No. 07-919

IN THE

# Supreme Court of the United States

AMERICAN ISUZU MOTORS, INC., *et al.*,
*Petitioners,*
v.
LUNGISILE NTSEBEZA, *et al.*,
*Respondents.*

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

**BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, U.S. COUNCIL FOR INTERNATIONAL BUSINESS, ORGANIZATION FOR INTERNATIONAL INVESTMENT, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether the Alien Tort Statute authorizes suits against private companies for engaging in ordinary commercial transactions with apartheid South Africa, where both the government of the United States and the government of South Africa have urged that such lawsuits interfere with their policies and sovereign authority.

2. Whether a private defendant may be sued under the Alien Tort Statute for allegedly aiding and abetting a violation of international law and, if so, what legal standard governs such claims.

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* and their members have a vital interest in the issues raised by the petition.[1] Over the past two decades, scores of U.S. and international companies have been sued under the Alien Tort Statute ("ATS") for al-

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court. *Amici* state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, their members, and their counsel made such a monetary contribution.

legedly aiding and abetting human rights violations by foreign governments. In many cases, the suits allege little more than that the corporations engaged in ordinary and otherwise lawful commercial transactions in foreign countries known to commit human rights abuses. And in many cases, the suits challenge trade with countries where the political branches have expressly decided to encourage commercial engagement. Those suits not only strain foreign relations but cause irreparable economic harm by deterring foreign trade. Because the Second Circuit's decision in this case greatly exacerbates that harm, *amici* urge this Court to grant review.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve some 300 member companies.

USA*Engage is a broad-based coalition representing trade associations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local levels.

The U.S. Council for International Business is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the American affiliate of the International Chamber of Commerce and the International Organization of Employers.

The Organization For International Investment is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. Its member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States.

The National Association of Manufacturers is the Nation's largest industrial trade association, representing small and large manufacturers in all 50 States. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding about the vital role of manufacturing to America's economic future.

In the aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and internationally. Various *amici* have appeared before this Court as both parties and *amici curiae* in cases with important ramifications for foreign trade. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989). The Second Circuit's decision in this case raises grave concerns for *amici* and their members. The decision increases the legal risks of doing business in foreign countries dramatically, undermining the ability and willingness of *amici*'s members and other companies—both in the United States and abroad—to expand global commerce.

## REASONS FOR GRANTING THE PETITION

The Nation's well-being depends more on foreign trade with each passing day. From 1950 to 2005—a period roughly spanning the alleged conduct underlying this suit—this Nation's "global exports grew from $58 billion to $13 trillion." U.S. Trade Representative, *2007 Trade Policy Agenda and 2006 Annual Report of the President of the United States on the Trade Agreements Program* 1 (2007) [hereinafter "*USTR 2006 Report*"]. That trade dramatically improved the Nation's economy: "Trade liberalization in the last ten years has helped

raise U.S. GDP by nearly 40 percent and boosted job growth by over 13 percent." *Ibid.* Global commerce "has raised real incomes, restrained prices, introduced greater product variety, spurred technological advances and innovation, and raised living standards." Council of Economic Advisors, *Economic Report of the President* 167 (2007).

The United States also encourages foreign trade as an important foreign policy tool. Although the political branches sometimes choose to restrict trade, in many cases they properly determine that commercial engagement would do more to improve conditions in foreign countries over the long term. As a result, the political branches often decide to *encourage* trade in order to promote foreign policy goals. Private companies need to be able to rely on those foreign policy decisions.

The Second Circuit's decision makes that critical reliance impossible. This suit is premised on the theory that myriad businesses "aided and abetted" violations of international law by engaging in ordinary commercial transactions with South Africa that indirectly contributed to that country's former apartheid regime. The Executive, however, long ago adopted a policy of commercial engagement with apartheid South Africa. Private firms relied on that policy when they engaged in trade. For that and related reasons, South Africa's current democratic government and the U.S. government have both urged that this suit must be dismissed. But the Second Circuit refused, remanding for what may be years of additional litigation. That decision converts the foreign policies of the U.S. government into an afterthought, exposing companies to years of litigation and adverse publicity for engaging in the very trade upon which the Executive's policy of commercial engagement relies.

