No. 11-___

IN THE

Supreme Court of the United States

RIO TINTO PLC AND RIO TINTO LIMITED,
Petitioners,

v.

ALEXIS HOLYWEEK SAREI, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, permits federal courts to recognize, under narrow circumstances, a very limited set of federal common law claims by aliens based on violations of international law.

This case raises four questions noted but left unanswered in *Sosa*:

1. Whether U.S. courts should recognize a federal common law claim under the ATS arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens.

2. Whether U.S. courts should recognize a federal common law claim under the ATS based on aiding-and-abetting liability, even absent concrete factual allegations establishing that the purpose of the defendant's conduct was to advance the principal actor's violations of international law.

3. Whether a plaintiff asserting a federal common law claim under the ATS addressed to conduct occurring entirely within the jurisdiction of a foreign sovereign must seek to exhaust available remedies in the courts of that sovereign before filing suit in the United States, as international and domestic law require.

4. Whether federal common law claims asserted under the ATS for violations of international human-rights law norms may be brought against corporate entities.

PARTIES TO THE PROCEEDING

Petitioners are Rio Tinto plc and Rio Tinto Limited.

Respondents are Alexis Holyweek Sarei, Paul E. Nerau, Thomas Tamuasi, Phillip Miriori, Gregory Kopa, Methodius Nesiko, Aloysius Moses, Raphael Niniku, Gabriel Tareasi, Linus Takinu, Leo Wuis, Michael Akope, Benedict Pisi, Thomas Kobuko, John Tamuasi, Norman Mouvo, John Osani, Ben Korus, Namira Kawona, Joanne Bosco, John Pigolo, and Magdalene Pigolo, who purport to represent themselves and a class of individuals similarly situated.

RULE 29.6 DISCLOSURE

Rio Tinto plc has no parent corporation. No publicly held company owns 10% or more of the stock of Rio Tinto plc.

Rio Tinto Limited has no parent corporation. No publicly held company owns 10% or more of the stock of Rio Tinto Limited

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The second decision of the en banc court of appeals is not yet reported. It is electronically available at 2011 WL 5041927, and is reprinted in the Appendix ("App.") at 1a-203a. The district court's opinion on limited remand from the en banc court of appeals is reported at 650 F. Supp. 2d 1004, and is reprinted at App. 204a-261a. The first decision of the en banc court of appeals is reported at 550 F.3d 822, and is reprinted at App. 262a-311a. The amended panel opinion of the court of appeals is reported at 487 F.3d 1193, and is reprinted at App. 312a-425a. The original panel opinion of the court of appeals is reported at 456 F.3d 1069, and is reprinted at App. 426a-535a. The original district court opinion is reported at 221 F. Supp. 2d 1116, and is reprinted at App. 536a-734a.

JURISDICTION

The en banc court of appeals issued its decision on October 25, 2011. App. 2a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides: "The 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."

STATEMENT OF THE CASE

A sharply-divided en banc Ninth Circuit held that federal common law recognizes a claim under the ATS asserted by foreign citizens against a foreign corporation implicating the conduct of a foreign government on foreign soil. It is difficult to imagine a judicial action interfering more directly with the interests of a foreign sovereign, and hence with the foreign-policy interests of the United States. Yet the action is not unusual—it is an increasingly common feature of U.S. litigation under the ATS to challenge the conduct of foreign actors, including foreign governments, on their own soil. Despite the manifest foreign-policy significance of such litigation, the legal standards governing ATS claims remain unclear and hotly contested, as illustrated by the seven separate opinions issued in the proceeding below.

The Solicitor General already once asked this Court to grant certiorari in a similar case because of the serious adverse foreign policy consequences of the positions adopted by the decision below. This Court was unable to hear that case for lack of a quorum, but there should be no such obstacle here. This Court has also granted certiorari this Term to hear one of the questions presented here, *see Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, but the other questions are equally if not more important to proper application of the ATS. They are best considered together, so the Court can analyze each component of ATS liability in light of the others. The Court should grant certiorari and decide this case in tandem with *Kiobel*.

A. ATS Litigation Background

1. The ATS was enacted by the First Congress as part of the Judiciary Act of 1789. It now provides that "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. Despite its vintage, the ATS had very limited significance for nearly two centuries, providing jurisdiction in only two cases before 1980. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

2. The Second Circuit's opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), opened the door to a new wave of ATS litigation, holding for the first time that an alien plaintiff may bring suit in U.S. courts alleging that foreign officials violated certain specific, concrete norms universally recognized under the law of nations (in that case torture by a state actor). *Id.* at 890. ATS litigation expanded after *Filartiga*, but the cases were still limited in number, scope, and consequence. They generally "involved claims by alien plaintiffs against alien individual defendants," who often failed to defend the suits and had default judgments entered against them. Julian Ku, *The Third Wave: The Alien Tort Statute And The War On Terrorism*, 19 Emory Int'l L. Rev. 105, 108 (2005) (hereinafter Ku, *Third Wave*). These actions did not appear to cause any serious international friction or elicit strong reactions from either the United States or foreign sovereigns. *Id.*

3. A new wave of ATS litigation was unleashed in 1995, when the Second Circuit held that some

norms of international human rights law—like genocide and war crimes—do not require state action. *Kadic v. Karădzíc*, 70 F.3d 232, 241-43 (2d Cir. 1995). Largely in response to *Kadic*, alien plaintiffs began to bring suit—often in the form of class actions—against private corporations operating in foreign nations.

ATS suits against corporations were significantly different in kind and consequence from the suits against individual state officials brought in *Filartiga*'s wake. Most international norms require state action, and even those that do not are nevertheless usually committed directly by state actors. Thus, in order to reach corporations under the ATS, plaintiffs generally sought to hold them secondarily liable for the primary conduct of foreign governments. *See, e.g.*, *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (class of Burmese citizens sue U.S. and French corporation, alleging that corporations enlisted Burmese military, police, and security forces to commit human-rights violations against indigenous population); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43, 549 (S.D.N.Y. 2004) (suit against dozens of corporations who allegedly aided and abetted apartheid by doing business with South Africa's apartheid regime); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (suit alleging that ExxonMobil knowingly aided the Indonesian government and military in torturing and killing civilians); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006) (purported class action on behalf of Sudanese residents, alleging that Canadian corpora-

tion aided Sudan in committing genocide, crimes against humanity, and war crimes).

