No. 09-34

In the Supreme Court of the United States

PFIZER INC., PETITIONER

v.

RABI ABDULLAHI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. 1350, can extend to a private actor based on alleged state action by a foreign government where there is no allegation that the government knew of or participated in the specific acts by the private actor claimed to have violated international law.

2. Whether, absent state action, a complaint that the private actor has conducted a clinical trial of a medication without adequately informed consent can surmount the "high bar to new private causes of action" under the ATS that this Court recognized in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004).

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Alien Tort Statute (ATS) provides that federal "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. As this Court has explained, the statute "is in terms only jurisdictional," and it does not create a right of action. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004); see also *id.* at 729. When Congress enacted the ATS in 1789, its grant of jurisdiction "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at

common law." *Id.* at 712. At the time, that category comprised "three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724. In *Sosa*, however, the Court held that the door had not been closed "to further independent judicial recognition of actionable international norms" dictated by "the present-day law of nations." *Id.* at 729, 725.

Elaborating on the "narrow class of international norms" that might give rise to such claims today, *Sosa* specified that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." 542 U.S. at 729, 732. The Court acknowledged a "related consideration" when evaluating the applicability of a specific norm: "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." *Id.* at 732 n.20.

Sosa also directed federal courts to consider "the practical consequences" and "potential implications for the foreign relations of the United States" before recognizing a federal-common-law claim as valid. 542 U.S. at 727-728, 732-733. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power," the Court observed, "but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." *Id.* at 727. The Court recognized that "modern international law is very much concerned with just such ques-

tions," and stated that it is necessary to exercise "great caution in adapting the law of nations to private rights." *Id.* at 727, 728.

2. Petitioner is a pharmaceutical company. The petition involves two lawsuits, brought under the ATS,[1] that arise out of petitioner's testing of an experimental antibiotic during an epidemic of bacterial meningitis in northern Nigeria in March and April of 1996. Pet. App. 6a-8a. Respondents are the plaintiffs in the two lawsuits: Nigerian children (and their guardians or estate representatives) who reside in Nigeria and allege that they were subjects in petitioner's drug test. *Id.* at 116a, 154a-155a.

Respondents allege that when petitioner's employees in Connecticut learned of the epidemic in Nigeria, they quickly developed a plan to test Trovafloxacin Mesylate (marketed as "Trovan") on children stricken with bacterial meningitis. Pet. App. 178a, 236a-237a, 303a-308a. Nigeria's government allegedly facilitated the test by providing a letter requesting that petitioner export Trovan to Nigeria—a letter required by the U.S. Food and Drug Administration (FDA) as a condition of export. *Id.* at 237a, 311a-312a, 328a-329a. The Nigerian government also allegedly gave petitioner control over two wards at the Infectious Disease Hospital in Kano, Nigeria, in which to carry out the testing. *Id.* at 238a, 329a. Respondents allege that the Trovan test was jointly administered by three U.S. physicians sent by petitioner from Connecticut, and by Nigerian physicians and nurses whom the Nigerian government assigned to assist them. *Id.* at 238a-239a, 299a, 328a-329a.

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[1] One lawsuit also asserts claims under Connecticut state law, see Pet. App. 400a-409a, 414a-416a, but they are not at issue here.

Respondents allege that there were approximately 200 participants in petitioner's study, selected from those who sought medical assistance at the Kano hospital. Pet. App. 239a-240a, 304a. Participants were administered either Trovan or a control drug, Ceftriaxone. *Id.* at 241a, 305a. Respondents allege that the form of Trovan being administered had not previously been tested on humans but that it was known, on the basis of animal studies, to have potentially serious side effects. *Id.* at 235a, 305a, 307a. Respondents also allege that study participants who received the control drug were given only one-third of the recommended dosage, in order to make Trovan seem more effective in comparison. *Id.* at 241a, 305a, 313a.

