No. 09-34

In the Supreme Court of the United States

PFIZER INC.,

Petitioner,

v.

RABI ABDULLAHI, *et al.*,

Respondents.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

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

Many Chamber members have been named as defendants in cases under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. This Court in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004), set a "high bar to new private causes of action for violating international law" under the ATS. Since *Sosa* was decided, however, lower courts, including the court below, have disregarded *Sosa*'s strictures and recognized an ever-expanding array of novel international law-based causes of actions in suits against American and foreign firms doing business abroad. The Chamber has consistently opposed corporate ATS litigation on the ground that it is unauthorized by Congress, has no basis in international law, and significantly harms American business activity abroad.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* affirms that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amicus curiae* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of the intent to file this brief at least ten days prior to the filing of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

One of the Chamber's primary missions is to represent the interests of its members in court on issues of national importance to American business. It is those broader interests that the Chamber seeks to advance through the filing of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The Chamber believes this Court should grant *certiorari* on both questions presented in this case for the reasons stated in Petitioner's brief. The Chamber files this brief *amicus curiae* to raise two more general reasons for granting the petition that are of central importance to the American business community.

First, the Chamber urges the Court to grant the petition to address and resolve the confusion and excesses found across the entire spectrum of corporate ATS cases. Corporations are not subject to international law except in a few well-defined instances (like war crimes and genocide). The lower courts have permitted plaintiffs to skirt this limitation by alleging links between corporate behavior and state behavior that, the lower courts conclude, bring corporations within the international law-based causes of action available under the ATS. Courts have done this not only in cases, like the one below, where corporations are the primary alleged wrongdoer and states allegedly facilitate the wrongdoing, but also in cases where states are the primary alleged wrongdoers and corporations allegedly facilitate the wrongdoing, as well as in cases where corporations are linked to states via intermediary private parties. The central legal disagreement concerning the appropriate

state/private actor link in all three types of case is whether the actor facilitating the wrongdoing (be it a state or a private party) must have actual knowledge of the specific wrongdoing by the primary wrongdoer (be it a state or a private party). This case is an excellent vehicle to resolve this issue, because the majority and dissenting opinions below clearly addressed it and sharply disagreed about it.

The Chamber also urges the Court to grant the petition because the erroneous expansion of corporate liability in ATS cases damages American business activity abroad and thus raises issues of national importance. First, the very broad standards of liability in the ATS case law, and the legal uncertainty about permissible involvement with foreign governments, impose enormous costs on American business and chill U.S. business activity abroad. Second, because U.S. corporations are (compared to their foreign competitors) disproportionately subject to ATS lawsuits, these lawsuits act as a discriminatory tax on U.S. corporations engaged in business and investment abroad. *Sosa*'s separation of powers principles demand that Congress, and not lower courts, make the decision whether to impose these economic harms by applying novel extraterritorial human rights claims to corporations.

ARGUMENT

ATS litigation against corporations for alleged wrongdoing outside the United States has exploded in recent years. These cases are based on the legal novelty of extending international law—which usually applies to states but not private actors—to private corporations. Plaintiffs have succeeded in

this illegitimate extension of ATS liability by alleging vague links between firms and states, or between corporate parents and their foreign subsidiaries (which in turn are linked to states), or between corporations and private groups like paramilitaries (which are also linked to states).

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THE LEGAL STANDARD NEEDED TO ESTABLISH CORPORATE LIABILITY UNDER INTERNATIONAL LAW IN THE BROAD ARRAY OF ATS CASES

In footnote 20 of *Sosa*, this Court, acknowledging that international law is normally limited to states, noted the importance in ATS cases of distinguishing between private and state actors. *Sosa*, 542 U.S. at 732 n.20 (2004) (drawing attention to "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"). That footnote did not, however, indicate that international law causes of action could be extended to corporations. And it provided no guidance, assuming that such an extension were possible, about the nature of the links needed to make a corporation subject to international law.

