No. 08-___

IN THE

Supreme Court of the United States

PFIZER INC.,
Petitioner,

v.

RABI ABDULLAHI, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the midst of an unprecedented bacterial meningitis epidemic in Nigeria, petitioner Pfizer Inc. ("Pfizer") conducted a clinical trial of an antibiotic medication. Respondents filed suit in two United States district courts, invoking federal subject matter jurisdiction under the Alien Tort Statute ("ATS"), 28 U.S.C. 1350. The complaints alleged that Pfizer had violated international law by failing to obtain adequate consent from patients. They alleged that the Nigerian government assisted generally in the importation of the medicine and provision of hospital facilities, but not that the government knew of or participated in the failure to obtain adequate consent. The questions presented are:

1. Whether ATS jurisdiction 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 a 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).

PARTIES AND RULE 29.6 STATEMENT

Petitioner, Pfizer Inc. ("Pfizer"), was the defendant in the consolidated district court actions and was the appellee in the Second Circuit. Pfizer has no parent company, and no publicly held company owns 10% or more of Pfizer's stock.

Respondents, individuals, were the plaintiffs in the consolidated district court actions and were the appellants in the Second Circuit. They are:

Rabi Abdullahi, individually and as the natural guardian and personal representative of the estate of her daughter Lubabatau Abdullahi

Salisu Abullahi, individually and as the natural guardian and personal representative of the estate of his son Abulliahi (Manufi) Salisu

Alasan Abdullahi, individually and as the natural guardian and personal representative of the estate of his daughter Firdausi Abdullahi

Ali Hashimu, individually and as the natural guardian and personal representative of the estate of his daughter Suleiman

Muhammadu Inuwa, individually and as the natural guardian and personal representative of the estate of his son Abdullahi M. Inuwa

Magaji Alh Laden, individually and as the natural guardian and personal representative of the estate of his son Kabiru Isyaku

Alhaji Mustapha, individually and as the natural guardian and personal representative of the estate of his daughter Asma'u Mustapha

Suleiman Umar, individually and as the natural guardian and personal representative of the estate of his son Buhari Suleiman

Haji Abdullahi, individually and as the natural guardian of Zainab Abdu, a minor

Abdullahi Madawaki, individually and as the natural guardian of Firdausi Abdullahi, a minor

Sani Abdullahi, a minor, by his father and natural guardian, Sani Abdullahi

Aisha Ado, individually and as the natural guardian of Abdullahi Ado, a minor

Abdumajid Ali, a minor, by his father and natural guardian, Alhaji Yusuf Ali

Muhammad Ali, individually and as the natural guardian of Nura Muhammad Ali, a minor

Malam Badamasi Zubairu, individually and as the natural guardian of Umar Badamasi, a minor

Alhaji Danaldi Ibrahim, individually and as the natural guardian of Muhammadu Fatahu Danladi, a minor

Malam Gwammaja, individually and as the natural guardian of Dalha Hamza, a minor

Mukhtar Saleh, individually and as the natural guardian of Tasiu Haruna, a minor

Tijjani Hassan, individually and as the natural guardian of Muhyiddeen Haasan, a minor

Kawu Adamu Ibrahim, a minor, by his father and natural guardian, Malam Abamus Ibrahim Adamu

Alhaji Ibrahim Haruna, individually

Mallam Idris, individually

Idris Umar, individually and as the natural guardian of Yusuf Idris, a minor

Isa Muhammed Isa, individually and as the natural guardian of Hafsat Isa, a minor

Malam Isa Usman, individually and as the natural guardian of Taju Isa, a minor

Isyaku Suaibu, individually and as the natural guardian of Hadiza Isyaku, a minor

Jafaru Baba, individually and as the natural guardian of Zahra'u Jafaru, a minor

Malam Mohammed, individually and as the natural guardian of Anas Mohammed, a minor

Yahawasu Muhammed, individually and as the natural guardian of Nafisatu Muhammed, a minor

Muhsinu Tijjani, a minor, by his father and natural guardian, Tijjani Hassan

Alhaji Yusuf Ali

Maryam Idris, a minor, by her father and natural guardian, Malam Idris

Ajudu Ismaila Adamu, individually and as parent and natural guardian of Yahaya Ismaica, minor

Malam Mohammed, individually and as parent and natural guardian of Bashir Mohammed, minor

Malam Yusab Ya'u Amale, individually and as parent and natural guardian of Suyudi Yusals Yu'a, minor

Malasm Haruna Adamu, individually and as parent and natural guardian of Mohammed Tasi'u Haruna, minor

Zangon Kwajalawa, individually and as parent and natural guardian of Nuruddim Dauda, minor

Malam Dahauru Ya'y, individually and as parent and natural guardian of Rabi Dahuru, minor and as parent and natural guardian of Zainab Musa Dahuru, minor

Zangon Marikita, individually and as parent and natural guardian of Ismaila Musa, minor

Arhaji Muihammad Soja, individually and as parent and natural guardian and personal representative of estate of Hamaza Achaji Muhammad, minor, deceased

Achaji Ibrahim Dankwalba, individually and as parent and natural guardian of Personal Representative of estate of Abdullahi Ibrahim, minor

Mallam Lawan, individually and as parent and natural guardian and personal representative of estate of Aisha Lawan, minor, deceased

Alhaji Muhammed Tsohon Sojo, individually and as parent and natural guardian and personal representative of estate of Unni Alhasi Muhammed, minor

Ismaila Zubairui, individually and as parent and natural guardian and personal representative of estate of Mustapha Zubairu, minor, deceased

Abubaker Musa, individually and as parent and natural of Sa'adatu Musa, minor

Mohamed Abdu, individually and as parent and natural guardian of Haruna Abdu, minor

Mallam Hassan, individually and as parent and natural guardian and personal representative of estate of Sadiya Hassan, minor, deceased

Mallam Yakubu Umar, individually and as parent and natural guardian of Abubakar Yakubu, minor