Respondents further allege that the study participants and their families were not told that they were part of a medical study, that there were risks associated with the treatments they received, or that Doctors Without Borders was operating on the hospital's grounds and administering, without charge, a standard treatment for bacterial meningitis. Pet. App. 239a-240a, 242a, 307a. Respondents allege that petitioner did not take steps that could have reduced risks to study participants, including properly evaluating children prior to administering Trovan, reevaluating them during treatment, and changing treatment for those who failed to improve. *Id.* at 241a-242a, 314a-315a. Petitioner's team allegedly left Nigeria after two weeks, making no arrangements for follow-up care. *Id.* at 240a, 313a. Respondents allege that many of the study participants suffered death or serious injuries as a result of receiving Trovan or inadequate doses of the control drug. *Id.* at 254a-280a, 313a-314a, 335a-395a.

In the United States, the FDA eventually approved Trovan for use, but its approval was limited to adult patients. Pet. App. 395a-396a. In 1999, responding to new reports of serious reactions to Trovan, the FDA issued a public health advisory substantially limiting its use. See Center for Drug Evaluation & Research, FDA, *Trovan (Trovafloxacin/Alatrofloxacin Mesylate): Interim Recommendations* (June 9, 1999), http://www.fda.gov/Drugs/DrugSafety/PublicHealthAdvisories/UCM053103.

3. In 2001 and 2002, respondents filed suits against petitioner in the United States District Courts for the Southern District of New York and for the District of Connecticut. Pet. App. 175a-289a (S.D.N.Y. Compl.), 290a-419a (D. Conn. Compl.). They alleged that petitioner had violated customary international law by conducting medical experiments on Nigerian children without informed consent. *Id.* at 242a-247a, 409a-410a. Respondents' account of customary international law cited various provisions from the Nuremberg Code; the World Medical Association's Declaration of Helsinki; the International Covenant on Civil and Political Rights; guidelines from the Council for International Organizations of Medical Services; the Universal Declaration of Human Rights; and a United Nations General Assembly Resolution. *Id.* at 230a-231a & n.5, 282a-283a, 314a-330a, 409a.

The Connecticut action was transferred to the Southern District of New York, and the district court granted petitioner's motions to dismiss both actions. Pet. App. 114a-152a, 153a-174a. The district court held that it lacked subject-matter jurisdiction under the ATS because the sources of international law on which respondents relied did not support a federal-common-law cause

of action under this Court's decision in *Sosa*. *Id.* at 126a-142a, 160a-163a.

In both cases, the district court held in the alternative that, even if respondents had alleged a valid claim under the ATS, it would dismiss on grounds of *forum non conveniens*. The court concluded that an adequate alternative forum existed in Nigeria and noted it would condition dismissal on petitioner's cooperation with litigation there. Pet. App. 142a-152a, 168a-174a.

4. Respondents appealed the orders dismissing both cases. After consolidating the appeals, Pet. App. 6a, the court of appeals reversed and remanded, *id*. at 1a-106a.

a. The court of appeals first held that the district court had "incorrectly determined that the prohibition in customary international law against nonconsensual human medical experimentation cannot be enforced through the ATS." Pet. App. 7a. It concluded that respondents' allegations of large-scale drug testing without informed consent, carried out with the involvement of the Nigerian government, established a violation of a "customary international law norm that is sufficiently (i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern" to be the basis for a federal-common-law cause of action cognizable under the ATS. *Id*. at 25a-26a, 49a.

b. The court of appeals further held that petitioner could be liable under the ATS if it "acted in concert with" the Nigerian government. Pet. App. 50a (quoting *Kadic* v. *Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996)). The court looked to standards for establishing state action in claims brought under 42 U.S.C. 1983, and concluded that respondents adequately alleged state action here. Pet. App. 50a-52a. The court observed that respondents "alleged that the

Nigerian government was involved in all stages of the Kano test and participated in the conduct that violated international law," *id.* at 50a, and it found that their allegations that "the violations occurred as the result of concerted action between [petitioner] and the Nigerian government" were sufficient "[a]t the pleading stage," *id.* at 51a-52a.

c. The court of appeals did not determine whether the district court abused its discretion by holding, in the alternative, that the actions should be dismissed on *forum non conveniens* grounds. Pet. App. 52a. Instead, the court noted that the parties had requested that the issue be remanded to the district court to be reconsidered "in light of recent developments, in particular the initiation of proceedings by the federal government of Nigeria and the state of Kano against [petitioner] and certain of its employees." *Ibid.* After providing some "guidance to assist the parties and the district court" in addressing the *forum non conveniens* issue, the court of appeals remanded the issue. *Id.* at 52a, 54a.