In the lower courts, the central disputed legal issue about such links is whether the actor facilitating the wrongdoing (be it a state or a private entity) must have actual knowledge of the specific wrongdoing by the primary wrongdoer (be it a state or a private actor). This case is an excellent vehicle to resolve this issue. The majority and dissenting opinions below agreed that plaintiffs alleged that the

Nigerian government provided only general assistance and not that the government had specific knowledge of petitioner's alleged wrongful act (the failure to obtain adequate consent). *See* Pet. App. 50a-52a, 102a. But they reached contrary conclusions about the significance of the allegations for corporate liability under the ATS.

A. *Sosa* Alluded To But Did Not Resolve A Critical Legal Question In Corporate ATS Litigation: The Type of Link Between Corporations And States, If Any, That Can Establish Corporate Liability Under International Law

Modern litigation under the ATS has developed in two waves. In the first, alien plaintiffs sued foreign officials for alleged human rights abuses committed outside the United States. The seminal decision here was *Filartiga* v. *Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a suit by Paraguayans alleging that a Paraguayan police official had tortured a Paraguayan citizen in Paraguay. The Supreme Court addressed the basis and scope of this type of ATS litigation in *Sosa*, a suit by a Mexican doctor against Mexican officials for arbitrary arrest in Mexico, allegedly in violation of international law. *Sosa* held that the ATS is a "limited, implicit sanction to entertain" a narrow class of international law-based causes of action that are "accepted by the civilized world and defined with a specificity comparable" to those available in 1789. 542 U.S. at 712, 725. The Court dismissed plaintiff's claim because his proposed cause of action for arbitrary arrest lacked specific definition and adequate acceptance among nations. *Id.* at 736-38.

In the second wave of ATS lawsuits, which began in the 1990s, alien plaintiffs sued multinational corporations rather than foreign officials, and sought to apply international law-based causes of action to corporate activity that occurred outside the United States. Corporations with a U.S. presence are attractive targets for such lawsuits. Unlike most foreign officials sued in the first wave of ATS cases, these corporations have deep pockets, assets inside the United States, and a continuous and systematic presence inside the United States that permits the assertion of general personal jurisdiction. *See* Julian Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism,* 19 EMORY INT'L L. REV. 105, 109 (2005); Joel Paul, *Holding Multinational Corporations Responsible Under International Law,* 24 HASTINGS INT'L & COMP. L. REV. 285, 291-92 (2001).

A fundamental legal roadblock to second-wave corporate ATS lawsuits is that almost all international law applies to nations and not to private actors like corporations. The exceptions to this rule are rare and limited. *See Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 447-48 (2nd Cir. 2000) (suggesting that the main exceptions are war crimes, genocide, the slave trade, airplane hijacking, and piracy). It follows that alleged corporate malfeasance abroad would normally be viewed as a private tort likely governed by local law. In second-wave ATS cases, however, lower courts have permitted plaintiffs to transform private torts into international law violations by alleging vague links between corporate activity and state action.

Sosa was a first-wave ATS case, but it touched on the second-wave cases. In the course of explaining

the "definite content" requirement for an ATS cause of action, the Court acknowledged the significance of the fact that almost all of international law applies to states and not private entities:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (CADC.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* v. *Karadžić*, 70 F.3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

542 U.S. at 732 n.20. The Court also alluded to this issue later in its opinion. *See id.* at 737 (noting, in the course of explaining why plaintiff's proposed ATS cause of action for arbitrary detention was too broad, that "all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still"); *see also id.* at 760 (Breyer, J., concurring) (noting that the international law norm "must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue").

These passages are most naturally read to prohibit suits against corporations or other private entities under the ATS unless the international laws in question (such as the international laws of war or the international law of genocide) apply directly to

private actors.[2] Many lower courts (including the court below) have gone much further, interpreting these passages, and the *Sosa* decision more generally, to permit corporate liability for violating international laws normally limited to states if the private actor is closely enough linked to the state. *Sosa* acknowledged that courts in ATS cases must pay attention to whether the defendant is a private actor or a state actor. But it did not settle whether international law-based ATS causes of action can be extended to corporations through links with a state, and if so, what the proper legal standard is for establishing this link. The issue implicated by footnote 20 has led to grave confusion and vexatious litigation in lower courts over the scope of ATS corporate liability, and creates an urgent need for the Court's review.