Mallam Samaila, individually and as parent and natural guardian of Adamu Samalia, minor

Musa Yahaya, individually and as parent and natural guardian of Ukhasa Musa, minor

Audu Ismailia Adamu, individually and as parent and natural guardian of Yashaya Samaila

Malam Musa Dahiru, individually and as parent and natural guardian of Zainabu Musa, minor

Malam Musa Zango, individually and as parent and natural guardian of Samaila Musa, minor

Mallam Alhassan Maihula, individually and as a parent and natural guardian of Najib Maihula, minor

Mallam Abdullah Gama, individually and as parent and natural guardian of Dankuma Gama, minor

Dauda Nuhu, individually and as parent and natural guardian and personal representative of estate of Hamisu Nuhu, minor, deceased

Mallam Abdullahi, individually and as parent and natural guardian and personal representative of estate of Najaratu Adbullahi, minor, deceased

Malam Umaru Mohammed, individually and as parent and natural guardian and personal rep-

resentative of estate of Sule Mohammed, minor, deceased

Mallam Nasiru, individually and as parent and natural guardian and personal representative of estate of Yusif Nasiru, minor, deceased

Yusuf Musa, individually and as parent and natural guardian and personal representative of estate of Nafisatu Musa, minor, deceased

Mallam Muritala, individually and as parent and natural guardian and personal representative of estate of Umaru Muritala, minor, deceased

Mallam Tanko, individually and as parent and natural guardian and personal representative of estate of Madina Tankol, minor, deceased

Mallam Sheu, individually and as parent and natural guardian and personal representative of estate of Madina Tankol, minor, deceased

Malam Kabiru Mohamed, individually and as parent and natural guardian and personal representative of estate of Kabiru Mohamed, minor, deceased

Mallam Sule Abubakar, individually and as parent and natural guardian and personal representative of estate of Fatima Abubaker, minor, deceased

Mallam Idris, individually and as parent and natural guardian and personal representative of estate of Baba Idris, minor, deceased

Mallam Mohamed Bashir, individually and as parent and natural guardian and personal representative of estate of Sani Bashir, minor, deceased

Ibrahim, individually and as parent and natural guardian and personal representative of estate of Hassan Ibrahim, minor, deceased

Alhaji Shuaibu, individually and as parent and natural guardian and personal representative of estate of Masjbatu Shuaibu, minor, deceased

Mallam Abdullahi Sale, individually and as parent and natural guardian and personal representative of estate of Shamisiya Sale, minor, deceased

Mallam Ibrahim Amyarawa, individually and as parent and natural guardian and personal representative of estate of Yahaya Ibrahim, minor, deceased

Mallam Abdu Abubaker, individually and as parent and natural guardian and personal representative of estate of Nasitu Abubaker, minor, deceased

Mallam Yusuf, individually and as parent and natural guardian and personal representative of estate of Hodiza Yusuf, minor, deceased

Mallam Dauda Yusuf, individually and as parent and natural guardian and personal representative of estate of Abubaker Sheu, minor, deceased

Maliam Mohammed Sheu, individually and as parent and natural guardian and personal representative of estate of Mustapha Yakubu, minor, deceased

Alhaji Ubah, individually and as parent and natural guardian and personal representative of estate of Maryam Ubah, minor, deceased

Mallam Mohamadu Jabbo, individually and as parent and natural guardian of Auwalu Mohamadu

Mallam Abdullah Adamu, individually and as parent and natural guardian and personal representative of estate of Abdullah Adamu, minor, deceased

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Pfizer Inc. ("Pfizer"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of a divided panel of the Second Circuit (Pet. App. 1a-106a) is reported at 562 F.3d 163. One opinion of the district court (Pet. App. 114a-152a) is available at 2005 WL 1870811, and a second opinion of the district court (Pet. App. 153a-174a) is reported at 399 F. Supp. 2d 495.

JURISDICTION

The Second Circuit issued its decision on January 30, 2009. Pet. App. 6a. Pfizer's petition for rehearing and rehearing *en banc* was denied on April 9, 2009. Pet. App. 112a. This Court has jurisdiction under 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

In the decision below, the Second Circuit dramatically expanded ATS jurisdiction by allowing two complaints to proceed against an American corporation for conducting a clinical trial of an antibiotic medication in Nigeria, allegedly without obtaining adequate consent as required by international law. In so doing, the Second Circuit disregarded this Court's caution in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004), that there should be a "high bar to new private causes of action" under the ATS. The Second Circuit also created two circuit conflicts: (1) its decision sets a much lower bar for alleging state action under the ATS than the Fifth, Ninth, and Eleventh Circuits have required; and (2) its decision takes a much broader view than the Sixth, Ninth, Tenth, and Eleventh Circuits have taken of the kinds of ATS causes of action that may proceed against purely private actors. This Court should grant certiorari to resolve these conflicts and to give much-needed guidance to the lower courts in the appli-

cation of *Sosa* to ATS lawsuits against American corporations that do business abroad.

1. In 1996, Pfizer administered the new antibiotic Trovan to children in Kano, Nigeria, in the midst of an unprecedented outbreak of cerebospinal meningitis ("CSM"). Trovan had been tested previously in thousands of adult patients. In administering the medicine to ill children, Pfizer allegedly failed to advise that some would receive Trovan, and others (a control group) would receive an established comparator treatment. Pfizer also allegedly failed to advise of possible risks associated with either type of treatment, and to provide fully adequate care.

2. Respondents, allegedly participants in the clinical trial and/or their representatives, filed suits in two federal district courts invoking ATS jurisdiction. In August 2001, one set of respondents (*Abdullahi et al.*) filed suit in the U.S. District Court for the Southern District of New York, alleging that Pfizer's clinical trial violated international law.[1] In November 2002, a second set of respondents (*Adamu et al.*) filed suit in the U.S. District Court for the District of Connecticut, alleging jurisdiction under the ATS on grounds of international law as well as under two Connecticut state statutes. The *Adamu* action was transferred to the Southern District of New York and consolidated with the *Abdullahi* action.

