to permit (or promote) trade with another nation, American businesses can and frequently do export the goods. When the political branches decide whether to sell military equipment to an important ally, American businesses can and frequently do manufacture the equipment. When the political branches decide whether to permit investment in a country with a problematic human rights record (yet whose alliance may advance the geopolitical interests of the United States), American businesses can and frequently do make the investment.

The United States Government's approach to the apartheid era in South Africa is illustrative. As Petitioners explain, the United States deliberately did not adopt a boycott policy against South Africa. Instead, through a policy of "constructive engagement," the United States maintained economic ties with South Africa during the 1980's with only a few limited exceptions. Such a policy facilitated the development of economic ties between the two countries and, over the long run, enhanced the diplomatic leverage of the United States. The success of that strategy depended on the participation of the American business community.

What was true in South Africa during the 1980's remains true around the world today. Whether in South Asia, the Middle East or Africa, American businesses are actively engaged in a variety of significant economic activity, sometimes in politically unstable regions. As with any business decision, their willingness to undertake these sorts of risky

ventures requires clear rules defining the scope of permissible conduct. Just like the securities field, this area of the law demands "certainty and predictability." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (citation omitted).

2. *Unclear standards over whether—and to what extent—corporations can be liable for claims arising under the Alien Tort Statute threaten such overseas business activity.*

Despite this compelling need for "certainty and predictability," the badly divided decision below further muddies the ATS's already turgid waters. Particularly since the 1990's, private plaintiffs have relied on the ATS to commence suits against corporations based on their activities abroad. Such lawsuits proliferated following the Second Circuit's 1995 decision in *Kadic v. Karadzic*, which marked the first time a federal appellate court held that the Alien Tort Statute supported jurisdiction over claims against private parties for alleged torts committed in violation of the law of nations. 70 F.3d 232, 239. In the wake of *Kadic* and despite this Court's contemporaneous rejection of implied causes of action predicated on principles of aiding-and-abetting liability, *see Central Bank of Denver*, 511 U.S. at 175-92, private plaintiffs launched a spate of lawsuits against companies, especially American ones, generally alleging that they facilitated unlawful action by a state or state-owned enterprise. *See generally* Elliott J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Colum. J. Transnat'l L. 153, 159 (2003).

This Court's decision in *Sosa v. Alvarez-Machain* has done little to stop this particular flood of litigation against corporations. 542 U.S. 692 (2004). Despite *Sosa*'s charge that federal courts engage in "vigilant doorkeeping" when deciding whether to create implied causes of action, private plaintiffs exploited the door left ajar by *Sosa* to argue that it did not disturb the post-*Kadic* decisions holding that the ATS covered the activities of private corporations under various theories of third-party liability.[2] Indeed, litigation commenced since *Sosa* and predicated on the sorts of principles approved by the panel majority demonstrates that *Sosa* has not stemmed the tide.[3]

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[2] Some commentators read a footnote in *Sosa* as implied approval for such theories. *See* 542 U.S. at 732 n. 20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."). *See also, e.g.*, Beth Stephens, *"The Door Is Still Ajar" For Human Rights Litigation In U.S. Courts*, 70 Brook. L. Rev. 533, 535 (2004-05) (relying on this footnote to argue that *Sosa* approved corporate liability based on complicity principles).

[3] *See, e.g., Does v. Chiquita Brands*, No. 07-CV-10300 (S.D.N.Y. filed Nov. 14, 2007); *Mastafa v. Australian Wheat Bd. Ltd*, No. 07-CV-7955 (S.D.N.Y filed Sept. 11, 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, No. 5:07-CV-02798 (N.D. Cal. filed May 30, 2007); *Xiaoning v. Yahoo! Inc.*, No. 4:07-CV-2151 (N.D. Cal filed Apr. 18, 2007); *Barboza v. Drummond Co.*, No. 06-CV-61527 (S.D. Fla filed Oct. 16, 2006); *Doe v. Wal-Mart Stores, Inc*, No. CV 05-3707 (C.D. Cal. filed Oct. 11, 2005); *Doe v. Nestle, SA*, No. CV 05-5133 (C.D. Cal. filed July 14, 2005); *Corrie v. Caterpillar, Inc.*, No. 3:05-CV-5192 (W.D. Wash. filed Mar. 15, 2005); *Afriat-Kurtzer v. Arab Bank, PLC,* No. 05-CV-0388 (E.D.N.Y filed Jan. 21, 2005); *Almog v. Arab Bank*, No. 04-CV-5564 (E.D.N.Y filed Dec. 21, 2004). For a list of cases filed before *Sosa*, Gary C. Hufbauer & Nicholas K. Mitrokostas,