That harm is exacerbated by the widespread confusion over aiding and abetting liability under the ATS. Plaintiffs often accuse corporations of "aiding and abetting" human rights violations simply by engaging in ordinary commercial transactions with countries with problematic human rights records—countries that include many of this Nation's most important trading partners. Whether aiding and abetting liability exists under the ATS and, if so, what standard applies are questions of crucial importance to firms engaged in international trade. *Amici* therefore urge the Court to review the Second Circuit's decision.

## I. The Second Circuit's Refusal To Defer To The Executive's Foreign Policy Determinations At The Threshold Damages International Trade

### A. Firms Engaged In International Trade Need To Be Able To Rely On Clear Guidance From The Political Branches

Confronted by a rapidly changing and complex global environment, the Nation's political branches must regularly determine how to respond to injustices abroad. "In implementing its human rights and democracy strategy, the United States employs a wide range of diplomatic, informational, and economic tools to advance its foreign policy objectives." U.S. Dep't of State, *Supporting Human Rights and Democracy: The U.S. Record 2004-2005*, at ii-iii (2005).

In some circumstances, the political branches may decide to impose trade restrictions or even complete embargoes to encourage political reform. See, *e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864, codified at 50 U.S.C. § 1701; *Prohibiting Trade and Certain Transactions Involving Libya*, Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986). Often,

however, the Executive determines that the best policy is commercial engagement. Engagement can expand U.S. influence on a foreign government; improve living standards and educational opportunities for foreign citizens; and profoundly affect the attitudes of foreign citizens and government officials. "Economic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reform, and the fight against corruption, and it reinforces the habits of liberty." Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). Sometimes the Executive may pursue both strategies, imposing limited sanctions crafted to ensure that the United States maintains influence while making clear that it disapproves of disregard for human rights. See, *e.g.*, D. Rennack, *China: Economic Sanctions* 4-9 (2005).

Whether trade sanctions are ever an effective strategy for improving human rights is a topic of considerable debate,[2] and *amici* have routinely opposed such measures on policy grounds. But the Constitution commits resolution of such foreign policy issues to the political branches. See *Sosa*, 542 U.S. at 727.

Respecting that constitutional design is critical to international trade. When the political branches impose economic sanctions, they at least provide clear, up-front notice of what trade is prohibited—notice that an after-

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[2] See, *e.g.*, Pape, *Why Economic Sanctions Do Not Work*, 22 Int'l Security 90 (1997). Similarly, whether economic engagement or isolation is the best strategy for improving human rights is also debated. See Meyer, *Activism and Research on TNCs and Human Rights*, in *Transnational Corporations and Human Rights* 33, 34-35 (Frynas & Pegg eds., 2003); compare Bhagwati & Srinivasan, *Trade and Poverty in the Poor Countries*, 92 Am. Econ. Rev. 180 (2002), with Li & Reuveny, *Economic Globalization and Democracy: An Empirical Analysis*, 33 Brit. J. Pol. Sci. 29 (2003).

the-fact lawsuit under the ATS cannot provide. Where the Executive has chosen a policy of engagement, companies need to be able to rely on that foreign policy decision. Indeed, a policy of engagement ultimately *depends* on such reliance. The Executive can *encourage* firms to engage in foreign commerce to promote U.S. interests abroad (and has programs designed to do so),[3] but it cannot *force* firms to trade. Legal decisions that threaten litigation for engaging in foreign trade that the political branches have decided to permit or even encourage undermine the country's foreign policies and irreparably harm international trade.

### B. The Second Circuit's Decision Imposes Grave Uncertainty And Costs On International Trade

The Second Circuit's decision profoundly damages both the Executive's foreign policies and international trade. This Court previously singled out this very lawsuit as an instance where deference to the political branches was appropriate. See *Sosa*, 542 U.S. at 733 n.21. The Second Circuit, however, refused *even to consider* the Executive's views at this stage, demoting that critical threshold inquiry into a virtual afterthought. Because

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[3] For example, the U.S. Trade Representative has created a public/private advisory system to help develop trade policy. *USTR 2006 Report*, *supra*, at 235-40. The Department of Commerce manages a comprehensive website to "assist American businesses in planning their international sales strategies." Export.gov, *Export.gov Helps American Companies Succeed Globally*, http://www.export.gov/about/index.asp. And the State Department awards conduct by firms that promote U.S. interests overseas. See, *e.g.*, *2003 Award for Corporate Excellence: ChevronTexaco Corporation*, *at* http://www.state.gov/secretary/former/powell/25315.htm; see also Trade Promotion Coordinating Comm., *The 2007 National Export Strategy* 20 (2007) ("[T]he trade promotion agencies of the Federal Government are pursuing a number of initiatives to ensure that American companies can take advantage of growing emerging markets.").