Unlike the early post-*Filartiga* suits, the underlying conduct targeted by these suits against corporations was that of sovereign governments themselves, not individual rogue state actors. Courts thus were required to find that a foreign sovereign itself violated a universally recognized international law norm, such as torture, war crimes, or genocide. Further, because corporations are a much more attractive target than individuals—particularly individuals with no U.S. assets—the volume of such suits increased dramatically through the late 1990s and into the new century. *See* Ku, *Third Wave*, at 109.

Not surprisingly, the nature and increased volume of these new corporate actions sparked significant international tension. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("recent ATS cases based on acts that occurred in foreign nations have often engendered conflict with other sovereign nations" (emphasis omitted)). Numerous sovereigns—including close U.S. allies—objected to such extraterritorial suits as interfering with their sovereign rights to regulate their own territory and citizens. *Id.* at 79 n.8 (citing foreign government objections). Objections were also heard from the sovereigns whose companies were being sued. *See* Br. for the United States as Amicus Curiae in Support of Petitioners ("U.S. *Ntsebeza* Br."), *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S.), 2008 WL 408389, at *20 (Feb. 11, 2008) (noting formal objections to Apartheid litigation filed with the State Department by United Kingdom, Germany, Switzerland, and other countries). The

United States itself also routinely filed "Statements of Interest" or amicus briefs explaining that continued adjudication of these cases would risk serious foreign policy consequences. *See*, *e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 347 (D.C. Cir. 2007) (statement of interest); *S. African Apartheid Litig.*, 346 F. Supp. 2d at 553 (statement of interest); Br. for United States as *Amicus Curiae*, *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir. Oct. 14, 2005).

B. Respondents' Allegations

This case shares all of the major characteristics of modern corporate ATS litigation—a sprawling theory of extraterritorial liability against a corporation operating in a foreign country, pressed over the foreign-policy objections of the United States and foreign sovereigns, based on allegations that the corporation somehow supported a foreign sovereign's acts in violation of international human-rights law norms.[1]

1. Bougainville is an island located off the main island of Papua New Guinea ("PNG"). Petitioners are Rio Tinto plc, a British corporation, and Rio Tinto Limited, an Australian corporation (collectively, Rio Tinto). In the 1960s, a PNG-based subsidiary of Rio Tinto entered an agreement with the PNG government to build a mine on Bougainville, under which PNG would receive a 20% stake in the mine's operations. App. 538a-539a.

[1] Because this case is at the pleading stage, the facts below accept the complaint's allegations as true. The allegations against Rio Tinto are, in fact, false.

In 1988, militant rebels sought to close the mine and to win Bougainville's independence from PNG. The rebels stole dynamite from Rio Tinto, "blew up the mine's infrastructure and machinery, and engaged in other acts of sabotage. The violence escalated, ultimately forcing the mine to close and provoking a popular uprising on the island." App. 547a.

PNG sent in its military to put down the uprising. In response to one particularly harsh military attack, the Bougainville Revolutionary Army called for secession, and a nearly decade-long civil war ensued. App. 550a.

In 1990, the PNG government, with the alleged assistance of the Australian government, imposed a blockade on Bougainville, which respondents say prevented food and medical supplies from reaching the island, leading to thousands of deaths. App. 551a. Respondents additionally allege that throughout the civil war, the PNG military, with the assistance of Australian pilots and helicopters, attacked Bougainvillean towns and villages and committed serious human-rights abuses. App. 551a-552a.

The civil war officially ended after a lengthy diplomatic process—in which the United States took active part—when the PNG parliament formalized a peace accord in 2002. App. 266a.

2. In 2000, respondents initiated this action on behalf of a putative class of current and former residents of Bougainville. Respondents alleged that PNG, through its military and with the support of the Australian government, engaged in genocide and war crimes against residents of Bougainville. (Respondents also alleged a series of other purported

violations of the laws of nations, including racial discrimination and environmental torts, which have since been either abandoned or dismissed, and are no longer part of this case. App. 4a, 57a-63a.)

Rather than suing PNG or Australia, however, respondents sued Rio Tinto, on the theory that Rio Tinto supported and aided the PNG government's actions during the civil war.

As in other ATS suits against corporations involving the conduct of foreign sovereigns, the U.S. State Department filed a Statement of Interest in the district court, advising that "continued adjudication of the claims ... would risk a potentially serious adverse impact on the peace process [in Bougainville], and hence on the conduct of our foreign relations." App. 33a. The PNG government submitted conflicting statements. *E.g.*, App. 337a n.15.

C. Proceedings Below

1. Rio Tinto moved to dismiss respondents' First Amended Complaint for lack of subject-matter jurisdiction, failure to exhaust local remedies, and failure to state a claim. The district court granted the motion.

The district court first held that respondents were not required to exhaust local remedies before bringing suit in the United States. App. 580a.

The court then considered whether respondents adequately alleged a violation of the law of nations. With respect to respondents' allegations of war crimes and crimes against humanity (including genocide), the court recognized that the primary conduct alleged in the complaint was committed by

PNG, not Rio Tinto. But the court found that Rio Tinto could be held liable based on actions that allegedly aided and supported PNG's conduct. App. 587a-603a & 608a n.146.

The district court nevertheless dismissed the entire complaint as stating a nonjusticiable "political question," because adjudicating the case would require passing on the legitimacy of the acts of a foreign sovereign and would undermine U.S. foreign policy. App. 701a-712a.

2. While the appeal from that judgment was pending, this Court granted certiorari in *Sosa*. The Court held that "the ATS is a jurisdictional statute creating no new causes of action," 542 U.S. at 724, but that it does empower federal courts to recognize under federal common law a cause of action to enforce "a very limited category" of law-of-nations norms. *Id.* at 712.