The complaints, although lengthy, each made only a few brief references to the Nigerian govern-

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[1] The *Abdullahi* case was initially dismissed on the ground of *forum non conveniens*, *Abdullahi* v. *Pfizer, Inc.*, No. 01 Civ. 8118 (WHP), 2002 WL 31082956, at *12 (S.D.N.Y. Sept. 17, 2002), but that dismissal was vacated and remanded for further fact-finding, 77 Fed. Appx. 48, 53 (2d Cir. 2003).

ment's supposed assistance to Pfizer. The *Abdullahi* complaint alleged that the Nigerian government "provid[ed] the requisite request for a clinical trial letter to the FDA," and "arrang[ed] for Pfizer's accommodation in Kano." ¶108 & n.6 (Pet. App. 237a). The *Adamu* complaint alleged that "the Nigerian dictatorship at the time was intimately involved and contributed, aided, assisted and facilitated Pfizer's efforts to conduct the Trovan test," ¶ 21 (Pet. App. 312a), and that the "Nigerian government acted in concert with Pfizer by ... assigning Nigerian physicians to assist in the project," ¶ 6(h) (Pet. App. 299a). Neither complaint, however, alleged any specific facts that would support an inference that the Nigerian government knew of or participated in the specific conduct alleged to violate international law, namely Pfizer's supposed failure to obtain adequately informed consent to Trovan's administration.[2]

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[2] Plaintiffs' only other allegations of state involvement were similarly vague and general. For example, plaintiffs alleged that the Nigerian government silenced critics of the drug trial. *E.g.*, *Adamu* ¶¶ 6(h), 40 (Pet. App. 299a, 321a); *Abdullahi* ¶¶ 108 n.6, 147 (Pet. App. 237a, 252a). But plaintiffs did not allege that such critics were specifically addressing the administration of Trovan without adequate consent. Moreover, both complaints describe "silencing" as mere self-censorship by the critics out of a sense that the Nigerian dictatorship then in power would not tolerate public criticism, not as an active tactic by that regime.

Plaintiffs also alleged that, in response to a 1997 FDA audit, a letter from the ethics committee at the hospital where the clinical trial was held, stating that it had "reviewed Pfizer's test plans," was back-dated. *Abdullahi* ¶ 133 (Pet. App. 244a). But even if the committee were a state actor (which is not alleged) and even if such a letter was later created and back-dated, this allegation does not suggest that the Nigerian government, *at the*

3. The district court (Pauley, J.) dismissed the *Abdullahi* action for lack of subject matter jurisdiction under the ATS, reasoning that "[a] cause of action for Pfizer's failure to get any consent, informed or otherwise, before performing medical experiments on the subject children would expand customary international law far beyond that contemplated by the ATS." Pet. App. 141a (internal quotation marks omitted). Several months later, the district court dismissed the *Adamu* action based on the same reasoning. Pet App. 163a.[3]

4. A divided panel of the Second Circuit reversed. The panel majority (Parker, J., joined by Pooler, J.) held that a clinical trial conducted without adequate consent violates eight supposed sources of customary international law: (1) the International Covenant on Civil and Political Rights ("ICCPR"), (2) a 1997 Council of Europe convention, (3) a 2001 directive of the European Parliament, (4) a 2005 UNESCO declaration, (5) the Declaration of Helsinki issued by the World Medical Association, (6) the International Ethical Guidelines for Research Involving Human Subjects promulgated by the Council for International Organizations for Medical Sciences, (7) several countries' domestic laws, and (8) the Nuremberg Code. Pet. App. 26a-43a. The panel majority further concluded that these sources of a norm against nonconsensual clinical trials were "sufficiently specific,

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time of the Trovan trial, knew of or participated in the alleged lack of informed consent.

[3] The district court held, in the alternative, that the actions should be dismissed for *forum non conveniens*, finding that Nigeria was an adequate alternative forum. Pet. App. 170a. Pfizer did not rely on *forum non conveniens* as a basis for affirmance on appeal.

universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm" within the meaning of the ATS. Pet. App. 49a.

The panel majority devoted only three paragraphs of its opinion to the question of state action. Starting from the premise that "a private individual will be held liable under the ATS if he 'acted in concert with' the state, i.e., 'under color of law,'" Pet. App. 50a, the panel majority found state action adequately pleaded, noting respondents' allegations "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." Pet. App. 50a-51a.

The panel majority suggested, in the alternative, that administering a clinical trial without adequate consent would give rise to a cause of action under the ATS even if brought against a purely private actor without any state involvement. The majority held that Pfizer is bound by the Nuremberg Code principle that "[t]he voluntary consent of the human subject is absolutely essential," Pet. App. 21a, even though that principle was announced as a result of criminal verdicts against state actors who were part of the governmental machinery of the Third Reich (the one non-state defendant tried at Nuremberg was acquitted), see Pet. App. 92a n.17 (dissent). And the majority held that Article 7 of the ICCPR, which provides that "no one shall be subjected without his free consent to medical or scientific experimentation," is "not limited to state actors; rather, it guarantees individuals the right to be free from nonconsensual medical experimentation by any entity—state actors, private actors, *or* state and private actors behaving in concert." Pet App. 32a, 33a (emphasis added).