ATS suits are uniquely damaging and costly (even when wholly meritless), that decision will deeply chill foreign trade—even foreign trade that the political branches seek to promote.

1. There can be no doubt that the threat of protracted litigation, and litigation under the ATS in particular, is a serious disincentive to international trade. A recent survey of corporate general counsel found that over one-third of respondents "reported being sued in the United States by a foreign plaintiff for conduct that took place in another country." Inst. for Legal Reform, *Global Forum Shopping: The Situation Facing Multinational Corporations after the Supreme Court's* Empagran*,* Sosa*, and* Intel *Decisions* 5 (Mar. 25, 2006), *at* http://www.instituteforlegalreform.com/issues/issue.cfm?issue=GFS&doctyp=STU. "More than half [the respondents] acknowledged that the U.S. legal climate affects their decisions on where to invest, expand, or make acquisitions." *Ibid.* A legal journal has warned in-house counsel for multinationals to pay "close attention to [ATS] suits," observing that, "[i]f your corporation has deep pockets and high public visibility, it's a safe assumption that it could become the target of litigation related to a supplier's labor conditions in the developing world." Schindel *et al.*, *Workers Abroad, Trouble at Home*, 14 Corporate Counsel 65, 65 (2007). Similar warnings from other sources abound.[4]

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[4] The President of the U.S. Council for International Business has warned that the ATS "threatens to make it virtually impossible for companies, foreign or American, to invest anywhere in the world for fear that they will be subjected to frivolous lawsuits in U.S. courts." U.S. Council for Int'l Bus., *Business Groups Urge Supreme Court to Curtail Abuse of Alien Tort Statute* (Jan. 23, 2004), *at* http://www.uscib.org/index.asp?DocumentID=2815. And a retired U.S. military officer has argued that ATS litigation will impair defense contrac-

ATS litigation harms trade by foreign multinational corporations as well. It deters those corporations from doing business in the United States for fear of subjecting themselves to jurisdiction in ATS suits based on alleged misconduct elsewhere. As the Secretary General of the International Chamber of Commerce has explained, "[T]he practice of suing EU companies in the US for alleged events occurring in third countries could have the effect of reducing investment by EU companies in the United States * * * if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui to Romano Prodi, President, European Commission (Oct. 22, 2003), *available at* http://www.iccwbo.org/icccbhc/index.html; see also Hufbauer & Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 257 (2004).

All those concerns are well-founded. Even meritless ATS lawsuits exact a significant toll. ATS lawsuits based on events halfway across the globe "run up massive costs because they involve numerous pre-discovery motions, overseas discovery, expert witnesses in foreign and international law, and near certainty of appeal." Hufbauer & Mitrokostas, *supra*, at 252-53. The reputational consequences are more dramatic still. Suits based on serious human rights abuses by foreign governments can damage a business irreparably, even where the allegations of corporate complicity are dubious. In many cases, negative publicity is the intended result of ATS litigation: "[The] real intent, it seems, is to rely on an extensive legal discovery process to uncover matters that embarrass

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tors' ability to function abroad. See Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, 16 St. Thomas L. Rev. 627, 665 (2004); see also Hufbauer & Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 252-58 (2004).

companies and delay their business plans." 151 Cong. Rec. S11435 (daily ed. Oct. 17, 2005) (statement of Sen. Feinstein).

In 2001 and 2002, for example, labor-rights lawyers filed ATS suits against Coca-Cola Co. and Drummond Co., claiming that the companies were complicit in anti-union violence in Colombia. See *Sinaltrainal* v. *Coca-Cola Co.*, No. 01-3208 (S.D. Fla. filed July 20, 2001); *Rodriguez* v. *Drummond Co.*, No. 7:02-cv-00665 (N.D. Ala. filed Mar. 14, 2002). Plaintiffs' counsel publicly acknowledged that they "[we]re not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media"—for the defendants, the suits were "public relations disasters waiting to happen." Kovalik, *Colombia, Human Rights, and U.S. Courts* (Apr. 25, 2002), *at* http://www.clas.berkeley.edu:7001/Events/spring2002/04-25-02-kovalik/index.html. Advocacy groups called for boycotts of Coke products. See *Campaign for a Coca-Cola Free Campus*, http://www.killercoke.org/pdf/campguide.pdf (campus activism packet); *Colleges, Universities and High Schools Active in the Campaign to Stop Killer Coke*, http://www.killercoke.org/active-in-campaign.htm. And a Danish energy company suspended coal purchases from Drummond. See Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case*, Platts Coal Outlook, Nov. 27, 2006, at 6, *available at* 2006 WLNR 21355024.