3. After obtaining supplemental briefing in light of *Sosa*, a panel of the Ninth Circuit reversed the district court's dismissal of the complaint. The panel concluded that, under *Sosa*, the district court correctly exercised jurisdiction over respondents' claims asserting war crimes, crimes against humanity (including genocide), and racial discrimination. App. 437a-438a. The court also determined that the ATS recognized secondary liability and that respondents sufficiently pleaded such liability. App. 438a-440a. The panel further held that the political question doctrine did not require dismissal of any claims. App. 451a. Finally, the panel found that respondents were not required to exhaust available remedies in PNG before filing an ATS suit in the United

States. App. 462a-485a. Judge Bybee dissented on exhaustion grounds. App. 486a-535a.

Rio Tinto filed a petition for rehearing or rehearing en banc, supported by the United States. In response, the panel amended its original opinion. The sole significant difference was that the panel no longer attempted to resolve definitively whether respondents stated a claim under the ATS or whether the ATS recognizes theories of secondary liability. Instead, the panel found only that respondents' claims were "nonfrivolous," and therefore satisfied the ATS's jurisdictional requirement. App. 328a. Judge Bybee continued to dissent on exhaustion grounds. App. 375a-425a.

4. Rio Tinto filed another petition for rehearing en banc, again supported by the United States. The Government contended that "the ATS does not authorize federal courts to fashion federal common law … to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens." U.S. 2007 Amicus Br. 3.[2] The Government also argued that the panel erred in failing to require exhaustion. *Id.* at 3-4.

The United Kingdom and Australia filed a joint amicus brief, arguing that the "unwarranted assertion of jurisdiction by the courts of one state infringes on the rights of other states to regulate matters within their territories," U.K. Amicus Br. 5, and

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[2] "U.S. 2006 Amicus Br." refers to the amicus curiae brief filed below by the United States, on September 28, 2006. "U.S. 2007 Amicus Br." refers to the amicus curiae brief filed below by the United States, on May 18, 2007.

that exhaustion of foreign remedies at least should be required to minimize interference with sovereignty, *id.* at 7-10.[3]

Rio Tinto's en banc petition was granted, and a divided en banc court remanded for the district court to consider whether respondents' claims require exhaustion in PNG. Judge McKeown's plurality opinion "decline[d] to impose an absolute requirement of exhaustion in ATS cases," but found "as a threshold matter" that "certain ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law." App. 264a. The plurality remanded to the district court "for the limited purpose to determine in the first instance whether to impose an exhaustion requirement on plaintiffs." App. 282a. The court declined to consider any other threshold issues presented.

Judge Bea (joined by Judge Callahan) concurred in the limited remand, but would have held that federal law, "and not mere judicial prudence, requires the district court to consider exhaustion." App. 283a.

Judge Ikuta (joined by Judge Kleinfeld) dissented on the ground that the case should be dismissed, because the ATS cannot be applied "to a dispute not involving U.S. territory or citizens" (App. 293a), where the court is "asked to judge, rather than vindicate, the interests of a foreign sovereign" (App. 298a). Such disputes, they warned, are "rife with

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[3] "U.K. 2007 Amicus Br." refers to the amicus curiae brief filed below by the United Kingdom and Australia, on May 24, 2007. "U.K. 2009 Amicus Br." refers to the amicus curiae brief filed below by the same nations on December 16, 2009.

'risks of adverse foreign policy consequences.'" App. 298a (quoting *Sosa*, 542 U.S. at 728).

Judge Kleinfeld also filed a concurring opinion, because without his vote there would have been no majority disposition and because "failure to exhaust is an additional reason for dismissal." App. 299a.

Finally, Judge Reinhardt (joined by Judges Pregerson, Berzon, and Rawlinson) dissented on the ground that no exhaustion—and hence no remand—was required. App. 300a.

5. On remand, the district court held that exhaustion was not required for respondents' claims of war crimes, crimes against humanity (including genocide), and racial discrimination. App. 259a.

6. The en banc court of appeals reassumed jurisdiction, and ordered a new round of briefing on the remaining issues in the case (which the prior en banc decision had not addressed). The United Kingdom and Australia again submitted an amicus brief reiterating their "basic position … that international law does not permit the United States to exercise extraterritorial civil jurisdiction to adjudicate claims bearing so little connection to the United States," U.K. 2009 Amicus Br. 2, and that exhaustion is at the least required, *id.* at 11-17.

A divided en banc court held that two of respondents' then-remaining claims—crimes against humanity and racial discrimination—could not proceed, but that their war crimes and genocide claims could. App. 63a. The majority opinion (per Judge Schroeder, joined in various parts by Judges Reinhardt, Pregerson, Rawlinson, Silverman, McKeown, and Berzon) included several rulings pertinent here:

- It held that courts may recognize federal common law claims under the ATS arising from conduct occurring entirely within the territory of another sovereign, including the conduct of a foreign sovereign on its own soil. App. 7a-13a.

- It held that courts may recognize federal common law ATS claims against corporations, including claims for violations of international law norms against genocide and war crimes. App. 13a-16a, 40a-44a, 51a-52a.

- It concluded that the ATS supports aiding-and-abetting liability generally (App. 16a-17a), and that international law permits aiding-and-abetting liability for war crimes (App. 52a-53a).

- Finally, it affirmed the district court's prudential exhaustion analysis. App. 28a-30a.

Judge Reinhardt concurred in the judgment and most of the majority opinion, agreeing that the ATS recognizes corporate liability and secondary liability, but for a different reason. App. 64a-67a.

Judge Pregerson (joined by Judge Rawlinson) would have held that mere knowledge satisfies the mens rea for aiding-and-abetting liability. Judge Pregerson also would have allowed respondents' crimes against humanity and racial discrimination claims to proceed. App. 68a-86a.