d. Judge Wesley dissented. Pet. App. 58a-106a. Although he "agree[d] with the methodology used by the majority to determine whether a norm falls within the jurisdictional grant of the ATS," *id.* at 60a, he criticized the majority for failing to consider whether the international law norm prohibiting nonconsensual medical testing is one that applies to private actors, *id.* at 63a. He concluded that "non-consensual medical experimentation by private actors, though deplorable, is not actionable under international law." *Id.* at 62a. He further concluded that, even assuming "that international law prohibits states from conducting non-consensual medical tests," respondents had failed to "demonstrate[] that [petitioner] acted under the color of law," and thus peti-

tioner could not be held liable for violating any norm against state conduct. *Id.* at 98a.

5. After the court of appeals denied rehearing (Pet. App. 107a-113a), petitioner sought a writ of certiorari from this Court. On November 2, 2009, the Court invited the Solicitor General to file a brief expressing the views of the United States. See 130 S. Ct. 534 (noting that the Chief Justice and Justice Sotomayor took no part in the consideration or decision of the petition).

Since then, there have been further developments associated with the July 2009 settlement between petitioner and Nigerian governmental authorities that was mentioned in the parties' briefs. See Br. in Opp. 6 n.4; Reply Br. 2. On the basis of public reports and recent communications with counsel for petitioner and respondents, we understand that the settlement established, *inter alia*, a $35 million trust fund from which participants in the Trovan study can seek compensation. We also understand that one condition for receiving compensation involves a release of other claims against petitioner including the claims in the lawsuits before this Court.

More than 500 claims were filed. It is not yet clear how many claims were made on behalf of the respondents before this Court, though it appears that at least some respondents did not file claims before the deadline. The board established by the settlement to administer the trust and make compensation payments has recently begun collecting samples for DNA testing to identify which claimants were actual participants in the Trovan study. See Oluokun Ayorinde, *$75 [Million] Settlement: Pfizer Begins DNA Test To Determine Genuine Claimants,* P.M. News Nigeria, May 18, 2010, http://pmnewsnigeria.com/2010/05/18/75-settlement-pfizer-

begins-dna-test-to-determine-genuine-claimants. It is not yet known how many respondents will submit to the DNA testing or be found eligible for compensation. Nor is it known when the board will begin making individual compensation determinations or when claimants in that process will be required to sign releases of their other claims against petitioner.

DISCUSSION

Neither of the questions presented warrants this Court's review. The court of appeals did not itself decide either of the questions, and there is no conflict in the circuits about them. Petitioner does not challenge the proposition that international law prohibits nonconsensual medical testing when there is state involvement. Petitioner's questions concern only the adequacy of respondents' specific allegations of state involvement, or, in the alternative, the enforceability of a norm prohibiting nonconsensual medical testing "absent state action." Pet. i. As presented in this case, those questions are not of general significance for litigation under the ATS.[2]

Moreover, the procedural posture of the case counsels strongly against further review at this time. Not only is it possible that a decision by this Court would not even resolve the viability of respondents' ATS claim for purposes of this case, but petitioner may still prevail on other dispositive questions—including the *forum non*

[2] Although petitioner makes broad policy arguments about the practical consequences of ATS litigation for American corporations (Pet. 25-29), it appropriately does not join the suggestion of its amici that the Court should grant certiorari in this case to consider whether suits under the ATS can be brought against private corporations at all. See Reply Br. 4. That question was not addressed by the court below. Nor is it "fairly included" in the scope of either of the questions presented. See Sup. Ct. R. 14.1(a); *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010).

conveniens issue that can be revisited on remand. In addition, it is possible that the settlement process in Nigeria may render moot the claims in this case of some respondents. Review is thus unwarranted at this stage of the case.

A. The Court Of Appeals Did Not Depart From Other Circuits When It Allowed Respondents' ATS Claims To Proceed On The Basis Of The Nigerian Government's Alleged Participation In The Trovan Test

With respect to the first question presented, petitioner argues (Pet. 18-19) that the court of appeals should not have found that petitioner acted under color of law where there was no allegation that the Nigerian government or any government employee played a role in the nonconsensual testing. But that is not how the court of appeals understood respondents' allegations. Nor is any conflict created or exacerbated by the court of appeals' decision to allow an ATS claim to proceed on the basis of allegations that "the Nigerian government was involved in all stages of the Kano test and participated in the conduct that violated international law." Pet. App. 50a.