Years later, the Coca-Cola suit was dismissed, see *Sinaltrainal* v. *Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); 474 F. Supp. 2d 1273 (S.D. Fla. 2006), appeal pending, No. 06-15851 (11th Cir. filed Oct. 27, 2006), and a jury rejected all the claims against Drummond, see Whitmire, *Alabama Company Is Exonerated in Murders at Colombian Mine*, N.Y. Times, July 27, 2007, at C2, appeal pending, No. 07-14090 (11th Cir. filed Aug. 27,

2007). But vindication in the courts could not undo the economic and reputational damage the suits had caused.

Indeed, in at least one other case, ATS litigation and related publicity not only impeded trade but caused a multinational to withdraw from a country altogether. Talisman Energy, a Canadian oil company, was sued for allegedly conspiring with the government of Sudan to commit human rights abuses. *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 639 (S.D.N.Y. 2006). Talisman vigorously denied the allegations, stating that it "operated in both an ethical and transparent fashion with a genuine desire to improve the lives of the Sudanese people." Talisman Energy, Inc., *2006 Corporate Responsibility Report* 2 (2006). The Canadian government objected that the suit interfered with its ability to "'implement its foreign policy initiatives.'" *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, No. 01 Civ. 9882, 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005). Nevertheless, because of negative publicity, the company divested its interest. See Kobrin, *Oil And Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 426, 430 (2004).

Years later, the district court granted summary judgment in Talisman's favor, holding that plaintiffs had failed to prove Talisman's involvement in the human rights abuses. 453 F. Supp. 2d at 668, appeal pending, No. 07-0016 (2d Cir. filed Jan. 3, 2007). But, once again, the damage was already done.

2. The Second Circuit's decision in this case greatly exacerbates those consequences. Throughout this litigation, South Africa has urged that this suit "preempt[s] [its] ability * * * to handle domestic matters" and "discourage[s] needed investment in the South African economy." Pet. App. 206a. The United States has likewise urged that this suit hampers its "policy of encouraging positive change in developing countries via economic in-

vestment." *Ibid.* The district court properly deferred to those political judgments by dismissing this case. *Ibid.* The Second Circuit, however, "decline[d] to affirm the dismissal * * * on the basis of [those] prudential concerns," stating that they were not jurisdictional and could be addressed at a later stage. Pet. App. 14a, 17a. The court thus consigned the defendants to years of more litigation, despite clear statements from the U.S. and South African governments that the suit should be dismissed.

Even if the court of appeals were correct that deference to the political branches is not jurisdictional—which is far from clear[5]—it clearly should be addressed at the earliest opportunity. There are many issues that courts must resolve at the outset of a lawsuit despite their nonjurisdictional character. For example, qualified immunity must be addressed at the outset to ensure that the threat of litigation does not deter conduct the Constitution ought not deter. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001); see Pet. 18 (citing other examples).

Deference to the political branches in an ATS suit likewise must be addressed at the earliest possible time. When the United States and a foreign power both urge that a suit should be dismissed, the affront to both sovereigns—and the damage to the Executive's foreign policies—increases with each day the suit proceeds. The adverse impact on foreign commerce likewise can be avoided only by prompt action. Vindication of the defendant after years of litigation is insufficient because the

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[5] The court of appeals stated that deference was an issue related to whether to recognize a cause of action—not jurisdiction. Pet. App. 17a. But the ATS confers jurisdiction only over suits for "a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, and several courts have interpreted that language to mean that jurisdiction does not exist unless the plaintiff can state a claim, see, *e.g.*, *Enahoro* v. *Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005).

litigation itself imposes massive legal costs. Vindication after years of litigation is insufficient because the reputational harm of even being involved in the litigation can be devastating. As a result, vindication after years of litigation is ineffectual, because the litigation itself—not the result—deters trade. Where the Executive Branch determines that trade will promote the interests of the United States (and improve the lot of foreign citizens as well), courts must respect that determination by shutting down inconsistent litigation at the earliest opportunity.