B. Lower Courts Are Deeply Confused About The Legal Standard For The Link Between Corporations and States Needed For Corporate Liability Under International Law In ATS Cases

In response to the onslaught of corporate ATS cases filed in recent years, lower courts have issued confusing and overbroad decisions about the legal standard for the public/private links needed to bring corporate actors within the reach of ATS. This is the issue presented by the first question in Pfizer's

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[2] Judge Wesley, dissenting in the case below, concluded that the sources relied on by the majority opinion "fall[] short of charting the existence of a universal and obligatory international norm actionable against non-governmental actors under the ATS." Pet. App. 61a.

petition. It is an issue that is central to three different lines of corporate ATS cases.

First are cases where the primary actor in the alleged wrongdoing is a corporation and the state serves a secondary, facilitative role. In the instant case, for example, petitioner allegedly conducted medical tests without adequate patient consent, and plaintiffs tried to bring the tort within the rubric of international law via Nigeria's alleged role in assisting Pfizer in getting permission to import Trovan and to use hospitals for the trials. Similarly, in *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005), corporations allegedly recruited a private security force to commit torture in Guatemala. Plaintiffs tried to transform these wrongs into an international law violation by alleging that the Guatemalan government tolerated private security forces and knew about and ignored the defendant's security force's actions, and that a local mayor participated in the violence.

In cases like *Pfizer* and *Aldana*, plaintiffs try to bring corporations, the primary alleged wrongdoers, within the rubric of international law through links to state actors who serve a facilitative role in the corporation's alleged wrongdoing. But the courts in *Pfizer* and *Aldana* applied different legal standards to resolve this issue, creating a square circuit conflict.

In *Pfizer*, the Second Circuit brought petitioner within the ATS's ambit on the basis of Nigeria's alleged assistance in helping set up the experiments, with no requirement that plaintiff allege that the government knew of or participated in the specific

wrongful acts—medical trials without proper consent. *See* Pet. App. 50a-52a. *Aldana*, by contrast, required much more. It rejected a state action link based on allegations that the state tolerated and failed to prevent torture, and required plaintiffs to allege that state officials "knew of and purposefully turned a blind eye" to the specific acts that formed the basis of the international law claim. *Aldana*, 416 F.3d at 1248. *Aldana* allowed only one claim to proceed, and then only because plaintiffs alleged that a state actor (the mayor) had actually participated in the alleged acts of torture that violated international law—a different and far more demanding state action standard than the one applied by the majority opinion below. Similarly, in *Abagninin* v. *Amvac Chemical Corp.*, 545 F.3d 733, 741-42 (9th Cir. 2008), the court required, as a prerequisite to a crimes against humanity claim by a worker in Ivory Coast against a chemical corporation, that the state knowingly participate in the corporation's wrongful acts. It also noted that plaintiff had not alleged a state plan or policy to commit the wrongful acts.

The *second* line of corporate ATS cases is the mirror image of the first. In these cases the state is the primary wrongdoer, and defendant corporations are brought within the rubric of the state's alleged international law violations through secondary liability theories like aiding and abetting or conspiracy.

A typical example in this line is the South African Apartheid case, *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 128 S. Ct. 2424 (2008). There the primary wrongdoer was the South African government, but

plaintiffs sued multinational corporations under the ATS based on their alleged facilitative role in aiding and abetting apartheid. While two judges in *Khulumani* concurred in the *per curiam* holding that aiding and abetting liability was available under the ATS, they disagreed, as is typical in these cases, about the proper standard of corporate involvement with the state.[3] Judge Katzmann concluded that an ATS plaintiff must show that the corporate defendant substantially assisted the state in the perpetration of the primary violation with the purpose of facilitating the primary violation. *Id.* at 277. Judge Hall articulated a different standard that did not require plaintiff to show that the corporation purposefully assisted the state's violation. *Id.* at 288.[4]

Other cases in this line insist—in contrast to the majority opinion below—that the actor facilitating the wrongdoing (in these cases, the corporation) do more than give general assistance to the primary wrongdoer (in these cases, a state), and must instead participate in or have actual knowledge of the specific wrongdoing. On remand from the Supreme Court in the South African Apartheid case, the district court held that an allegation of corporate

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[3] They also disagreed about the appropriate source of law to resolve the issue. *Compare* 504 F.3d at 268-270 (Katzmann, J., concurring) (corporate attribution issue governed by international law) *with id.* at 286-88 (Hall, J., concurring) (corporate attribution issue governed by federal common law).