Judge McKeown concurred in part and dissented in part, agreeing (joined in this part by Judges Reinhardt and Berzon) that the ATS permits claims involving conduct wholly within the territorial jurisdiction of other sovereigns and claims against corporate entities. App. 88a-105a. But unlike the major-

ity, Judge McKeown would have held that respondents' allegations were insufficient to establish Rio Tinto's liability for the violation of *any* international law norm. App. 105a-114a.

Judge Bea (joined by Judges Kleinfeld and Callahan, and in part by Judge Ikuta) dissented, arguing that exhaustion should have been required. App. 115a-124a.

Judge Kleinfeld (joined by Judges Bea and Ikuta) also dissented, contending that the ATS does not authorize claims arising from conduct wholly within another sovereign's territorial jurisdiction. App. 125a-170a. Such claims, he concluded, are inconsistent with the history of the ATS and this Court's precedents, and "dangerously interfere[] with decisions properly made only by the political branches of our government." App. 163a.

Finally, Judge Ikuta (joined by Judges Kleinfeld, Callahan, and Bea), dissented on the ground that the federal courts have no jurisdiction under the ATS to adjudicate suits between aliens. App. 171a-203a.

REASONS FOR GRANTING THE PETITION

As the en banc majority below recognized, this case presents several of the "legal uncertainties in the application of the ATS that flowed in the wake of the Supreme Court's decision in *Sosa*." App. 5a.

Those uncertainties are unacceptable. The rising tide of modern ATS litigation implicates serious foreign-policy concerns almost by definition. If those cases are going to be governed by judge-made common law—rather than by standards established by the political branches constitutionally responsible for

the Nation's foreign affairs—this Court must provide as much guidance as possible, with standards as clear as possible.

This Court attempted to provide certain guidance in *Sosa*, but the Court's limiting rules and signals have been largely misunderstood or ignored by the lower courts. The courts have not adequately heeded the Court's warning to keep federal common law strictly cabined to "a very limited category" of international law norms. 542 U.S. at 712. They have not been sensitive to the "practical consequences of making [ATS causes of action] available to litigants in the federal courts." *Id.* at 732-33. And courts have been anything *but* "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727.

This Court should resolve the uncertainties created by *Sosa*, and by the lower courts' interpretations of *Sosa*. The federal common law governing these matters of uncommon importance should not be determined by badly splintered appellate decisions. This case presents an ideal opportunity to address four of the most important questions raised by *Sosa*, including questions the United States asked this Court to answer once before, but that could not be reached for lack of a quorum. Now is the time to answer those questions.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER TERRITORIAL SCOPE OF FEDERAL COMMON LAW CLAIMS UNDER THE ATS

The two remaining claims in this case concern acts of genocide and war crimes allegedly committed

by the PNG military with the aid of the Australian military. Respondents seek to hold Rio Tinto liable on the theory that it provoked or aided the PNG government's conduct. Accordingly, to establish liability here, a U.S. court must necessarily find that Rio Tinto is liable for violations of international law that (a) occurred entirely in PNG, and (b) were committed by the PNG and Australian governments.

This Court and the U.S. Government have recognized that claims of this nature intrude directly on the foreign-policy functions of the political branches, and trample the sovereignty of foreign nations, including important U.S. allies. The Ninth Circuit ignored those concerns. Certiorari should be granted to restore proper territorial boundaries on federal common law claims asserted under the ATS.

A. The Territorial Scope Of Federal Common Law Under The ATS Is An Important Issue Worthy Of Review By This Court

1. This Court held in *Sosa* that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. Rather, the First Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations" that would have been seen as providing for personal liability and actionable under the general common law at the time: offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 714, 720. And while this Court acknowledged that there was no longer any *general* common law after *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it held that the ATS empowers federal courts to fash-

ion and apply *federal* common law to adjudicate claims asserting violations of "a very limited category" of law-of-nations norms. *Sosa*, 542 U.S. at 712; *see id.* at 726, 729-30, 732.

The *Sosa* Court, however, stressed the need for "great caution" before recognizing federal common law actions under the ATS. *Id.* at 728. That warning came largely in response to foreign-policy and separation-of-powers concerns raised by the United States. *See* Br. for the United States as Respondent Supporting Petitioner ("U.S. *Sosa* Br."), *Sosa v. Alvarez-Machain*, No. 03-339 (U.S.), 2004 WL 182581, at *42-44 (Jan. 23, 2004). The Court emphasized that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." 542 U.S. at 727. Especially problematic would be suits "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." *Id.* But because the Court in *Sosa* had no reason to answer that question on the facts before it, the Court left open whether such cases should be recognized "at all." *Id.* at 727-28.[4]

2. The Court was presented with exactly that question only a few years later. In *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007),

[4] The failure to allege a violation of a clearly defined and universally accepted norm of international law sufficed to dispose of Alvarez-Machain's case. *Sosa*, 542 U.S. at 732-38.

plaintiffs alleged that dozens of multinational corporations aided and abetted international law violations of the South African apartheid regime by doing business with that regime. After the Second Circuit ratified this theory of ATS liability, *id.* at 260, the defendants sought certiorari, and the United States took the highly unusual step of filing an unsolicited certiorari-stage amicus brief. The U.S. brief urged the Court to grant certiorari to decide whether the ATS authorizes suits for secondary liability when the underlying conduct is that of a foreign sovereign acting within its own territory. U.S. *Ntsebeza* Br., 2008 WL 408389, at *16-22. That question, the Government emphasized, was a matter of overriding importance to U.S. foreign policy, because of the serious adverse consequences that flow from recognizing liability for corporations based on the conduct of foreign sovereigns on their own soil. *Id.* at *5.

As the Government explained, respect for foreign sovereignty counsels against extraterritorial application of any U.S. statute. But "[c]oncerns for international friction are even greater when domestic courts purport to sit in judgment over the conduct of the foreign state itself, especially in its own territory." *Id.* at *14. Recognizing claims in such circumstances would compel federal courts "to adjudicate the legality under international law of the conduct of foreign states as to which Congress has conferred sovereign immunity from civil suits," thereby providing "a clear means for effectively circumventing" important restrictions on civil suits against foreign sovereigns. *Id.* at *14-15. Thus, any claim calling for a U.S. court to pass judgment on the conduct of foreign sov-

ereigns "poses serious risks to the United States' foreign relations with foreign states." *Id.* at *18.