Accordingly, the panel majority reversed and remanded for further proceedings in the district court.[4]

5. Judge Wesley dissented. Pet. App. 58a-106a. Judge Wesley rejected the majority's holding that there is any international law norm at all, enforceable against either a state or private actor, proscribing clinical trials lacking adequate consent. Pet. App. 60a-61a. Judge Wesley explained why such a norm is not "universal and obligatory":

> (1) the International Covenant on Civil and Political Rights has been described by the Supreme Court as a "well-known international agreement[] that despite [its] moral authority, ha[s] little utility," in defining international obligations, *Sosa*, 542 U.S. at 734, and moreover, it does not apply to private actors, such as the Defendant in this action;
>
> (2) the Council of Europe's Convention on Human Rights and Biomedicine—a regional convention—was not ratified by the most influential nations in the region, such as France, Germany, Italy, the Netherlands and the United Kingdom, and it was promulgated ... one year *after* the conduct at issue in this litigation;
>
> (3) the UNESCO Universal Declaration of Bioethics and Human Rights of 2005 and (4) the European Parliament Clinical Trial Directive of

[4] After the Second Circuit denied Pfizer's petition for rehearing and rehearing *en banc*, Pfizer filed a motion in the Second Circuit requesting that the court stay its mandate pending the disposition of Pfizer's petition for a writ of certiorari. That motion was granted July 7, 2009.

> 2001 both also post-date the relevant time period by several years;
>
> (5) the Declaration of Helsinki issued by the World Medical Association, a private entity, and
>
> (6) the International Ethical Guidelines for Research Involving Human Subjects promulgated by the Council for International Organizations for Medical Sciences, another private entity, "express[] the sensibilities and the asserted aspirations of some countries or organizations" but are not "statements of universally-recognized legal obligations," *Flores* [v. *S. Peru Copper Corp.*, 414 F.3d 233,] 262 [(2d Cir. 2003)];
>
> (7) states' domestic laws, which, unsupported by express international accords, are not "significant or relevant for purposes of customary international law," *id.* at 249; and
>
> (8) the so-called Nuremberg Code, a statement of principles that accompanied a criminal verdict, possesses at best "subsidiary" value as a judicial decision, Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

Pet. App. 60a-61a (ellipsis and final two brackets added).

Judge Wesley went on to conclude that, "even assuming, for argument's sake, that international law prohibits states from conducting non-consensual medical tests," Pet. App. 98a, respondents had failed sufficiently to allege that Pfizer was acting in concert with *Nigeria*'s violation of international law. As Judge Wesley stated, "it is not enough ... for a plaintiff to plead state involvement in *some activity* of

the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the *activity that caused the injury* giving rise to the action." Pet. App. 101a (internal quotation marks omitted; emphasis and ellipsis in original). Judge Wesley noted that the complaints alleged that the Nigerian government provided general assistance, such as "request[ing] the import of Trovan and arrang[ing] for Pfizer's accommodations and some medical staff in Kano," but explained that the complained-of "activity was not, as the majority concludes, conducting the Trovan trials in general, but rather administering the drug without informed consent"—an activity in which the Nigerian government was nowhere alleged to have knowingly participated. Pet. App. 102a.

Judge Wesley also rejected the panel majority's alternative holding that an ATS claim might be brought against a private actor, even in the absence of state action, for engaging in a clinical trial without fully informed consent. He explained that, while the list of actionable international norms remains narrow as against state actors, it is narrower still against "private actors." Pet. App. 84a; see also Pet. App. 93a (quoting *Sosa*, 542 U.S. at 729).

6. During the pendency of the proceedings below, the Nigerian and Kano State governments themselves filed civil and criminal actions in Nigerian courts against Pfizer for conducting the Trovan trial in Kano. See Pet. App. 52a; *Nigeria Sues Drugs Giant Pfizer*, BBC News Online, June 5, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/6719141.stm (last accessed July 1, 2009). These actions were premised on the governments' view that, far from knowingly participating with Pfizer in the clinical

trial, they were themselves harmed by Pfizer's actions and entitled to recover against Pfizer.

REASONS FOR GRANTING THE WRIT

In the decision below, the Second Circuit announced for the first time that a private actor's clinical trial of a medication abroad, allegedly without obtaining adequate consent in the foreign country, is an international law violation enforceable in a U.S. court under the ATS. This decision conflicts with the decisions of other circuits both as to the nature of the state action required to sustain an ATS claim and the scope of customary international law enforceable under the ATS against a purely private actor. Certiorari should be granted to resolve these conflicts and to give much-needed guidance to the lower courts as to the limited circumstances under which ATS liability is available against American corporations that do business abroad.

The 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." This Founding-era statute "was originally understood to be available to enforce a small number of international norms," *Sosa*, 542 U.S. at 729, that are "specific, universal, and obligatory," *id.* at 732 (internal quotation marks omitted), such as "violation of safe conducts, infringement of the rights of ambassadors, and piracy," *id.* at 715 (citing Blackstone, 4 Commentaries 68).

In *Sosa*, this Court instructed the lower courts to exercise "vigilant doorkeeping" to ensure that this narrow list is not unduly expanded. 542 U.S. at 729; see *id.* at 720 ("Congress intended the ATS to furnish

jurisdiction for a relatively modest set of actions alleging violations of the law of nations."). The Court also urged caution in deciding "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*," as opposed to a state actor to whom international law norms generally apply. *Id.* at 732 n.20 (emphasis added). As Justice Breyer noted, an international law norm enforceable under the ATS "must have a content as definite" and universal as 18th-century norms such as the prohibition of piracy and also "must extend liability to *the type of perpetrator (e.g., a private actor)* the plaintiff seeks to sue." *Id.* at 760 (Breyer, J., concurring) (emphasis added).

But in the five years since *Sosa*, the lower courts have too often, as here, disregarded this Court's admonitions. The ATS has continued to be used to bring complaints for supposed misconduct that, as here, is a far cry from the settled paradigms Congress recognized at the Founding. The Second Circuit's decision, like its previous decision in 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), acknowledges *Sosa* but in fact dramatically expands ATS jurisdiction over private American corporations doing business abroad. Recusals prevented the Court from deciding on the petition in *American Isuzu* and thus from providing urgently needed guidance on the scope of corporate secondary liability under the ATS. This petition presents a similar opportunity to clarify the scope of ATS liability as to American corporations doing business abroad and to dispel confusion on

questions that have bedeviled the lower courts in *Sosa*'s aftermath.