1. The premise of petitioner's argument (Pet. 14) is that the court of appeals did not require respondents to allege that the Nigerian government had any actual knowledge of, or direct participation in, the alleged violations of international law. Respondents, however, alleged that the government "was intimately involved and contributed, aided, assisted and facilitated [petitioner's] efforts to conduct the Trovan test." Pet. App. 312a. The government's cooperation allegedly included requesting Trovan's export to Nigeria, providing accommodations for the test in Kano, "assigning Nigerian physicians to

assist" with the test, "acting to silence Nigerian physicians" who criticized the test, and back-dating a letter approving the test. *Id.* at 237a & n.6, 243a-244a, 312a, 328a-329a.

The court of appeals read respondents' complaints as alleging that the government "participated *in the conduct that violated international law*." Pet. App. 50a (emphasis added). At most, therefore, petitioner's challenge is to the court's application of a legal standard, rather than to the standard itself. Whether the court's application of that standard to the circumstances of this case was correct or incorrect, certiorari "is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, while it is true that the court of appeals did not mention any allegation of specific knowledge on the part of the government of the allegedly nonconsensual nature of the test, it also did not affirmatively hold that state action, or liability in actions under the ATS more generally, can be proved in the absence of such knowledge or participation in the alleged acts. That issue has been left undecided by the court of appeals.[3]

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[3] Much of the gravamen of petitioner's objections to the court of appeals' decision (*e.g.*, Pet. 15 n.5; Reply Br. 4-5) seems to be that respondents' allegations of state involvement are too general or conclusory to satisfy the standards articulated in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009). Cf. *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (finding that "naked allegation" that paramilitary forces "were in a symbiotic relationship with the Colombian government" was too conclusory to be credited as true under *Iqbal*). That question, however, can presumably be addressed by the district court on remand without any intervention from this Court, because *Iqbal* post-dates the court of appeals' decision. In any event, this Court should not be the first to consider how *Iqbal* should apply to the pleadings in this case. And re-

2. Although petitioner contends (Pet. 14-19; Reply Br. 5-9; Pet. Supp. Br. 2-3) that there is disagreement in the courts of appeals about the standard for assessing the presence of state action for purposes of ATS claims, the cases it cites do not conflict with the decision in this case.

Petitioner relies extensively (Pet. 15-16; Reply Br. 8-9; Pet. Supp. Br. 2-4) on *Abagninin* v. *AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008). In that case, however, the Ninth Circuit merely "assume[d], because the parties d[id], that the Rome Statute accurately states the elements of a crime against humanity," including the existence of a course of conduct "pursuant to or in furtherance of a State [or State-like organization's] policy." *Id.* at 741 (citation omitted). Thus, the Ninth Circuit's state-action discussion in *Abagninin* (*id.* at 742) was not a general conclusion that any ATS claim must satisfy a state "plan-or-policy test" (Reply Br. 6 n.2)—much less a determination that domestic law is irrelevant to questions of state action under the ATS (Pet. Supp. Br. 2-3).[4] It was instead a holding about the

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spondents might also wish to respond to *Iqbal*, which they might do by amending their complaints. See Fed. R. Civ. P. 15(a)(2) (providing that courts should "freely give leave" to amend pleadings before trial "when justice so requires").

[4] Nor has the Second Circuit clearly held that only domestic law is relevant to the state-action inquiry. The earlier decision cited by the court of appeals in this case (Pet. App. 50a) looked to both international law and jurisprudence under 42 U.S.C. 1983 to conclude that sufficient state action had been alleged. See *Kadic* v. *Karadzic*, 70 F.3d 232, 243-245 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). Cf. *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2009) (noting that "domestic law might provide guidance on whether to recognize a violation of international norms" but using international law to identify "the *mens rea* standard for aiding and abetting lia-

elements of the specific kind of violation alleged in that case (a crime against humanity). There is accordingly no conflict between the Ninth Circuit's decision in *Abagninin* and the decision below.[5]