The Government also emphasized that such actions interfere with its ability to use trade-related foreign policy tools—including encouraging or limiting trade—to foster the liberalization of undemocratic regimes. *Id.* at *20-21. The threat of ATS actions creates "uncertainty for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." *Id.* at *20. By "hinder[ing] global investment in developing economies, where it is most needed," extraterritorial ATS litigation "inhibit[s] efforts by the international community to encourage positive changes in developing countries." *Id.* (quoting letter from United Kingdom, joined by Germany, to the U.S. State Department).

Despite the Government's request, this Court was unable to consider the question presented in *Ntsebeza* because the Court lacked a quorum. It thus affirmed the Second Circuit's judgment as if by an equally divided court. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

3. The same question is presented here. And it is even *more* important now, given the continued expansion of ATS litigation challenging foreign corporations' involvement in the alleged international-law violations of foreign sovereigns. *See Exxon Mobil*, 654 F.3d at 26 ("modern ATS litigation has primarily focused on atrocities committed in foreign countries").[5] Despite the manifest importance of the is-

[5] Extraterritorial ATS cases often involve claims against foreign corporations (as opposed to U.S. corporations) challeng-

sue, federal appellate courts have struggled to identify the proper territorial boundaries of the federal common law that may be applied under the ATS.

The en banc Ninth Circuit in this case, of course, divided sharply over the extent to which federal common law may be invoked under the ATS to challenge conduct occurring solely within another sovereign's jurisdiction, and involving another sovereign's own conduct. The majority held that such claims pose no foreign policy concerns, App. 11a—over the explicit objections of the United States itself, as well as the U.S. allies (Australia and the U.K.) directly implicated by the claims, *see supra* at 10-12. By contrast, three dissenting judges, while recognizing that claims under the ATS may arise from piracy and other acts on the high seas—where *no* sovereign possesses territorial jurisdiction—forcefully denounced the majority's holding as a "new imperialism" that

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ing conduct in foreign countries. *See*, *e.g.*, *Bauman v. Daimler-Chrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (German); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (Dutch and British); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (Canadian); *Khulumani*, 504 F.3d 254 (dozens of corporations, including Swiss, Canadian, German, and British); *Hereros ex rel Riruako v. Deutsche Afrika-Linien Gmblt & Co.*, 232 Fed. App'x 90 (3d Cir. 2007) (German); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (Japanese); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Dutch and British); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (Swiss); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009) (Jordanian); *Chowdhury v. WorldTel Bangladesh Holding*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (Bangladeshi); *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270 (S.D. Fla. 2008) (Curacao); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (Jordanian); *Unocal Corp.*, 27 F. Supp. 2d 1174 (French).

pronounces an illegitimate "entitlement to make law for all the peoples of the entire planet." App. 127a.

The D.C. Circuit split just as sharply over the same extraterritoriality question in *Exxon Mobil*. The panel majority (per Judge Rogers, joined by Judge Tatel) held that the ATS authorizes courts to hear federal common law claims challenging the conduct of a sovereign U.S. ally on its own soil. *See* 654 F.3d at 20-28. Judge Kavanaugh dissented, emphasizing that claims arising from conduct within another sovereign's territory (as opposed to the high seas or within United States territory) have created "conflict with other sovereign nations." *Id.* at 77.

The Second Circuit majority opinion in *Kiobel* also expressed serious doubts about the extraterritoriality position adopted by the majorities in the divided D.C. and Ninth Circuit opinions.[6]

4. The Ninth Circuit's decision in this case is especially important because it establishes a de facto nationwide rule opening the doors of U.S. courts to ATS actions alleging that foreign sovereigns have

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[6] The *Kiobel* majority explained:

> We need not address here the open issue of whether the ATS applies "extraterritorially." … Were we to take up that issue, however, and were we to … follow the opinion of Attorney General Bradford, we very well could conclude that the ATS does *not* apply extraterritorially, and thus we would dismiss this and the vast majority of recent ATS suits on the ground that the violations of customary international law alleged by plaintiffs "originated or took place in a foreign country."

Kiobel, 621 F.3d at 142 n.44 (quoting opinion of Attorney General Bradford, 1 Op. Att'y Gen. 57, 58 (1795)).

committed grave human-rights violations, with the aid of private corporations that do business with them. As Judge Kleinfeld observed ruefully, the decision "makes the Ninth Circuit the best place in the world to bring class actions against deep-pocket private defendants to recover compensatory and punitive damages and attorneys' fees for the evils so prevalent all over the world." App. 160a.

The Ninth Circuit will be an appropriate venue for virtually every ATS case raising the extraterritoriality question presented here. Plaintiffs in ATS actions are by definition aliens. And suit against a foreign defendant—like the defendants in this case—may be brought "in any district." 28 U.S.C. § 1391(d). Even suits against U.S. defendants typically target major corporations that can be "found" within the Ninth Circuit's broad geographic scope. *Id.* § 1391(b)(3). Finally, because the Ninth Circuit's decision is en banc, there is no prospect that the rule it announced will be revised. Unless and until this Court intervenes, the decision will chart the course of all ATS litigation for the foreseeable future.

B. The Ninth Circuit's Extraterritoriality Holding Is Incorrect

This Court should grant review to solidify what it only suggested—albeit strongly—in *Sosa*: courts should not recognize a federal common law ATS cause of action for conduct occurring entirely within the jurisdiction of a foreign sovereign, especially when the claim challenges the conduct of a foreign sovereign affecting its own citizens on its own soil. As the United States explained in its amicus brief below:

> The presumption against extraterritorial application of U.S. law absent express direction from Congress, the history of the ATS' enactment, and the Supreme Court's many warnings in *Sosa* necessarily lead to the conclusion that the ATS does not authorize federal courts to fashion federal common law—*i.e.*, law of the United States—to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens.