This proliferation of litigation against companies under the ATS has sown widespread confusion in the lower federal courts, exemplified by the substantial disagreements among the three judges in the decision below. The majority's approval of judicially implied aiding and abetting liability further deepens sharp disagreements among lower courts over the availability of such third-party liability theories under the ATS. In contrast to the panel majority, other courts, like the dissenting judge and the district judge, have rejected such theories, relying on this Court's repeated, and recently reaffirmed, jurisprudence against implied causes of action. *See Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 770-74 (2008); *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67 n. 3 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001); *Central Bank of Denver*, 511 U.S. at 181. *See generally* Gary B. Born & Peter B. Rutledge, International Civil Litigation in the United States 56 (4th ed. 2006) (discussing split).

Moreover, as the disagreement between the judges in the panel majority amply demonstrates, even if such liability is theoretically available, courts cannot even agree over the proper rule or the source of that rule—whether international law, federal common law, Section 1983 principles or something else. This chaos leaves companies helpless when trying to determine what rules govern their activities abroad. *See Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019, 1027 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (describing the material differences between accessorial liability standards predicated on interna-

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Awakening Monster: The Alien Tort Statute of 1789 63-73 (2003).

tional law and those predicated on federal common law); *Doe I v. Exxon Mobil Corp.*, 393 F.Supp.2d 20, 26 (D.D.C. 2005), *mandamus denied*, 473 F.3d 345 (D.C. Cir. 2007) ("[I]t is notoriously difficult to determine when a party has acted under color of law, making it harder for courts to engage in 'vigilant doorkeeping.'"). *See generally* Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 Loy. L.A. Int'l & Comp. L. Rev. 47, 48-49 (2003) ("No court has settled on particular rules for aiding and abetting liability. Courts have also failed to define clearly the process by which that question should be answered."). These conflicting standards enable plaintiffs to "shop among the 12 circuit[s]" for the most favorable forum. Gary C. Hufbauer & Nicholas K. Mitrokostas, Awakening Monster: The Alien Tort Statute of 1789 at 7 (2003).

Unless this Court resolves these questions promptly—an opportunity this petition cleanly presents—continued litigation over these matters will deter American businesses from participating in the sort of economic activity affecting American diplomacy. This Court repeatedly has recognized how unchecked judicial creation of implied causes of action can deter desirable business activity. *Stoneridge*, 128 S.Ct. at 765; *Central Bank*, 511 U.S. at 188. In this context, "[s]econdary liability for aiders and abettors exacts costs that may disserve" not simply the goals of the business community but also important elements of American foreign policy. *Central Bank*, 511 U.S. at 188. *Cf. O'Reilly De Camara v. Brooke*, 209 U.S. 45, 52 (1908) ("[W]e think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a tort only in violation of the law of nations . . . it is

impossible for the courts to declare an act a tort of that kind when the Executive, Congress and the treaty-making power all have adopted that act."). *See generally* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 Ariz. L. Rev. 805, 809 (2005) ("For the business community, ATS cases present a liability threat which may make companies wary of investing in countries with a poor human rights record.").

3. *These unclear standards affect both businesses throughout the American economy and countries around the world.*

The stakes of the numerous ATS suits predicated on third-party liability principles extend far beyond the fifty plus companies named as defendants in this litigation. Companies in countless business sectors have been named as defendants in ATS cases employing some of the very same theories approved by the panel majority. Schrage, 42 Colum. J. Transnat'l L. at 159 ("[A]ll companies whose supply chains or distribution markets reach into developing countries are suspect."). These sectors include mining, oil, consumer products, pharmaceuticals, agriculture, financial services, technology, chemicals, automotive, manufacturing, and defense.[4] Indeed, ***at least half***

[4] *See, e.g., Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (mining); *Doe I v. Exxon Mobil Corp.*, 393 F.Supp.2d 20 (D.D.C. 2005) (oil); *Doe I v. The Gap, Inc.*, No. Cv-01-0031, 2001 WL 1842389 (D.N. Mar. I. Nov. 26, 2001) (consumer products); *Abdullahi v. Pfizer, Inc.*, No. 01 CV 8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002) (pharmaceuticals); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (agricultural); *Xiaoning v. Yahoo! Inc.*, No. C07-2151 CW

of the companies currently comprising the Dow Jones Industrial Average are (or have been) named as defendants in suits under the Alien Tort Statute—twelve alone in the litigation underlying this petition.[5] *See* Petition at 36-41.