[4] Judge Korman concluded that *Sosa* did not permit aiding and abetting liability under the ATS but concurred in Judge Katzmann's articulation of the aiding and abetting standard to provide a controlling opinion on remand. *Id.* at 260.

aiding and abetting of South Africa's international law violations must include corporate knowledge of the state's specific wrongful acts. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). In *Bigio* v. *Coca Cola Co.*, 239 F.3d 440 (2nd Cir. 2000), plaintiff sought to hold a U.S. company that had purchased property from the Egyptian government liable for the government's earlier, allegedly illegal nationalization of plaintiff's property. The court rejected the claim because, among other reasons, the complaint did not allege that the corporation participated with state officials in the expropriation, and that the corporation's mere failure to halt the expropriation did not establish state action. In *Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1024 (W.D. Wash. 2005), the court rejected plaintiffs' attempt to hold an American manufacturer liable for the Israel Defense Force's alleged war crimes against Palestinian citizens because plaintiffs did not allege that the corporation participated in or directed Israel's challenged conduct. In *Presbyterian Church of Sudan* v. *Talisman Energy*, 374 F. Supp. 2d 331, 340-41 (S.D.N.Y. 2005), by contrast, the court allowed an ATS case to proceed against a Canadian energy company, but only because plaintiffs alleged that the firm encouraged the government of Sudan to engage in ethnic cleansing and helped it to do so.

The *third* line of corporate ATS cases involves a private actor facilitating not the state as the primary violator of international law, but rather a second private actor that itself is alleged to be connected to the state.

Plaintiffs have used this approach to try to link corporate parents to foreign subsidiaries that in turn

are linked to the state in which they do business, all in an attempt to attribute the state's alleged international law violation to the parent corporation. In *Doe I* v. *Exxon Mobil Corp.*, 573 F. Supp. 2d 16 (D.D.C. 2008), plaintiffs brought an ATS claim against a U.S. parent oil company for its foreign subsidiary's complicity with the Indonesian military in alleged international law violations. The court implied the possibility of liability but dismissed the case because of insufficient evidence that an agency relationship existed between parent and subsidiary. *Id.* at 30-32. Similarly, in *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), a case that recently settled on the eve of trial, *see* Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, June 9, 2009, at B1, the Second Circuit allowed an ATS case to proceed against a British and Dutch oil company whose Nigerian subsidiary allegedly recruited Nigerian police to commit international law violations against local villagers. *See also Bowoto* v. *Chevron Corp.*, 2009 U.S. Dist. LEXIS 21944 (N.D. Cal. 2009) (denying post-verdict motions based on plaintiffs' allegation that an American oil company controlled and ratified its Nigerian subsidiary, and that the Nigerian subsidiary in turn was engaged in a joint enterprise with the Nigerian state, which committed the violations).

Plaintiffs have similarly tried to bring corporations within international law by linking them to legally independent private actors that in turn have relationships with a state. In *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006), *appeal pending* (11th Cir.), plaintiffs tried to hold a corporation liable for the actions of unrelated

and unnamed alleged paramilitary soldiers based on the paramilitary's symbiotic relationship with the state. The court accepted the possibility of liability through these links, but dismissed the case because plaintiff did not allege that the corporation knew of or directed the specific means that the paramilitary force used. *Id.* at 1276. To similar effect was *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1316-17 (11th Cir. 2008), a case decided under the Torture Victim Protection Act, 28 U.S.C. § 1350 note, which requires state action for international law-based causes of action for torture and extrajudicial killing. The court in *Romero* held that a Colombian subsidiary of a U.S. corporation was not responsible for the alleged recruitment of a private paramilitary force that allegedly had a symbiotic relationship with state actors because plaintiffs failed to allege that the state actors were actively involved in the alleged assassinations or that the paramilitary assassins enjoyed a symbiotic relationship with the military in connection with the assassinations.