Certiorari should be granted, *first*, because the decision below conflicts with the decisions of other circuits as to both interpretation of ATS state action requirements and interpretation of *Sosa*'s limits on the scope of customary international law norms enforceable against private actors. Certiorari should be granted, *second*, because the scope of ATS liability against private actors for novel customary international law claims like the one here is a question of national and international importance. Where, as here, American corporations are haled into U.S. courts to face foreign regulatory or tort claims in the guise of international law violations, the ATS threatens to become an ever more expansive vehicle for burdensome litigation and crippling liability that imposes a kind of discriminatory tax on American companies doing business abroad.

I. THE SECOND CIRCUIT'S DECISION EXPANDING ATS JURISDICTION IS IN TENSION WITH THIS COURT'S DECISION IN *SOSA* AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

This Court should grant certiorari to resolve two circuit conflicts created by the decision below: (1) a conflict concerning the degree of state action required to allow an ATS complaint to proceed, and (2) a conflict concerning what kinds of international law norms may be pleaded under the ATS against purely private actors.

The law of nations, as its name suggests, has historically required fidelity by nation-states, not by private individuals. There is no general inter-

national common law of torts. Thus, to establish subject matter jurisdiction under the ATS for a violation of international law by a private corporation or individual, plaintiffs in most cases must allege that the private actor acted under color of law or in concert with a foreign government.

The Second Circuit's decision, however, conflicts with decisions of other circuits as to the degree of state action required to transform a private party into a state actor for ATS purposes. The Fifth, Ninth, and Eleventh Circuits all have rejected ATS complaints that were based on purported state action but that failed to allege that the foreign government knew of or participated in the *specific conduct* alleged to violate international law. The Second Circuit, by contrast, held below that respondents had sufficiently alleged state action merely by referring to the Nigerian government's general assistance to Pfizer without any allegation that the government knew of or participated in Pfizer's alleged failure to obtain adequate consent to the clinical trial of Trovan. This holding conflicts with the decisions of other circuits that have found state action adequately invoked only by allegations that the state was specifically involved in the allegedly wrongful conduct, either as a matter of official state policy or under color of law.

The Second Circuit created an additional circuit conflict by its alternative holding that an ATS claim may proceed, even without any state action, against a private corporation for failure to obtain adequate consent to a clinical trial. The Sixth, Ninth, Tenth, and Eleventh Circuits all have held that ATS jurisdiction over purely private actors is limited to an exceedingly narrow category of offenses of universal concern—namely, war crimes, genocide, slave trade,

and piracy. Those circuits accordingly have required ATS claims against private actors to be dismissed where they allege violation of other international law norms—even norms against such offenses as rape, torture, abduction, detention, pesticide poisoning, and other alleged crimes against humanity. As Judge Wesley noted in dissent, the majority's recognition of a "previously unrecognized norm of international law" against nonconsensual clinical trials "apparently overlook[s] the fact that this purported norm in no way resembles those few norms enforceable against private entities." Pet. App. 92a-93a. This Court should grant certiorari to resolve both conflicts.

A. The Second Circuit's Decision Conflicts With Decisions Of Other Circuits As To The Degree Of State Action Required For An ATS Claim

The Second Circuit's decision allows respondents to proceed with their ATS claims despite their failure to allege that the Nigerian government knew of or participated in the specific conduct by Pfizer that is claimed to violate international law—namely, the administration of a clinical trial without adequate consent. Discussing the requirement of state action in barely three paragraphs of its opinion, Pet. App. 50a-52a, the Second Circuit allowed the complaints to survive based merely on cursory allegations of general assistance by the Nigerian government. See *supra* at 3-5 & n.2.

No other circuit has so permissively interpreted the degree of state action required to make out violations of international law cognizable under the ATS. To the contrary, the vague, conclusory, and general allegations of state assistance allowed by the Second Circuit here would have led to dismissal under the

conflicting standards for state action applied under the ATS in the Fifth, Ninth, and Eleventh Circuits. As Judge Wesley explained in dissent, "it is not enough ... for a plaintiff to plead state involvement in *some activity* of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the *activity that caused the injury* giving rise to the action." Pet. App. 101a (internal quotation marks omitted; emphasis and ellipses in original).[5]

The Ninth Circuit's decision in *Abagninin* v. *AMVAC Chemical Corp.*, 545 F.3d 733 (9th Cir. 2008), starkly illustrates this circuit conflict. In *Abagninin*, an ATS complaint was brought against a private company that managed an agricultural plantation in the Ivory Coast, claiming that the company's use of a pesticide that caused sterilization of plantation workers had amounted to a crime against humanity in violation of customary international law. The complaint alleged collaboration between the Ivory Coast government and the private company.

The Ninth Circuit, however, found the allegations in *Abagninin* insufficient to establish state action because they did not identify any knowing participation by the Ivory Coast government in the specific conduct complained of: the use of the harmful pes-

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[5] Allowing such conclusory allegations to proceed not only creates a circuit conflict with other courts of appeals interpreting the state action requirements of the ATS, but also is in tension with this Court's recent decision in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), which held, extending the holding in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), that a pleading is insufficient under Fed. R. Civ. P. 8(a)(2) "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." 129 S. Ct. at 1950.

ticide. The Ninth Circuit explained that not just "any involvement by the State meets the 'State action' requirement"; rather, "allegations of 'affirmative action by the government of the Ivory Coast' fail to state a claim for crimes against humanity because Abagninin does not allege that the use of [the pesticide] was part of a *[state] plan or policy* to commit one of the enumerated acts, *i.e.* to sterilize the plantation workers." *Id.* at 742 (emphasis added). Cf. *Sosa*, 542 U.S. at 737 (noting that the plaintiff there failed to allege any "'*state policy*'" favoring prolonged arbitrary detention) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986)) (emphasis added).