3. The Second Circuit's failure to defer to the Executive's foreign policy judgments is particularly egregious here. The Executive Branch long ago determined to confront the evils of apartheid, not by isolating South Africa economically, but by measured commercial engagement. See C. Coker, *The United States and South Africa 1968-1985: Constructive Engagement and Its Critics* 9-28, 58-92, 154-78 (1986). President Reagan determined that *some* sanctions were appropriate because apartheid was "repugnant to the moral and political values of democratic and free societies and run[s] counter to United States policies." *Prohibiting Trade and Certain Other Transactions Involving South Africa*, Exec. Order No. 12,532, 50 Fed. Reg. 36,861, 36,861 (Sept. 9, 1985). The sanctions he imposed, however, permitted trade in all but certain enumerated categories of restricted goods. *Id.* § 1, 50 Fed. Reg. at 36,861-62.

That was purposeful. Most of the business community had adopted a code of conduct, known as the "Sullivan Principles," that aimed to erode apartheid by, among other things, promoting anti-discriminatory labor principles. See Hess & Dunfee, *Fighting Corruption: A Principled Approach; The C[2] Principles (Combating Corruption)*, 33 Cornell Int'l L.J. 593, 616-17 (2000). The President recognized that engagement under that code "benefitted those in South Africa who have been disadvantaged

by the apartheid system." Exec. Order No. 12,532 § 2(a), 50 Fed. Reg. at 36,862. It was "the policy of the United States," the President declared, "to follow this commendable example." *Ibid.* The President also "encouraged [firms] to take reasonable measures to extend the scope of their influence on activities outside the workplace." *Id.* § 2(d), 50 Fed. Reg. at 36,863.

In reliance on that foreign policy, countless firms engaged in the ordinary commercial transactions that form the basis for plaintiffs' suit. But now the Second Circuit is forcing them to confront years of additional litigation and negative publicity for scrupulously honoring the Executive's chosen policy. That result is particularly ironic because engagement under the Sullivan Principles "fostered significant progress and w[as] likely one of the factors that led to [apartheid's] abolition." Hess & Dunfee, *supra*, at 617. The Second Circuit's decision is immensely damaging to international trade—it sends the clear message that firms may be subjected to protracted ATS litigation for engaging even in trade that the Executive Branch specifically chose to promote.

## II. The Court Should Resolve The Widespread Confusion Over Aiding and Abetting Under The ATS

This Court should also grant the petition to clarify the law regarding aiding-and-abetting liability under the ATS. Most ATS suits against corporations allege, not that the corporation itself committed human rights abuses, but that it "aided and abetted" violations by the government of a foreign country. As the fractured opinions below demonstrate, there is widespread confusion over whether aiding and abetting liability exists under the ATS and, if so, what standard governs. That legal uncertainty is a matter of pressing concern.

### A. The Law Is In Complete Disarray

Courts and the Executive have adopted wildly divergent approaches to aiding-and-abetting liability under the ATS.

The Executive, for example, has argued convincingly that aiding-and-abetting liability does not exist under the ATS. In its brief before the Second Circuit, the United States urged that aiding and abetting "does not satisfy *Sosa*'s threshold requirement that an international law norm be both firmly established and well defined." Gov't C.A. Br. as *Amicus Curiae* 19-23. And it urged that such a theory ignores this Court's instruction in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that "whether or not to permit a civil aiding and abetting claim is a legislative choice." Gov't C.A. Br. at 4, 23-25; see also Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 924-27 (2007).

The courts that have allowed aiding-and-abetting claims have reached wholly irreconcilable results. Judge Katzmann below, for example, attempted to derive an aiding-and-abetting standard from customary international law. He concluded that a corporation can be liable only if it "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the *purpose* of facilitating the commission of that crime." Pet. App. 47a (emphasis added). The Ninth Circuit has likewise looked to international law, but arrived at a very different standard, requiring only "*knowing* practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (emphasis added), reh'g en banc granted, 395 F.3d 978 (9th Cir. 2003), dismissed per stipulation, 403 F.3d 708 (9th Cir. 2005). The fact that different cases reached different conclusions about the content of inter-

national law is no surprise, as customary international law is notoriously difficult to ascertain. See Goldsmith & Posner, *The Limits of International Law* 23-26 (2005).