Petitioner also contends (Reply Br. 6) that decisions of the Eleventh Circuit "require[] that the foreign government know of the specific wrongful conduct alleged to violate international law." But that is not the test employed by the Eleventh Circuit, and the cases petitioner cites are not inconsistent with the decision below. In *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), cert. denied, 549 U.S. 1032 (2006), the court followed the Second Circuit and held that the police's general policy of registering and tolerating private security forces did not "transform those forces' acts into state acts." *Id.* at 1247-1248. It also held that state action had been established when a governmental actor (the mayor) was "not a mere observer" but someone who "actually 'assisted' the [private] security force." *Id.* at 1249. The court's discussion of what

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bility in ATS actions"), petitions for cert. pending, No. 09-1262 (filed Apr. 15, 2010), and No. 09-1418 (filed May 20, 2010).

[5] Petitioner's supplemental brief also discusses (at 2-3) the Second Circuit's recent decision in *Presbyterian Church of Sudan*. But that case involved a claim for aiding and abetting alleged wrongdoing by a foreign government, an issue not presented here. Moreover, the decision petitioner cites, following circuit precedent that aiding-and-abetting liability is valid under the ATS, indicated that such liability may be controlled by a different legal standard than is primary liability. See 582 F.3d at 258-259. Assuming such a claim for secondary liability is a valid basis for liability under the ATS, the decision in *Presbyterian Church of Sudan* does not speak to the issues in this case. And to the extent that the decision conflicts with the decision in this case, such an intra-circuit disagreement would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

the Guatemalan police "knew of the events in question" was part of the court's attempt to determine whether state action arose from "police *in*action." *Id.* at 1248 (emphasis added). This case, however, does not involve allegations of government inaction. There is accordingly no inconsistency between *Aldana* and the court of appeals' conclusion in this case that petitioner could be liable for acts that allegedly "occurred in a Nigerian facility *with the assistance of the Nigerian government*." Pet. App. 51a (emphasis added). The same is true of the other Eleventh Circuit cases on which petitioner relies.[6]

B. This Court Should Not Be The First To Decide Whether The ATS Allows A Claim About Nonconsensual Medical Testing In The Absence Of State Action

Even if petitioner were to prevail on its claim that the court of appeals erred with respect to the adequacy of respondents' allegations of state action, petitioner acknowledges that its ATS argument would avail it nothing if an international-law norm prohibiting nonconsensual medical testing were applicable to purely private actors. Thus, petitioner's second question (Pet. i) asks whether nonconsensual medical testing by a private actor, "absent state action," can be the basis for an ATS

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[6] See *Sinaltrainal*, 578 F.3d at 1266 (finding no state action on the basis of a general allegation that state police "tolerated and permitted [private] paramilitary forces to exist"; noting that the complaint had not alleged that the government was either "aware of" or "involved in" the illegal conduct); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1317-1318 (11th Cir. 2008) (finding no state action in a case arising under the Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, where the general "symbiotic relationship" alleged between paramilitary organizations and the state military was not alleged to "involve[] the torture or killing alleged in the complaint").

claim. That question, however, was not even implicitly decided by the court of appeals, which is a sufficient basis for this Court to decline to address it. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (under its "usual procedures," the Court does not decide questions that were not answered by the court of appeals, because it is a court "of final review, 'not of first view'") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

1. Petitioner tacitly acknowledges that the court of appeals did not decide the second question presented in its petition. Petitioner says certiorari on that question is "required *if* the Second Circuit decision is understood alternatively to expand ATS jurisdiction over purely private actors." Pet. 19 (emphasis added). Petitioner also says: "[t]he panel majority *suggested*, in the alternative," that an ATS cause of action could exist "against a purely private actor without any state involvement." Pet. 6 (emphasis added).

Notwithstanding petitioner's inferences, the court of appeals' decision about the viability of respondents' ATS claims plainly depended on the allegation that petitioner acted in concert with the Nigerian government. See Pet. App. 50a ("A private individual will be held liable under the ATS if he 'acted in concert with' the state, i.e., 'under color of law.'") (quoting *Kadic*, 70 F.3d at 245). Although the court's preceding discussion of customary international law and nonconsensual medical testing (*id.* at 20a-50a) did not focus on allegations of state action, those allegations were a necessary part of its analysis.