The Eleventh Circuit, like the Ninth Circuit, has required dismissal of ATS claims lacking in specificity as to a foreign government's involvement in the alleged violation of international law. In determining the existence of state action under the ATS, the Eleventh Circuit "look[s] to ... 'jurisprudence under 42 U.S.C. § 1983,'" *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (quoting *Kadic* v. *Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)), and thus asks whether a defendant has acted "under color of law."[6]

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[6] To the extent that the ATS requires a showing of action "under color of law" analogous to that under 42 U.S.C. 1983, the Second Circuit's decision is also in tension with that of many other circuits interpreting the latter statute. For example, the First Circuit has held that, "to the extent that state-granted authority can justify a finding of state action, that authority must be connected to the aim of encouraging or compelling *the specific complained-of conduct*." *Barrios-Velazquez* v. *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico*, 84 F.3d 487, 493 (1st Cir. 1996) (emphasis added). The Fifth Circuit has explained that, "[t]o make the requisite showing of

In *Aldana*, the Eleventh Circuit affirmed the dismissal of all but one ATS claim alleging state action by Guatemala in connection with militias' violent disruption of labor organizing activities at an American company's plant. The court there found that allegations that Guatemala broadly tolerated private militias and that Guatemalan police failed to stop the violence were inadequate to support state action where the plaintiffs "d[id] not allege sufficient facts to warrant the inference that the National Police knew of and purposefully turned a blind eye to the events" that were the specific conduct alleged to violate international law. 416 F.3d at 1248.

In *Romero* v. *Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), the Eleventh Circuit similarly affirmed a rejection of claims under the Torture Victim Protection Act, 28 U.S.C. 1350 note ("TVPA"), for failure to prove state action with sufficient specificity. Because the TVPA expressly requires a showing of action "under color of law," the Eleventh Circuit, as in ATS cases like *Aldana*, looked to "under color of law" jurisprudence under 42 U.S.C. 1983, see 552 F.3d at 1317 (relying on *Brentwood Academy*, 531 U.S. at 295).

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state action by a regulated entity, [a plaintiff] must establish 'a sufficiently close nexus between the State and the *challenged action* of the regulated entity.'" *Cornish* v. *Correctional Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982)). And in *Crissman* v. *Dover Downs Entertainment Inc.*, 289 F.3d 231 (3d Cir. 2002) (*en banc*), the Third Circuit explained that the "central purpose" of the state action inquiry is to "'assure that constitutional standards are invoked when it can be said that the State is *responsible* for the *specific conduct* of which the plaintiff complains.'" *Id.* at 239 (quoting *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295 (2001)) (emphasis altered).

Applying that standard, the court upheld summary judgment against plaintiffs, rejecting their attempt to assert state action where executives of a Colombian subsidiary of an American coal mining company allegedly paid paramilitary operatives to torture and assassinate leaders of a Colombian trade union. The Eleventh Circuit held that, to satisfy the requirement of state action, "there must be proof of a symbiotic relationship between a private actor and the government that involves the [misconduct] alleged in the complaint." 552 F.3d at 1317. Finding insufficient the complaint's allegations of a general relationship between the military and the private paramilitary actors, *id.* at 1317-18, the court held that "plaintiffs failed to offer evidence either that state actors were actively involved in the assassination of the union leaders or that the paramilitary assassins enjoyed a symbiotic relationship with the military for the purpose of those assassinations." *Id.* at 1318.

The Fifth Circuit approved a similar approach to that of the Ninth and Eleventh Circuits in affirming the dismissal of an ATS complaint in *Beanal* v. *Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374-80 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999), a case emphasized by Judge Wesley in his dissent from the panel majority's state action holding. As Judge Wesley noted, Pet. App. 103a, *Beanal* held that an ATS complaint does not adequately allege state action unless a governmental actor is alleged to have actually participated in the wrongdoing at issue.

In sharp contrast to these decisions by other circuits, the Second Circuit allowed plaintiffs' complaints to survive dismissal even though, as Judge Wesley's dissent noted, they "do not allege that the

government or any government employee played any role in either administering Trovan without consent or deciding to do so in the first instance," but rather "[a]t most ... alleg[e] that the Nigerian government acquiesced to or approved the Trovan program in general without knowing" its details. Pet. App. 102a, 105a. The decision below thus conflicts with previous interpretations of the state action requirement under the ATS (and TVPA) by other circuits, whether those circuits require a showing of official state policy as in the Ninth Circuit's decision in *Abagninin* and Restatement (Third) of Foreign Relations Law § 702, or action under color of law as in the Eleventh Circuit's decisions in *Aldana* and *Romero*. This Court should grant certiorari in order to resolve this split and to clarify the appropriate standard for assessing allegations of state action under the ATS.

B. The Second Circuit's Decision Conflicts With Decisions Of Other Circuits As To The Scope Of Customary International Law Norms Applicable To Purely Private Actors

Certiorari is equally required if the Second Circuit decision is understood alternatively to expand ATS jurisdiction over purely private actors. This Court's decision in *Sosa* admonishes the lower courts to engage in "vigilant doorkeeping" against improper uses of ATS jurisdiction. 542 U.S. at 729. *Sosa* cautioned that the "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 § 1350 was enacted." *Id.* at 732.

Such "vigilan[ce]" should be all the more heightened when the defendant is a private actor lacking any particularized involvement with foreign state action or policy. Because the law of nations typically binds nation states, not private actors, ATS jurisdiction must be especially sparing when "the perpetrator being sued ... is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 n.20. The Restatement (Third) of Foreign Relations Law, for example, distinguishes, for purposes of universal jurisdiction, between "those violations that are actionable when committed by a state and a more limited category of violations" that are actionable against private actors. *Kadic*, 70 F.3d at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 404, 702). The latter category consists only of "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404.