The three lines of corporate ATS cases are usually distinct, and it is usually clear which actor—the state, the corporation, or a private non-corporate group—is the primary wrongdoer and which is the secondary facilitator. Sometimes, however, the three above-mentioned categories meld together, with each actor assisting the other, or with it being unclear which actor is the primary wrongdoer and which is providing the assistance. In *Chowdhury* v. *Worldtel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), plaintiff, a Bangladeshi citizen, claimed that a Mauritius corporation violated international law when it filed a criminal complaint against the defendant that resulted in the

Bangladeshi police torturing him. The court implied that such a link might be enough in theory to establish ATS liability, but noted that plaintiffs at that stage of the litigation had provided no motive for or policy of state-sponsored torture, leading the court to comment that it was "unclear who was aiding and abetting whom." *Id.* at 386. And in the portion of *Doe I* that was not dismissed, the foreign subsidiary of a U.S. firm allegedly directed the Indonesian military to commit killings to protect oil fields of mutual interest. *Doe I*, 573 F. Supp. 2d at 24-30.

These cases demonstrate the central role that the legal standard for linking corporations to states has played in the ATS cases, as well as the conflict between the decision below and the bulk of corporate ATS cases. It is imperative that this Court clarify that ATS suits cannot be brought against corporations based on mere vague allegations of involvement between the facilitating actor and the primary wrongdoer.

C. This Petition Presents An Ideal Vehicle To Resolve The Scope of Corporate Liability, If Any, In ATS Cases

This case is an ideal vehicle to resolve whether corporate links with states can ever establish corporate ATS liability, and, if so, what the pleading and proof requirements are for establishing such liability. The case cleanly presents the central issue of whether the link between states, corporations, and other private entities requires the facilitating party to have actual knowledge of specific wrongdoing by the primary wrongdoer (be it a state or a

corporation). The majority and dissent below agreed that the plaintiffs alleged that Nigeria provided only general assistance and not that Nigeria had specific knowledge of the alleged wrongful act (the failure to obtain adequate consent). *See* Pet. App. 50a-51a (describing respondents as "alleg[ing] that the Nigerian government provided a letter of request to the FDA to authorize the export of Trovan, arranged for Pfizer's accommodations in Kano, and facilitated the nonconsensual testing in Nigeria's IDH in Kano"); Pet. App. 105a ("At most, Plaintiffs' complaints alleged that the Nigerian government acquiesced to or approved the Trovan program in general without knowing its disturbing details."). And they reached contrary conclusions in reasoned opinions.[5]

In sum, this case squarely presents a central and often case-dispositive issue in all the ATS corporate liability cases, and will allow this Court to address the issue in ways that provide guidance across all its variations.

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[5] In addition, the majority opinion applied domestic law principles and not international law in crafting the legal standard for the requisite link between a state and a corporation needed to establish corporate liability under the ATS. Pet. App. 50a-52a. This contrasts with the lower court cases that, drawing on footnote 20 in *Sosa*, conclude that the link issue must be governed by international law. *See, e.g., Khulumani*, 504 F.3d at 268-270 (Katzmann, J., concurring).

II. *CERTIORARI* SHOULD BE GRANTED BECAUSE THE ERRONEOUS EXPANSION OF CORPORATE LIABILITY IN ATS SUITS HARMS AMERICAN BUSINESS ACTIVITY ABROAD

This Court should also grant this petition because the erroneous expansion of corporate liability in ATS cases significantly harms American business. First, the very broad standards of liability in the ATS case law, and the attendant legal uncertainty about permissible overseas activities, impose enormous costs on American firms and chill U.S. business activity abroad. Second, because U.S. corporations are (compared to their foreign competitors) disproportionately subject to ATS lawsuits, these lawsuits act as a discriminatory tax on American business and investment abroad. *Sosa*'s separation of powers principles demand that Congress, and not lower courts, make any decision whether to impose these economic harms through the application of novel extraterritorial human rights claims to corporations.