U.S. 2007 Amicus Br. 3. That analysis is unassailable.

1. There is a strong presumption, even with respect to an express cause of action, against extending it to encompass conduct in foreign territory. *See, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). That presumption stretches back to the era of the ATS's enactment. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808). And it was applied in the early years specifically to Acts of Congress adopted to address violations of the law of nations, such as piracy. *See United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818). "*A fortiori*, there should be a compelling presumption against recognizing a power in the courts to project U.S. law into foreign countries through the fashioning of federal common law." U.S. *Ntsebeza* Br., 2008 WL 408389, at *12.

2. Nothing in the ATS's own history supports the recognition of federal common law claims arising from conduct occurring entirely on foreign soil. The

ATS was enacted in response to international incidents caused by assaults by U.S. individuals on foreign ambassadors within the United States. *Sosa*, 542 U.S. at 716-17. The only two reported ATS decisions in the decades following the statute's enactment involved events on U.S. soil or in U.S. territorial waters. *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795). And a 1795 opinion by Attorney General Bradford—expressly relied upon in *Sosa*, 542 U.S. at 721—explained that U.S. courts possess jurisdiction over acts committed in violation of a treaty within the U.S. or, in the case of piracy, on the high seas, but that "[a]cts of the kind occurring in a foreign country … are not within the cognizance of our courts." 1 Op. Att'y Gen. at 58.

3. Recognizing an extraterritorial cause of action is particularly inappropriate where, as here, respondents ask federal courts to sit in judgment of a foreign government. Such cases squarely implicate the core concern animating the presumption against extraterritoriality—avoiding "clashes" with foreign governments "which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). *Sosa* explicitly cautioned against entertaining extraterritorial suits that "would go so far as to claim a limit on the power of foreign governments over their own citizens." 542 U.S. at 727. And the United States has advised this Court that any claim requiring a U.S. court to pass judgment on the conduct of foreign sovereigns "poses 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., 2008 WL 408389, at *18.

It bears further emphasis that neither the plaintiffs nor the defendants in this case are U.S. nationals—the plaintiffs are aliens, as the ATS requires, while Rio Tinto plc is a British corporation, and Rio Tinto Limited is Australian. In the view of four judges below, the lack of any U.S. party to the case deprived the court of jurisdiction under the ATS. App. 171a (Ikuta, J., dissenting). It is certainly difficult to comprehend why U.S. courts must be made available to adjudicate claims—not under Congress's guidance, but under judge-made common law—between *foreign* citizens and a *foreign* corporation concerning the conduct of a *foreign* sovereign on *foreign* soil. App. 163a (Kleinfeld, J., dissenting).[7] But until this Court says otherwise, "the modern ATS litigation juggernaut," *Exxon Mobil*, 654 F.3d at 78 (Kavanaugh, J., dissenting), will continue to roll inexorably in that direction.

4. The Ninth Circuit's extraterritoriality holding contravenes not only U.S. separation-of-powers principles and jurisdictional rules, but also the international law it purports to embrace. Under *Sosa*, courts incorporate international law norms into federal common law to adjudicate suits under the ATS, but international law itself prohibits the application of U.S. law to conduct by a foreign defendant on another sovereign's soil. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-66 (2004); Re-

[7] The propriety of foreign citizens suing foreign corporations under the ATS is itself a recurring question concerning the scope of the ATS. *See supra* note 5 (citing ATS actions against foreign corporations).

statement (Third) of Foreign Relations Law ("Restatement") § 402 (1987). Thus, the only plausible basis for exporting federal common law to extraterritorial conduct of a foreign national would be "universal jurisdiction." And while international law may recognize universal *criminal* jurisdiction for some limited set of norms, *id.* § 404, the legitimacy of universal *civil* jurisdiction is highly contested.[8] Congress and the President may of course invoke such jurisdiction when they see fit—as they did in the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note—but that is a policy decision for the political branches to make in the exercise of their foreign-affairs powers, not a legal judgment for courts to make in fashioning federal common law.

5. The en banc majority brushed off the foreign-policy implications of recognizing extraterritorial claims under the ATS, stating that "*Sosa* took such concerns fully into account when it held that ATS jurisdiction was limited to claims in violation of universally accepted norms." App. 11a (citing 542 U.S. at 727-28). That is clearly incorrect—the *Sosa* Court did not consider whether federal common law should recognize claims involving conduct entirely within another sovereign's jurisdiction, or implicating the conduct of foreign sovereigns. To the contrary, the

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[8] *See*, *e.g.*, Br. of Amicus Curiae the European Comm'n ("EC *Sosa* Br."), *Sosa v. Alvarez-Machain*, No. 03-339 (U.S.), 2004 WL 177036, at *14-22 (Jan. 23, 2004); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 41 I.L.M. 536, ¶ 48 (2002) (Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal) (universal civil jurisdiction exercised by U.S. courts under the ATS has "not attracted the approbation of States generally").

Court went out of its way to question whether such claims should be recognized "at all." 542 U.S. at 728.

The Ninth Circuit also concluded that because "the ATS provides a domestic forum for claims based on conduct that is illegal everywhere," concerns about imposing U.S. law on other nations "do not come into play." App. 11a-12a. That analysis misapprehends the nature of this case and the dozens like it that implicate not the conduct of individual rogue actors, but that of the foreign government itself. It is one thing for the United States to recognize norms of international law. It is wholly another for U.S. district courts, under the guise of federal common law without any guidance from Congress, to announce that U.S. foreign allies like PNG and Australia committed genocide and war crimes. Indeed, it is impossible to reconcile the Ninth Circuit's contention that concerns with international friction are absent here with the expressly stated objections of the United Kingdom and Australia to this litigation.