Not only do such suits have the potential to affect large swaths of the economy, they also complicate America's relations with a wide array of countries. Suits under the Alien Tort Statute have questioned conduct in over twenty different nations. *See* Born & Rutledge, International Civil Litigation in the United States at 33 n. 210 (collecting cases). These countries include some of the United States' most important political allies and trading partners such as Colombia (a critical ally in the nation's effort to combat illegal narcotics), Egypt (one of the only Middle Eastern countries officially to recognize the State of Israel), Indonesia (a declared ally in the war on terrorism), Israel (the centerpiece of current efforts by the Bush Administration to establish lasting peace in the Middle East), and others. *See* Hufbauer & Mitrokostas, Awakening Monster at 13.

(N.D. Cal.) (July 30, 2007), First. Am. Compl. ¶¶ 256, 263 (technology); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999) (automotive); *Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019 (W.D. Wash. 2005) (manufacturing); *In re Agent Orange Product Liability Litig.*, 373 F.Supp.2d 7 (S.D.N.Y. 2005) (defense and chemical).

[5] In addition to the twelve companies named as defendants in the suits underlying this petition (some of whom have been named in other ATS cases), other defendants in ATS suits that make up the Dow Jones Industrial Average include Caterpillar, Pfizer and United Technologies Corp. *See Corrie*, 403 F.Supp.2d 1019; *Abdullahi*, 2002 WL 31082956; *Carmichael v. United Tech. Corp.*, 835 F.2d 109 (5th Cir. 1988).

Given the stakes, the questions presented in this petiton go to the core of control over American foreign policy. This Court has repeatedly rejected intrusions on the federal sovereign's prerogatives in this area. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). In contrast to the express actions of the state governments in those cases (who at least were democratically elected), the theory approved by the panel majority in this case legitimizes an entire era of "plaintiff's diplomacy" allowing politically unaccountable private parties to second-guess the delicate foreign policy decisions of the elected federal branches and, thereby, to deter the business community from engaging in the sort of commercial activity affecting that policy. Absent this Court's prompt intervention, these lawsuits "represent[] a direct challenge to US foreign policy leadership." Schrage, 42 Colum. J. Transnat'l L. at 153.

4. *These unclear standards hamper the ability of the business community to assist foreign countries in their own economic development initiatives.*

This incautious approach to ATS suits exemplified by the panel majority also arrogantly intrudes upon the prerogatives of foreign sovereigns to make macroeconomic decisions affecting their countries' future. Such interference only exacerbates tensions between foreign countries and the United States.

Just as the United States must make politically sensitive decisions, so too must foreign sovereigns. In some cases, the country must decide how to address a particular historical legacy. In other cases, develop-

ing countries may decide to enter into a cooperative arrangement with foreign companies under which the companies obtain certain rights in return for assistance, whether in the form of a joint venture with a state-owned entity or direct payments to support the foreign government's desired initiatives. In each instance, the foreign sovereign government is making a delicate choice to allow the foreign company to do business in order to advance its economic goals. *See* William H. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 Human Rts. Q. 368, 392 (1996) (presence of foreign corporations is positively correlated with economic development and civil liberties).

Litigation under the ATS against companies threatens to undermine these delicate judgments. In this case, for example, the prospect of massive liability for the corporate defendants sends the "message that the United States does not respect the ability of South African society to administer justice by implying that U.S. courts are better placed to judge the pace and degree of South African national reconciliation." Schrage, 42 Colum. J. Transnat'l L. at 166. Other ATS suits against corporations, including ones predicated upon principles similar to those sanctioned by the decision below, have also undermined foreign countries' carefully crafted remedial schemes. *See Bodner v. Banque Paribas*, 114 F.Supp.2d 117, 122-24 (E.D.N.Y. 2000); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004).