A. Unclear Standards About Corporate Liability In ATS Cases Promote Vexatious Litigation And Chill U.S. Business Activity Abroad

Sosa established that the ATS's strict acceptance and specificity requirements should permit only "a *narrow* class of international norms today." 542 U.S. at 729 (emphasis added). And yet the number of novel international law-based causes of action recognized in corporate ATS cases has grown and grown in the five years since *Sosa* was decided.

The inexorable expansion of corporate ATS litigation is explained by the two issues raised in this petition. First, courts have permitted the vaguest allegations of links between corporations and states to transform private torts into international law-based causes of action. *See* Pet. 14-19. And second, courts have grounded ATS causes of action not in a broad acceptance among nations of genuine international law norms, as *Sosa* required, but rather, as in the case below, in all manner of *non-binding* pronouncements, directives, declarations, and non-self-executing treaties. *See* Pet. 19-25.

The uncertainty and unpredictability that inhere in these ATS standards invite stigmatizing and vexatious lawsuits that are hard to dismiss even when firms have done nothing wrong. This is one reason why so many corporate ATS suits are filed not to be tried, but rather to taint corporations doing business abroad, damage corporate identities, chill certain forms of foreign investment, and help extract *in terrorem* settlements. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 LAW & SOC'Y REV. 271, 290-91 (2009) (discussing "synergy between [ATS] litigation and other tactics" and how ATS lawsuits expand the "tactical repertoires of grassroots activists as well as those of litigators"); *Khulumani*, 504 F.3d at 295 (Korman, J., dissenting) (concluding that the complaints in the South Africa Apartheid litigation were "a vehicle to coerce a settlement"). It is also why corporate ATS cases typically endure for so many years, with some lasting a decade. *See, e.g.* Paul Elias, *Federal Jury Clears Chevron of Nigeria Abuses*, USA TODAY, December

12, 2002 (jury rejected claims, ten years after they were filed, that Chevron committed international law violations near a Nigerian oil rig).

The costs to U.S. firms from these developments are hard to assess with precision, but they are enormous and growing. *See* GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 37-43 (2003) (estimating in 2003 the damage from ATS cases to trade, outbound and inbound foreign investment, and target countries). The mere filing of an ATS case creates a publicity storm that often has a negative impact on stock values and debt ratings. Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights,* WORLD POLY J., Spring 2004, at 63. Discovery in corporate ATS cases is unusually extensive and burdensome because liability turns on the relationship among many corporate groups scattered around the globe, as well as those firms' relationship with a government. The lawsuits also raise the cost of doing business abroad in terms of higher risk insurance premiums, higher lawyers' fees, and the like.

These costs from ATS litigation fall across every sector of U.S. business.[6] Over half the companies

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[6] *See, e.g., Romero v. Drummond Co.,* 552 F.3d 1303 (11th Cir. 2008) (mining); *Abagninin v. Amvac Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008) (chemicals); *Bigio v. Coca Cola Co.*, 239 F.3d 440 (2nd Cir. 2000) (consumer products); *John Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988 (S.D. Ind. 2007) (manufacturing); *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (mining); *Doe I v. Exxon Mobil Corp..*, 393 F.Supp.2d 20 (D.D.C. 2005) (oil); *Doe I v. The Gap, Inc.*, No. Cv-01-0031, 2001 WL 1842389 (D.N. Mar. I. Nov. 26, 2001)

currently listed on the Dow Jones Industrial Average, representing a wide range of commercial sectors, have been named as defendants in suits under the ATS. *See* Brief of The Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *American Isuzu Motors* v. *Ntsebeza*, No. 07-919, at 10, *aff'd for lack of quorum*, 128 S. Ct. 2424 (2008). But the costs of ATS litigation extend much further. Any American company that does international business, and especially any company with a foreign subsidiary or other form of foreign direct investment, faces daunting ATS risks that, because of the uncertainties and potentially expansive liabilities created by the lower courts, are very hard to guard or plan against. And the costs extend further still, chilling direct investment in the United States by foreign corporations worried that such investments will expose them to ATS suits for their non-U.S. activities.