The Ninth Circuit's refusal to account for those objections vividly illustrates the broader point about extraterritorial claims under the ATS made by the United States below: "A court in the United States is not well-positioned to evaluate what effect adjudication of claims asserted under the ATS may have on a foreign sovereign's own efforts to resolve conflicts, or the effect such adjudication will have on the diplomatic relations of the foreign state." U.S. 2007 Amicus Br. 12. Because extraterritorial claims implicate foreign-affairs matters that are beyond the capacity of courts to handle, they should be considered beyond the scope of the federal common law that courts may apply under the ATS.

II. THE COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER FEDERAL COMMON LAW SHOULD RECOGNIZE CLAIMS UNDER THE ATS BASED ON AIDING AND ABETTING

The majority below also held that federal common law claims under ATS may extend beyond primary conduct-based claims like *Filartiga*, to aiding-and-abetting claims and similar theories of secondary liability. App. 16a-17a, 52a-53a. That conclusion is incorrect, as the United States has recognized, and will expand ATS liability far beyond the narrow class of cases contemplated in *Sosa*.

A. This Court's Precedents Preclude Federal Common Law Aiding-And-Abetting Liability

1. As the United States has explained, this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), makes clear that "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, and one that the courts should not undertake without congressional direction." U.S. *Ntsebeza* Br., 2008 WL 408389, at *8. Indeed, even when interpreting an *express* cause of action, *Central Bank* establishes a strong presumption against recognizing secondary liability not provided for by Congress. 511 U.S. at 182-84. *Central Bank* holds 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 pre-

sumption that the plaintiff may also sue aiders and abettors." *Id*. at 182.

This Court's admonition against reading *express* causes of action to include secondary civil liability applies *a fortiori* to *implied* federal common law causes of action, particularly the narrow sliver of actions permitted by *Sosa*. Given *Central Bank*'s strong presumption against implying secondary liability even in the case of a congressionally conferred cause of action, "[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, 542 U.S. at 726; *see* U.S. 2006 Amicus Br. 22-26 (arguing that ATS does not recognize any form of secondary liability absent an express congressional statement).

2. Secondary liability for claims under the ATS also should be rejected because of the seriously adverse "practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33. *Sosa* directs that courts exercise "great caution" before recognizing new federal common law actions, and that the door to ATS actions should be left only slightly "ajar subject to vigilant doorkeeping." *Id.* at 728, 729. Secondary liability does exactly the opposite, kicking the door wide open to a "vast expansion of federal law," *Central Bank*, 511 U.S. at 183, and "without the check imposed by prosecutorial discretion" that obtains in criminal cases, *Sosa*, 542 U.S. at 727.

Circuits that have recognized aiding-and-abetting liability have done little to constrain the theory, as this case illustrates. At the extreme, some courts—

including the D.C. Circuit—have held that a private party's *mere knowledge* of international-law violations by the sovereign it is working with will suffice to establish liability for the private defendant. *See*, *e.g.*, *Exxon Mobil*, 654 F.3d at 39. In the Apartheid litigation, for example, the allegation was that corporations who simply *did business* with the apartheid regime are liable for the crimes of that regime, even though their conduct was permitted by then-existent international sanctions rules, and even absent any allegation that the corporations actually intended their acts to advance the regime's crimes. U.S. *Ntsebeza* Br., 2008 WL 408389, at *13-14. And while other courts have adopted the seemingly more stringent "purpose" standard found in the Rome Statute governing the International Criminal Court, *see*, *e.g.*, *Presbyterian Church of Sudan*, 582 F.3d at 259; *see also* App. 110a n.8 (McKeown, J., concurring in part and dissenting in part), some courts have construed that standard as requiring little more than mere knowledge, *see*, *e.g.*, *Exxon Mobil*, 654 F.3d at 36-38. The majority decision below, for example, suggests that the war crimes allegations could satisfy a "purpose" requirement, *see* App 55a-56a, even though, as Judge McKeown observed, the complaint "is a jumble of facts and conclusory statements that do not allege a coherent theory of Rio Tinto's involvement in the alleged war crimes." App. 109a.

The aiding-and-abetting theory adopted below, in short, exposes essentially any corporation that operates in a foreign country with an imperfect human-rights record to costly and intrusive class-action litigation based on vague, conclusory, "information and

belief" assertions about the corporation's supposed involvement in the foreign government's affairs. And there is of course the potential for massive damages liability for wrongs committed by the foreign government. Imposing such transaction and liability costs on foreign investment directly frustrates U.S. foreign-policy objectives of *encouraging* investment as a way of liberalizing undemocratic regimes. *See* U.S. *Ntsebeza* Br., 2008 WL 408389, at *20-21.

In all, there is nothing "cautious" or "wary" or "vigilant" about haling foreign companies into U.S. courts to answer for the alleged wrongful acts of foreign sovereign governments.

B. Whether Secondary Liability Is Available In ATS Actions Is An Important Issue Worthy Of Review By This Court

As with the extraterritoriality question discussed above, the United States urged this Court in *Ntsebeza* to consider whether the ATS recognizes aiding-and-abetting claims. U.S. *Ntsebeza* Br., 2008 WL 408389, at *8-11. The question whether the ATS recognizes secondary liability theories is exceedingly important: it is secondary liability that facilitates ATS suits against private corporations, requires courts to adjudicate the conduct of foreign governments by proxy, and subjects nearly every major corporation to the threat of international class-action lawsuits that pose extraordinary transaction and reputational costs, even when they turn out to be frivo-

lous.[9] This Court should grant certiorari and make clear that the federal common law applicable to ATS claims does not recognize theories of secondary liability for violations of international-law norms.

III. THE COURT SHOULD GRANT REVIEW TO CONSIDER WHETHER ATS PLAINTIFFS MUST EXHAUST LOCAL REMEDIES BEFORE FILING SUIT IN THE UNITED STATES

This case also presents the question whether plaintiffs challenging foreign conduct under the ATS must first exhaust available, non-futile local remedies for such conduct. In response to the European Commission's argument in *Sosa* that exhaustion is required by international and U.S. law in extraterritorial cases like this one, this Court stated that it "would certainly consider this requirement in an appropriate case." 542 U.S. at 733 n.21; *see also id.* at 760-61 (Breyer, J., concurring). This is such a case.