Not only do such suits "represent a significant disempowering of states," Carlos M. Vasquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 Colum. J. Transnat'l L. 927, 950 (2005), they also present a diplomatic embarrassment

for this country. As Judge Korman recognized, judicial indulgence of these claims spawns diplomatic protests from countries who resent such imperialistic second-guessing of their own sovereign decisions. Pet. App. 79a These protests confront the United States with an intractable dilemma—either take a public stance that can be construed as aligning the United States with an alleged human rights violation or take no position and risk alienating an ally by subjecting it to protracted and potentially humiliating proceedings in United States Court. Hufbauer & Mitrokostas, Awakening Monster at 52.

B. Unresolved Questions About Corporate Liability Under The Alien Tort Statute Cripple American Businesses In Ways Repeatedly and Recently Condemned By This Court.

Apart from its intrusion into foreign affairs, the sort of ATS litigation sanctioned by the panel majority directly harms important interests of the American business community. This harm manifests itself in five interrelated ways.

First, plaintiffs' lawyers often bring these suits not to try them to judgment but, rather, to drag them out, exacerbating the burden on and the embarrassment to the corporate defendant. Cases under the ATS alleging aiding and abetting liability have endured for years, with some nearly a decade long. Some of the cases underlying this petition are over five years old, and none has even passed the pleading stage. Similarly, ATS litigation against Royal Dutch Shell, also in the Second Circuit, is twelve years old and remains ongoing. *See* Hufbauer & Mitrokostas,

Awakening Monster at 63-73 (providing filing date for oldest ATS suits).

Why the long duration? According to one of the plaintiffs' lawyers who brought an ATS suit against the Drummond Company predicated on aiding and abetting principles, they 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*." Brief for Appellees/Cross-Appellants in *Romero v. Drummond Co., Inc.*, Nos. 07-14090DD, 07-14356-D, United States Court of Appeals for the Eleventh Circuit (Jan. 14, 2008) at 30 (emphasis added), available at http://pacer.ca11.uscourts.gov/PCRPMGGC.PDF (last visited Feb. 1, 2008) (hereinafter "Drummond Brief"). With that strategy, it is perhaps unsurprising that, long after the close of the original discovery deadline in that case, the plaintiffs' lawyers revealed eight "newly discovered witnesses," including two whom they sought to offer *after* resting their case. *Id.* at 8, 17, 19. These dilatory tactics prompted the District Judge to complain that he was becoming "frustrated at being given misinformation about these late discovered witnesses" for they presented "a moving target for the court and certainly for the defense." *Id.* at 14.

Second, through this protracted litigation strategy, private plaintiffs can stigmatize companies, deliberately damage their corporate identities and, as the dissenting judge recognized, extract *in terrorem* settlements. Pet. App. 170a-171a n. 15. In *Central Bank of Denver*, this Court rejected aiding and abetting liability partly because the "uncertainty of the governing rules" induced corporate defendants "as a business judgment to abandon substantial defenses and to pay settlements in order to avoid the expense

and risk of going to trial." 511 U.S. at 189. That risk is even more pronounced in ATS litigation, for it is far more difficult to secure dismissal at the pleading stage. *Compare* 15 U.S.C. §78u-4 (heightened pleasing requirement of Private Securities Litigation Reform Act). Armed with the threat of protracted proceedings, private plaintiffs may plan an aiding-and-abetting lawsuit to coincide with a company's annual meeting in order to exert pressure through shareholder protests. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, World Pol'y J. 60, 63 (Spring 2004). Plaintiffs employed this strategy in an ATS suit against Unocal, thereby affecting the company's "stock valuations and debt ratings." *Id.* During the several years that the litigation was pending, Unocal's share price "lagged behind those of its oil industry peers." *Id.* Similarly, an ATS case against Coca Cola alleging that it aided and abetted human rights violations in Colombia, *Sinaltrainal v. Coca Cola Co.*, 256 F.Supp.2d 1345 (S.D. Fla. 2003), prompted shareholders to dump stock in 2003 following the company's first-quarter earnings meeting. Kurlantzick, World Pol'y J. at 64. (Coca Cola secured partial dismissal of the case soon thereafter. *Sinaltrainal*, 256 F.Supp.2d at 1356-57). As these anecdotes illustrate, suits against companies under the ATS present a particularly high "danger of vexatiousness," *Central Bank of Denver*, 511 U.S. at 189, and warrant clear rules that foreclose them at the pleading stage. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1973 n. 14 (2007); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