B. ATS Corporate Lawsuits Discriminate Against U.S. Corporations And Threaten U.S. Competitiveness Abroad

U.S. courts are the only ones in the world that permit plaintiffs to sue corporations for

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(consumer products); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (agricultural); *Xiaoning v. Yahoo! Inc.*, No. C07-2151 CW (N.D. Cal.) (July 30, 2007), First. Am. Compl. PP 256, 263 (technology); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424 (D.N.J. 1999) (automotive); *Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019 (W.D. Wash. 2005) (manufacturing); *In re Agent Orange Product Liability Litig.*, 373 F.Supp.2d 7 (S.D.N.Y. 2005) (defense and chemical).

extraterritorial business activity based on international law-based, civil causes of action. *See* HUFBAUER & MITROKOSTAS, *supra*, at 46. In addition to the costs of ATS litigation outlined above, these lawsuits have a profound *discriminatory* impact on U.S. business activity abroad, and thus operate as a harmful tax on U.S. competitiveness in international commerce. *See* Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 370-73 (2008).

The main reason for the discriminatory impact on U.S. firms is that in an American lawsuit alleging a tort committed outside the United States, plaintiffs can more easily get personal jurisdiction over a U.S. corporate tortfeasor than over a non-U.S. corporate tortfeasor. In both instances, personal jurisdiction will almost always need to be based on general jurisdiction, because the cause of action does not arise out of or relate to defendant's contacts with the U.S. forum. *See Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U.S. 408, 415 n.9 (1984). Plaintiffs can always get general personal jurisdiction over a U.S. corporation in the state of its headquarters and in every other state where it has "continuous and systematic contacts." *See id.* But plaintiffs cannot always, or even usually, get general personal jurisdiction over U.S. firms' foreign competitors. By definition these firms are not headquartered in the United States, and most of them lack the "continuous and systematic contacts" otherwise needed for general personal jurisdiction.

These features of U.S. personal jurisdiction law mean that all foreign business activity by U.S. corporations is potentially subject to ATS scrutiny, but only a fraction of foreign business activity by

non-U.S. corporations is. This asymmetry in potential ATS liability operates as a discriminatory tax on the global business activities of U.S. corporations. The tax clearly harms U.S. competitiveness abroad, and may reduce global economic welfare as well. "If plaintiffs can extract substantial amounts from U.S. defendants by alleging their complicity in such acts and persuading (or threatening to persuade) a jury that the U.S. defendant was somehow involved, the result may simply be a shift of business opportunities from U.S. firms to their less efficient competitors with little effect on the level of objectionable behavior." Sykes, *supra*, at 372.

C. Separation Of Powers Principles Demand That Congress, And Not Lower Courts, Make The Decision Whether To Create These Economic Harms Through Application Of Novel Extraterritorial Human Rights Claims To Corporations

This Court's urgent attention is needed to rein in the extraordinary and unjustified costs of ATS litigation on American overseas business activity. These manifold costs have resulted from lower court decisions to extend extraterritorial international law-based causes of action to corporations without any input or sanction from the body that is supposed to make fundamental international economic decisions in our constitutional system: the Congress.

There is no indication in any statute to suggest that Congress has authorized corporate ATS litigation or approves of the many costs imposed by this litigation. This fact alone is reason for the Court

to grant this petition and bring an end to judge-made corporate ATS suits. The Court has emphasized that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727. It has also emphasized that the decision to create secondary liability in civil suits must be made by Congress, not the courts. *See Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). And it has emphasized that these principles have special force in cases, like this one, that implicate international relations. *See Sosa*, 542 U.S. at 727-38 (noting that "since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution")

The corporate ATS cases defy these separation of powers principles by creating novel causes of action via secondary liability in an area that directly affects U.S. international economic relations. Courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Sosa*, 542 U.S. at 728. And yet this is precisely what the lower courts have done: sought out and defined new and debatable international law causes of action—causes of action that have no congressional sanction, and that are imposing enormous burdens on American business.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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