Thus, in addressing whether the international-law norm had sufficiently "concrete content" to satisfy *Sosa*, the court found it unnecessary to address "[w]hatever uncertainty may exist at the margin * * * because [re-

spondents] allege a complete failure on the part of [petitioner] *and the Nigerian government* to inform [respondents] of the existence of the Trovan experiments. Pet. App. 42a (emphasis added); see also *ibid.* (noting that respondents' "allegations, if true, implicate [petitioner] and the Nigerian government"). Indeed, in discussing the Nuremberg Code's "prohibition on nonconsensual medical experimentation," the court invoked Article 32 of the Fourth Geneva Convention, which it described as applying only to the conduct of "civilian or military *agents of the state parties*." *Id.* at 31a & n.9 (emphasis added); see International Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 221 (Ronald Griffin & C.W. Dumbleton trans., Jean S. Pictet ed. 1958) (noting that Article 32 of the Fourth Geneva Convention contains a formal pledge by "each Contracting Party" to the Convention that is "equally binding on *those under its authority* or acting in its name") (emphasis added). In any event, after discussing the substantive norm, the court immediately proceeded to its discussion of state action and found it adequately pleaded. Pet. App. 50a-52a. The conclusion that the court did not hold that purely private conduct is actionable under the ATS is reinforced by Judge Wesley's dissenting opinion, which expressly criticized the panel majority for addressing the international-law norm without taking petitioner's status as a private party into account. *Id.* at 63a.

2. Once stripped of the premise that the court of appeals found a tort committed by a "purely private actor[]" to be actionable under the ATS, the petition's claim of a conflict in the circuits on the second question (Pet. 23) evaporates. Moreover, none of the decisions

petitioner cites purported to adopt a standard for the level of state action necessary for all violations of international law. Each of those decisions rejected a particular cause of action under the ATS. See Pet. 23-24 (citing *Cisneros* v. *Aragon*, 485 F.3d 1226 (10th Cir. 2007); *Abagninin*, 545 F.3d at 741; *Aldana*, 416 F.3d at 1247; *Taveras* v. *Taveraz*, 477 F.3d 767 (6th Cir. 2007)). But two of them (*Cisneros* and *Taveras*) did not discuss state action at all. As noted above (pp. 12-13, *supra*), *Abagninin* discussed state action only in the context of an alleged "crime against humanity." 545 F.3d at 741. Similarly, *Aldana* discussed state action in the context of a claim involving "state-sponsored torture." 416 F.3d at 1247-1248. As a result, there is not even a conflict with petitioner's reading of the decision below.

Furthermore, petitioner identifies no other court that has addressed whether state action is required for a valid ATS claim arising out of nonconsensual medical testing by a purely private actor. There is no good reason for this Court to be the first to do so.

C. The Procedural Posture Of This Case Counsels Strongly Against Further Review At This Time

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari); see also *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., joined by Alito, J., concurring in the denial of certiorari) (noting that this Court's "consideration of the case would be premature" because the court of appeals had reversed and remanded, leaving open an alternative question that could preclude liability for petitioner); *Brotherhood of Locomotive Firemen* v.

Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").[7]

In this case, the interlocutory nature of the court of appeals' decision makes a denial of certiorari particularly appropriate, because another basis for dismissing the case will be ripe for consideration when the case is remanded to the district court. The district court has already held that dismissal of both complaints is appropriate on grounds of *forum non conveniens*, as long as petitioner consents to suit in Nigeria, waives any statute-of-limitations defense, and cooperates with trial and discovery there. Pet. App. 142a-151a, 168a-174a. Shortly before argument in the court of appeals, however, petitioner notified the court that, in light of then-recent developments in Nigeria, it would not seek affirmance on the basis of *forum non conveniens*. *Id.* at 15a; 05-4863-cv Docket entry (2d Cir. June 29, 2007). Respondents joined petitioner's request for a remand of

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[7] There are of course exceptions to the Court's general practice, such as when there is "an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis of certiorari." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007). Thus, in *American Isuzu Motors, Inc.* v. *Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919), the government's amicus brief (at 18-22) supported certiorari on one of three questions (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). In that case, the question was an important issue of law that had been decided by the court of appeals and the government assessed at that time that the decision on that question had significant adverse foreign policy consequences. Here, by contrast, petitioner's challenge is to the adequacy of respondents' allegations and to the scope of a specific international-law norm prohibiting nonconsensual medical testing.

the *forum non conveniens* issue, and the court of appeals granted that request. Pet. App. 52a.