Other judges have attempted to derive an aiding-and-abetting standard from *domestic common law*. See, *e.g.*, Pet. App. 67a-76a (Hall, J., concurring); cf. *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring); *Sarei* v. *Rio Tinto, PLC*, 487 F.3d 1193, 1202-03 (9th Cir. 2007), reh'g en banc granted, 499 F.3d 923 (9th Cir. 2007). Judge Hall below, for example, relied on the Restatement of Torts to conclude that a defendant can be liable for "*knowingly* and substantially assisting * * * a foreign government * * * to commit an act that violates a clearly established international law norm." Pet. App. 71a (quoting Restatement (Second) of Torts § 876 (1979)) (emphasis added). Other judges have argued that, even if domestic common law applies, it requires *intentional*, not merely *knowing*, conduct. See Pet. App. 163a (Korman, J., dissenting in part).

Finally, still other courts have allowed aiding-and-abetting claims without even attempting to grapple with these issues. See *Cabello* v. *Fernández-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Aldana* v. *Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005). A more compelling case of judicial disarray is difficult to imagine.

### B. Uncertainty Over Aiding And Abetting Harms International Trade

The resulting uncertainty irreparably damages international trade. The ATS, in most cases, requires a showing of state action. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 805-08 (D.C. Cir. 1984) (Bork, J., concurring); cf. *Kadic* v. *Karadzic*, 70 F.3d 232, 239-40 (2nd Cir. 1995). As a result, ATS lawsuits against corporations typically allege that the corporation aided and abet-

ted abuses by a foreign government. In many cases, the allegations amount merely to accusations that the corporation engaged in ordinary commercial transactions in a foreign country with the effect of facilitating the foreign government's human rights violations.

Here, for example, "car companies [we]re accused of selling cars, computer companies [we]re accused of selling computers, banks [we]re accused of lending money, oil companies [we]re accused of selling oil, and pharmaceutical companies [we]re accused of selling drugs." Pet. App. 82a (Korman, J., dissenting in part). Caterpillar has been sued for aiding and abetting by selling bulldozers to the Israeli government. *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007) (dismissing as political question), petition for reh'g filed, No. 05-36210 (9th Cir. Oct. 9, 2007). And a Boeing subsidiary has been sued for aiding and abetting by providing "itinerary, route, weather, and fuel planning" for the United States' alleged "extraordinary rendition" program. *Mohamed* v. *Jeppesen Dataplan, Inc.*, No. 5:07-cv-02798, First Am. Compl. ¶ 50 (N.D. Cal. filed Aug. 1, 2007).

Because virtually *every* ATS suit against a corporate defendant alleges aiding and abetting, immediate resolution of the widespread uncertainty over this issue is vital. Firms need to know the risks of doing business in foreign countries. Without clear guidance as to whether aiding and abetting is a valid theory under the ATS, firms cannot properly weigh those risks. Moreover, because many defendants have contacts throughout the United States, that disarray invites forum-shopping, with plaintiffs selecting the jurisdiction with the most lenient standard.

That disarray has dramatic consequences for foreign trade. Under the broad "knowing" standard advocated by most ATS plaintiffs, even routine commercial transactions can give rise to aiding-and-abetting claims. Plaintiffs regularly allege that the defendant "knew" that the

foreign government committed human rights abuses and "knew" that the economic benefits of international trade would somehow indirectly assist those offenses.

Indeed, the Executive's own foreign policy statements are often cited as evidence that a corporation "knew" human rights abuses would occur. See, *e.g.*, *Mother Doe I* v. *Al Maktoum*, No. 06-22253, Compl. ¶¶ 6, 88 (S.D. Fla. filed Sept. 7, 2006) (relying on State Department Country Reports as evidence of "active participation of the United Arab Emirates' elite in the trafficking and enslavement" of underage camel jockeys); cf. *Doe* v. *Unocal Corp.*, 110 F. Supp. 2d 1294, 1299-1303 (C.D. Cal. 2000) (relying on State Department communications as evidence that defendant knew about potential violations of customary international law). Surely something in the legal system has malfunctioned when the Executive acknowledges human rights abuses in a country and encourages private firms to trade with the country as a strategy to improve conditions, but plaintiffs can then sue those same firms for doing so because the firms should have "known" about the human rights abuses from the Executive's own foreign policy publications.

## III. Immediate Review Is Warranted

### A. The Impact of the Second Circuit's Decision Is Wide-Ranging

The Second Circuit's decision increases the legal risks of doing business in foreign countries dramatically, deterring both American and foreign companies from expanding global commerce. The decision also creates a regime in which the Executive's foreign policy decisions are replaced with an unpredictable patchwork of after-the-fact judicial sanctions under the ATS. The potentially ruinous financial consequences of such a regime for firms engaged in international trade are a matter of utmost importance.