The Second Circuit's decision disregarded *Sosa*'s admonitions on both counts. To begin with, it departed from all precedent in recognizing a novel private right of action under supposed customary international law against conducting a clinical trial without fully informed consent. Of the eight sources of customary international law relied upon by the panel majority, seven are patently insufficient to provide a private cause of action under the ATS: Three post-date the 1996 Trovan trial,[7] two are pure-

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[7] The 1997 Council of Europe Convention, the 2001 directive of the European Parliament and the 2005 UNESCO declaration by definition arise too late to assist the plaintiffs here. *See Vietnam Ass'n for Victims of Agent Orange* v. *Dow Chem. Co.*,

ly aspirational,[8] one is purely domestic,[9] and one has been rejected by this Court as unhelpful in the ATS context.[10] The panel thus relied principally on an eighth source, the Nuremberg Code, see Pet. App. 79a, but that source too is insufficient.

Numerous federal decisions in other contexts have held that "'there is no private right of action for an alleged violation of international law for the protection of human research subjects under ... the Nuremberg Code.'" *Ammend* v. *Bioport*, 322 F. Supp. 2d 848, 872 (W.D. Mich. 2004) (quoting *Robertson* v. *McGee*, No. 01-cv-60, 2002 WL 535045, *3 (N.D. Okla. Jan. 28, 2002)). See, *e.g.*, *White* v. *Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998) (declining "to

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517 F.3d 104, 118 (2d Cir. 2008) (treaty ratified in 1975 could not be used to assess conduct in the 1960s); *Abagninin*, 545 F.3d at 738 ("A treaty not ratified by the United States at the time of the alleged events cannot form a basis for an ATS claim.").

[8] The Declaration of Helsinki and the International Ethical Guidelines for Research Involving Human Subjects do not constitute "statements of universally-recognized legal obligations." *Flores*, 414 F.3d at 262.

[9] The fact that many countries' domestic laws require informed consent in clinical drug trials does not give those laws the status of customary international law. *See, e.g., IIT* v. *Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (mere fact that every nation's municipal law may prohibit theft does not incorporate the Eighth Commandment "Thou Shalt not steal" into the law of nations).

[10] This Court has stated that the ICCPR has "little utility" for ATS purposes, *Sosa*, 542 U.S. at 734-35, and the courts of appeals have uniformly held that it "does not provide independent, privately enforceable rights," *Guaylupo-Moya* v. *Gonzales*, 423 F.3d 121, 133 (2d Cir. 2005). *Accord Padilla-Padilla* v. *Gonzales*, 463 F.3d 972, 979-80 (9th Cir. 2006); *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 150 (1st Cir. 2005) (*en banc*).

imply from the law of nations the existence of a private right of action" for alleged violations of the prohibition on nonconsensual medical experimentation). Cf. *Conway* v. *A.I. DuPont Hosp. for Children*, No. 04-4862, 2007 WL 560502, at * 7 (E.D. Pa. Feb. 14, 2007) (agreeing with "[c]ourts [that] have held that there is no private right of action for violations of these declarations, codes, reports, or regulations," specifically the Nuremberg Code); *Hoover* v. *W. Va. Dep't of Health & Human Servs.*, 984 F. Supp. 978, 980 (S.D. W. Va.), *aff'd*, 129 F.3d 1259 (4th Cir. 1997) ("[T]he Helsinki Accord does not create a private right of action in U.S. federal courts and [does] not have the force of law."); *Jaffee* v. *United States*, 663 F.2d 1226 (3d Cir. 1981) (*en banc*) (rejecting an analogy to the Nuremberg Code in denying state-law and federal due process claims based on the government's testing of the effects of radiation on unknowing soldiers).

The decision below departs from that previously unbroken line of precedents by permitting a party to premise a cause of action on an alleged violation of the Nuremberg Code. The Second Circuit's bold expansion of ATS jurisdiction thus disregards this Court's admonition in *Sosa* that there should be a "high bar to new private causes of action" under the ATS, 542 U.S. at 727, and that federal courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations," *id.* at 728.

Even if the Nuremberg Code (or any of the Second Circuit's other asserted sources of customary international law) could give rise to an international law claim against a foreign government, however, the Second Circuit created a clear conflict with other

circuits in allowing such a novel claim to be asserted against a purely private actor. Administering a clinical trial without fully informed consent is a matter customarily governed by domestic administrative or tort law, and bears no resemblance to the narrow category of activities—war crimes, slave trade, piracy, or genocide—as to which international law norms have been held enforceable against purely private actors.

In conflict with the decision below, other circuits have repeatedly held that torts outside this narrow category are actionable under the ATS only against state, not purely private actors:

In *Cisneros* v. *Aragon*, 485 F.3d 1226 (10th Cir. 2007), for example, the Tenth Circuit held that, in the absence of concerted state policy, even the commission of child rape and other forms of sexual violation are not international law violations actionable under the ATS against purely private actors. In so holding, the Tenth Circuit relied upon earlier authority from the Second Circuit: "A pre-*Sosa* circuit-court opinion reflected this limitation when it recognized ATS causes of action for war crimes and genocide [against private actors] but not 'torture and summary execution—when not perpetrated in the course of genocide or war crimes.'" *Id.* at 1231 (quoting *Kadic*, 70 F.3d at 243).

Similarly, in *Abagninin*, the Ninth Circuit held that manufacture and use of a deadly agricultural pesticide on a banana plantation was not actionable under the ATS absent state action. The court relied on "[t]he traditional conception regarding crimes against humanity," which is "that a policy must be present and must be that of a State, as was the case in Nazi Germany." 545 F.3d at 741 (citing *Prosecutor*

v. *Tadic*, IT-94-1-T, Judgment, ¶ 654 (May 7, 1997)); *see also id.* ("crimes against humanity are crimes committed through political organization"). Even though the pesticide was alleged to have caused serious injury and death, its administration was deemed insufficient to justify an ATS complaint against a purely private actor not acting under a state policy.

Likewise, in *Aldana*, the Eleventh Circuit held that arbitrary detention, alleged crimes against humanity, and interference with rights of association by private parties were not actionable under the ATS against a private corporate defendant where there was no state action. 416 F.3d at 1247; cf. *id.* ("State-sponsored torture, unlike torture by private actors, likely violates international law and is therefore actionable under the Alien Tort Act.")