Third, discovery in these ATS suits can be abusive, politically sensitive and burdensome. The Drummond

case illustrates the risk of abusive overseas discovery. During that case (which concerned the company's alleged activities in Colombia), one plaintiff witness admitted that he "was not speaking the truth" at his deposition, was "lying to defense counsel," and "chang[ed] [his] version" for trial. Drummond Brief at 6 (quoting trial transcript). Another witness admitted that he had lied during his deposition, and two others submitted false documents to the Colombian Government. *Id.* at 6-7. Several witnesses admitted that plaintiffs' counsel had provided assistance, including one who received $1500 per month from a labor group associated with plaintiffs' counsel for work as an "intern." *Id.* at 7.

Discovery is also politically sensitive. The focus on a corporate defendant's relationship with the foreign sovereign—an essential element of aiding and abetting claims—naturally makes the sovereign's activities a centerpiece of the case (even if the sovereign is not a defendant in the litigation). *See Exxon Mobil*, 393 F.Supp.2d at 27 ("[D]etermining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do."). This forces both parties to seek discovery from and about the sovereign, typically in the form of a letter rogatory. At best, the sovereign's response to the letter rogatory may arrive (if at all) only after months or even years of waiting. *See* Born & Rutledge, International Civil Litigation in the United States at 963 (describing delays in letters rogatory process). For example, in the Drummond case, the Colombian Government responded to letters rogatory more than four months *after* trial had ended. Drummond Brief at 11. At worst, the discovery sparks a diplomatic

protest from the foreign sovereign which resents the intrusion into its internal affairs.

Discovery in ATS cases is burdensome. In cases predicated on aiding and abetting liability, such as those at issue here, liability ultimately turns on evidence of the company's assistance to the foreign sovereign and its "intent" (or knowledge, depending on the applicable standard). Proof of these elements, thus, requires "extensive discovery" from the company that can "take up the time of a number of people and [thereby] . . . represent[] an *in terrorem* increment of the settlement value." *Twombly*, 127 S.Ct. at 1966. In *Doe v. Unocal*, for example, the plaintiffs deposed the company's President, Chief Executive Officer and Vice President, among others; they also obtained copies of the companies' internal emails. *See* 395 F.3d 932, 938-42 & n. 10 (9th Cir. 2002), *rehearing en banc granted and appeal dismissed*, 403 F.3d 708 (2005). (Unocal eventually settled the case for $30 million. Diskin, 47 Ariz. L. Rev. at 809-10.)

Fourth, ATS litigation increases other costs to business. In both *Central Bank of Denver* and more recently in *Stoneridge*, this Court rejected arguments to expand implied rights of action partly for fear that the resulting lawsuits (or enhanced risk of lawsuits) would increase a company's costs, costs that would be passed on downstream. *Stoneridge*, 128 S. Ct. at 772; *Central Bank of Denver*, 511 U.S. at 189. The same basic cost-shifting phenomenon appears in ATS litigation against American companies. In this context, however, the increased costs come in the form of higher risk insurance premiums that lenders would demand in exchange for financing a foreign development initiative.

Fifth, ATS suits risk placing US-based firms at a competitive disadvantage in world markets. American companies obviously compete with their foreign counterparts for the opportunity to engage in the types of projects described in this brief. Yet the United States largely stands alone in authorizing its courts to exercise jurisdiction over claims arising from conduct taking place in foreign lands. Hufbauer & Mitrokostas, Awakening Monster at 46. Consequently, countries deciding whether to do business with a United States company or its foreign competitor face a stark choice. They can do business with the American company and risk later being dragged, directly or indirectly, into an American court where they must justify their conduct. Alternatively, they can do business with the foreign company where their interactions will remain a matter for the foreign sovereign's own courts. ATS litigation, thus, encourages foreign countries to prefer non-American partners.

In sum, the unresolved questions over the availability of third-party liability under the ATS wreak havoc on American businesses and present precisely the type of important legal question calling out for this Court's immediate involvement.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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