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[9] *See*, *e.g.*, Daniel Kovalik, *Colombia, Human Rights, and U.S. Courts* (Apr. 25, 2002) (noting acknowledgment by plaintiffs' lawyers handling two prominent ATS cases that 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" and that for defendants, ATS suits were "public relations disasters waiting to happen"), *available at* http://www.clas.berkeley.edu/Events/spring2002/04-25-02-kovalik/index.html.

A. Federal Common Law Should Require Exhaustion Of Local Remedies Before Extraterritorial ATS Claims May Be Filed

"Exhaustion is a well-established principle of international law, recognized by courts and scholars both here and abroad." App. 390a (Bybee, J., dissenting); *see* Restatement § 703 cmt. d; Chittharanjan Felix Amerasinghe, Local Remedies in International Law 3 (2d ed. 2003). As the European Commission explained in *Sosa*, exhaustion of local remedies is a necessary prerequisite to the exercise of extraterritorial jurisdiction, because international friction can at least be mitigated if a state is allowed to adjudicate claims before a foreign power purports to impose its law to conduct inside the state's borders. EC *Sosa* Br., 2004 WL 177036, at *22-26. If U.S. courts are to apply U.S. law to enforce international law norms concerning conduct taking place entirely within another country's borders, U.S. courts at least should respect the threshold requirements of international law in doing so. *See Sosa*, 542 U.S. at 760-63 (Breyer, J., concurring).

Courts also should follow the guidance provided by Congress when it enacted the TVPA. *See Sosa*, 542 U.S. at 726 ("the general practice has been to look for legislative guidance before exercising innovative authority over substantive law"). The TVPA permits suit for torture and extrajudicial killing occurring abroad, and it gives both aliens and U.S. citizens a cause of action. But the TVPA explicitly requires exhaustion of available local remedies as a prerequisite to suit. 28 U.S.C. § 1350 note, § 2(b). Courts should construe federal common law to be

consistent with the TVPA, rather than creating the opposite rule—omitting a threshold condition to suit for aliens under the ATS, even though Congress imposed exactly that condition on *U.S. citizens* under the closely analogous TVPA.

B. Whether Plaintiffs Must Exhaust Local Remedies Before Asserting Extraterritorial Claims Under The ATS Is An Important Question

The United States and numerous foreign sovereigns have explained the importance to international harmony of requiring exhaustion of extraterritorial claims—particularly claims, like this one, with no U.S. nexus at all. The United States argued below that an exhaustion requirement should be adopted in ATS cases as "a matter of international comity." U.S. 2007 Amicus Br. 6. An exhaustion requirement, the United States explained, "manifestly would *further* … Congress' intent to minimize the possibility of diplomatic friction by affording foreign states the first opportunity to adjudicate claims arising within their jurisdictions." *Id.* at 7-8.

Similarly, the United Kingdom and Australia argued below that exhaustion of local remedies is an important feature of international law, and that exhaustion "may help ameliorate the risks of intergovernmental conflict" in extraterritorial ATS cases. U.K. 2007 Amicus Br. 8. And as noted, the European Commission argued in its amicus brief in *Sosa* that to the extent U.S. courts recognize extraterritorial ATS claims, they should subject such claims to the conditions imposed by international law, includ-

ing the exhaustion-of-local-remedies requirement. EC *Sosa* Br., 2004 WL 177036, at *22-26.

Given the expressed concerns of the United States and multiple foreign sovereigns—including close U.S. allies—this Court should grant certiorari and resolve the exhaustion question conclusively. Assuming the federal common law applicable in ATS cases permits plaintiffs to challenge conduct in other sovereign jurisdictions, the Court should hold that plaintiffs first must pursue remedies in the courts (or other forums) of that sovereign before asking a U.S. court to apply U.S. law to such conduct.

IV. THE FOREGOING QUESTIONS SHOULD BE RESOLVED IN CONJUNCTION WITH THE CORPORATE LIABILITY QUESTION PRESENTED HERE AND IN *KIOBEL*

Finally, this case presents the question whether corporations may be held liable under the ATS—the question on which this Court granted certiorari in *Kiobel*. App. 13a-16a, 40a-44a, 51a-52a. Accordingly, the petition at least must be held in light of *Kiobel*. Rio Tinto urges the Court, however, to grant the petition now to decide the remaining questions presented here in conjunction with the corporate liability issue.

This Court has in the past granted review of multiple cases during a single Term to address related issues under a single statute or rule.[10] It should do

[10] *See*, *e.g.*, *Skilling v. United States*, 130 S. Ct. 2896 (2010), *Black v. United States*, 130 S. Ct. 2963 (2010), and *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (addressing scope of 18 U.S.C. § 1346); *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (addressing

the same here. As explained, the questions presented in this petition implicate serious separation-of-powers and foreign-policy concerns. Some of those concerns are connected to the question of corporate liability, because essentially every ATS suit against a corporation alleges extraterritorial conduct, is premised on a theory of secondary liability, and implicates the conduct of a foreign sovereign.

But no matter what the Court holds with respect to corporate ATS liability, the problems identified here will persist. Either corporate liability will be recognized, in which case the problems obviously remain, or it will not, in which case plaintiffs will simply attempt to sue individual officers and directors, and the problems will still remain. *See*, *e.g.*, *Doe v. Cisco Sys., Inc.*, No. 11-cv-2449, Dkt. No. 1 (N.D. Cal. May 19, 2011) (naming several corporate officers as defendants). The important questions raised in this petition thus will remain relevant—and unanswered—unless this Court resolves them now. And resolving them together with the corporate liability issue would permit the Court to consider the interplay between various aspects of federal common law liability under the ATS, and how that federal common law should be construed in light of the various objectives and interests involved.

Texas capital sentencing statute); *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (construing IIRIRA's jurisdiction-stripping provision); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), and *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (addressing ripeness in review of agency decisions).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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