And in *Taveras* v. *Taveraz*, 477 F.3d 767 (6th Cir. 2007), the Sixth Circuit held that even international child abduction and kidnapping were not cognizable as violations of international law under the ATS in the absence of state action. The court noted that "the ATS, by no means, supplies jurisdiction over every wrong committed against an alien." *Id.* at 771.

The majority below made no mention of these cases and did not try to reconcile them with its alternative holding. But, as Judge Wesley explained in dissent, the tort alleged here against Pfizer, "medical experimentation[,] more closely resembles the acts for which only state actors may be held responsible," and even "the norm against *torture* reaches only state actors." Pet. App. 90a (Wesley, J., dissenting) (emphasis added) (citing, *inter alia*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702(d)).

Because the Second Circuit's decision announces a new norm untethered to *Sosa*'s criteria and disregards the crucial ATS distinction between customary international law violations asserted against state and private actors, certiorari is warranted. If an American corporation's clinical trial abroad is sufficient to give rise to a violation of international law warranting ATS jurisdiction, then it is difficult to see any limiting principle to prevent the ATS from supplanting domestic remedies and becoming a plenary international law of tort.

II. THE SECOND CIRCUIT'S EXPANSION OF ATS JURISDICTION OVER AMERICAN CORPORATIONS DOING BUSINESS ABROAD RAISES ISSUES OF NATIONAL AND INTERNATIONAL IMPORTANCE

This Court instructed in *Sosa* that "the determination whether a norm is sufficiently definite to support a[n ATS] cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 733. The decision below will have significant adverse practical consequences for the conduct of private business abroad and for the Nation's foreign policy and commercial relations. These adverse consequences provide additional reasons why certiorari should be granted.

First, the expansion of corporate ATS liability exemplified by the Second Circuit's decision has the potential to subject American corporations doing business abroad to burdensome litigation, public relations problems, and crippling liability that will discourage their participation in international investment and development. See generally GARY CLYDE

HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 37-43 (2003) (calculating the monetary damage to trade and foreign direct investment likely to be caused by increased ATS suits against corporations). Corporations doing business in foreign jurisdictions present attractive deep pockets and publicity magnets for plaintiffs seeking to bring ATS complaints. Because the allegations often turn on events occurring in the far corners of the developing world, with testimony and documents all in a foreign language, discovery is particularly burdensome. Additionally, the negative corporate publicity that flows from inflammatory allegations of international law violations enables plaintiffs to seek coercive settlements.

Such features may explain the noticeable increase in ATS cases against American corporations in the past decade. As commentators have noted, "In the latest wave of ATS litigation, foreign plaintiffs have sued corporations—primarily U.S. corporations—in U.S. courts seeking civil redress for violations of customary international human rights laws in non-U.S. countries." Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus & Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1146 (2007). Such litigation tends to occur disproportionately against American corporations because "ATS-style tort suits by private parties to recover under customary international law are available only in the United States, and because U.S. personal jurisdiction laws apply much more easily to U.S. than to foreign firms." *Id.*; see also Melissa A. Waters, *Mediating Norms & Identity: The Role of Transnational Judicial Dialogue In Creating & Enforcing International Law*, 93 GEO. L.J. 487, 574 n.15 (2005) ("Human rights lawyers have successfully

utilized the Alien Tort Claims Act to bring a series of actions against foreign officials and, increasingly, against U.S. and foreign corporations for [alleged] human rights abuses committed abroad."); Armin Rosencranz & Richard Campbell, *Foreign Environmental & Human Rights Suits Against U.S. Corporations In U.S. Courts*, 18 STAN. ENVTL. L. J. 145, 148-71 (1999) (analyzing cases in which foreign plaintiffs brought suit against U.S. corporations in U.S. courts under the ATS).

ATS claims against American corporations thus pose a significant risk of vexatiousness, not unlike actions in other contexts that this Court has sought to restrain through the use of stringent pleading standards and narrow statutory construction. See, *e.g.*, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937; *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). This Court's review is necessary to prevent abuse of the ATS and to provide corporations with notice of the scope of their potential liability in U.S. courts for their purely private conduct occurring in foreign countries.

Second, the Second Circuit's decision implicates the foreign relations concerns that this Court identified in *Sosa*. See 542 U.S. at 727 (the federal courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"). The Second Circuit's uniquely permissive state action standard allows ATS complaints to proceed based upon only the thinnest reed of alleged involvement by a foreign government. Such a lowered pleading standard for state action makes it easier to attribute bad acts

to foreign governments, causing needless offense to such governments if a greater number of such allegations survive dismissal.[11] The decision below thus presents the very real possibility of "embarrass[ing] the United States in the conduct of its foreign affairs, which is committed by the Constitution to the executive and legislative—the political—departments of the government." *Igartua-De La Rosa*, 417 F.3d at 151 (quoting *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918)).

Finally, expansive construction of the ATS as in the decision below injures international commercial relations by tending to supplant measures for domestic redress. By authorizing a radical and unprecedented expansion of ATS jurisdiction to encompass the administration of a clinical trial by a U.S. corporation in a foreign nation, the decision below competes with domestic regulation by Nigeria and other nations through their own administrative and judicial systems. Under the decision below, any private doctor acting in any hospital in the world, even in the absence of any state action or policy, could be haled before a U.S. district court for failing to obtain "informed consent"—a term that is surely subject to varying definitions among different domestic law regimes. Domestic law and remedies, however, can better accommodate different nations' divergent interests with respect to the administration of medical treatment. And domestic courts are better equipped than American plaintiffs' lawyers to assess the rel-

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[11] This danger is illustrated here, where the Nigerian government itself has sued Pfizer over the Trovan clinical test, viewing itself as a victim entitled to compensation, at the same time as the complaints here cast aspersions on Nigeria for its supposed backing and facilitation of the test. See *supra* at 9-10.

ative costs and benefits of clinical trial practices for their nations.

These adverse practical consequences raise issues of national and international importance that provide additional reasons for this Court to review the Second Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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