Accordingly, regardless of whether petitioner prevails in this Court, the district court may again exercise its discretion to dismiss the complaints on *forum non conveniens* grounds. This Court has made it clear that *forum non conveniens* is the kind of threshold, nonmerits issue that can be considered at any time. *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (holding that a "district court * * * may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction"). It is therefore an issue that the district court could revisit upon remand.

2. Even apart from the *forum non conveniens* question, the Court's usual practice of waiting for a final judgment is appropriate here because this case is at a very early stage of proceedings. The district court dismissed the complaints for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and has not yet considered other grounds for dismissal for failure to state a claim under Rule 12(b)(6).[8] Pet. App. 127a, 142a, 163a & n.5. Thus, petitioner could avoid not just trial and liability but even discovery.

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[8] The district court's decision in the first case included one paragraph under the heading "Rule 12(b)(6) Standard," but the text of that paragraph explained how the court's "subject matter jurisdiction" inquiry differed in some respects from the usual standards applicable under Rule 12(b)(6). Pet. App. 125a-126a. The parallel discussion in its opinion in the second case included similar content and distinguished even more clearly between the two kinds of motions to dismiss. *Id.* at 159a-160a; see also *id.* at 163a n.5 ("Because this Court does not have jurisdiction under the ATS, it declines to consider [petitioner's] arguments regarding dismissal under Rule 12(b)(6) for failure to state a claim.").

Moreover, in the context of the ATS, the distinction between Rules 12(b)(1) and 12(b)(6) has the potential to alter this Court's need to analyze the underlying claims. When deciding the validity of respondents' ATS claims on jurisdictional grounds, the district court acted consistently with Second Circuit precedent holding that the international-law norm that is allegedly violated must satisfy the *Sosa* standards in order for subject-matter jurisdiction to exist under the ATS. See, *e.g.*, *Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*, 517 F.3d 104, 117 (2008), cert. denied, 129 S. Ct. 1524 (2009); see also *Kadic*, 70 F.3d at 238. In the view of the United States, however, the validity of a federal-common-law claim under *Sosa* should generally be treated as a merits question, with the ATS conferring subject-matter jurisdiction so long as the allegations of a violation of customary international law are not plainly insubstantial.[9] Under that view, the proper question at this stage of the proceedings should not be whether respondents' allegations fully satisfy the *Sosa* standards for a federal-common-law cause of action, but merely whether those allegations are "insubstantial on their face." *Hagans* v. *Lavine*, 415 U.S. 528, 542 n.10 (1974) (citation omitted). To the extent that this Court agrees with that view, it would be unnecessary to resolve fully

[9] "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). As a result, a plaintiff's failure to state a claim generally does not affect a court's subject-matter jurisdiction, unless the claim is so "plainly unsubstantial" that it falls outside the statutory grant of jurisdiction. *Ex parte Poresky*, 290 U.S. 30, 32 (1933); see also *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006) (treating statutory limitation of employment-discrimination claims to employers with 15 or more employers as "an element of a plaintiff's claim for relief, not a jurisdictional issue").

the questions raised in the petition in order to conclude that the court of appeals correctly reversed the judgment of the district court dismissing the case for lack of subject-matter jurisdiction.

3. Finally, the claims process associated with the settlement trust fund in Nigeria (see pp. 8-9, *supra*) will likely continue to be implemented. If some respondents receive compensation from the trust fund, the releases they would execute would likely moot their claims in this case.[10]

[10] Petitioner has suggested (Reply Br. 2) that respondents will have less incentive to release their claims in this case if this Court denies certiorari. Their principal incentive, however, would be the prospect of a payment from the Nigerian trust fund in the short term. The size and availability of such a payment would be known at the time of executing a release. Because this case is at such an early stage, this Court's certiorari decision would play only a small part in any attempt to calculate the likelihood that respondents will ultimately receive any compensation from it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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