Throughout the world, the United States regularly chooses to pursue engagement rather than isolation when dealing with countries that have problematic human rights records. China, for example, is an important trading partner. U.S. Dep't of State, *Background Note: China* (Oct. 2007), *at* http://www.state.gov/r/pa/ei/bgn/18902.htm. But China's "human rights record remain[s] poor," and includes such abuses as forced labor. U.S. Dep't of State, *2006 Country Reports on Human Rights Practices: China* ¶ 2 (2007). The United States has responded with targeted sanctions in specific instances. See Rennack, *supra*, at 4-9. But, by and large, the government pursues a policy of engagement: "China's integration into the global economy and progressive embrace of market principles have been encouraged by more than 25 years of U.S. political and economic engagement, pursued on a largely bipartisan basis across administrations." U.S. Trade Representative, *U.S.-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement* 3 (2006).

The Executive has determined that continued engagement will improve China's respect for human rights. Announcing China's admission to the World Trade Organization, the President expressly linked trade with political reform: "WTO membership * * * will require China to strengthen the rule of law and introduce certain civil reforms, such as the publication of rules." President George W. Bush, *Statement by the President: Ministerial Decision to Admit the People's Republic of China and Taiwan Into the World Trade Organization* (Nov. 11, 2001), *at* http://www.whitehouse.gov/news/releases/2001/11/20011111-1.html. "In the long run, an open, rules-based Chinese economy will be an important underpinning for Chinese democratic reforms." *Ibid.* The United States has also adopted policies of commercial engagement with countries such as Colombia, Indonesia,

and Nigeria,[6] all of which have problematic human rights records.[7]

A policy of commercial engagement cannot function if the threat of protracted litigation deters companies from establishing the economic ties necessary for engagement to work. Moreover, when Western firms pull out of countries with mixed human rights records, other countries are often eager to fill the void, and those countries may be much less interested in improving local conditions.[8]

Where the Executive adopts a policy of commercial engagement, courts must respect that judgment—not impose burdens that operate as *de facto* judicial economic sanctions against unpopular foreign governments at the behest of private plaintiffs. If the Second Circuit's deci-

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[6] See, *e.g.*, U.S. Dep't of State, *Background Note: Colombia* (Sept. 2007), *at* http://www.state.gov/r/pa/ei/bgn/35754.htm (the "United States is Colombia's largest trading partner"; "[p]romoting security, stability, and prosperity in Colombia will continue as long-term American interests"); U.S. Dep't of State, *Background Note: Indonesia* (Aug. 2007), *at* http://www.state.gov/r/pa/ei/bgn/2748.htm ("The United States has important economic, commercial, and security interests in Indonesia"); U.S. Dep't of State, *Background Note: Nigeria* (Jan. 2008), *at* http://www.state.gov/r/pa/ei/bgn/2836.htm (Nigeria is the "largest U.S. trading partner in sub-Saharan Africa").

[7] See U.S. Dep't of State, *2006 Country Reports on Human Rights Practices: Colombia* ¶ 2 (2007) ("unlawful and extrajudicial killings; forced disappearances; insubordinate military collaboration with criminal groups; torture and mistreatment of detainees," among other abuses); U.S. Dep't of State, *2006 Country Reports on Human Rights Practices: Indonesia* (2007) (similar); U.S. Dep't of State, *2006 Country Reports on Human Rights Practices: Nigeria* (2007) (similar).

[8] In the Sudan, for example, American divestiture left an investment hole that China was quick to fill. That is hardly a positive development for human rights. See Council on Foreign Relations Indep. Task Force, *U.S.-China Relations: An Affirmative Agenda, A Responsible Course* 45 (2007).

sion stands, the risk and uncertainty caused by the threat of a possible retroactive judicial embargo will discourage trade. The effect may be a *de facto present* embargo where the Executive has purposely decided not to impose one.

### B. Prompt Review Is Imperative

Although the Second Circuit remanded for further proceedings, this Court should review its decision now. Proceedings on remand will shed no light on whether aiding and abetting is a valid theory of liability under the ATS, an issue of crucial and immediate importance to the international business community. And although the court of appeals left open the possibility that the district court could address deference to the political branches on remand, Pet. App. 214a-221a, years of litigation will follow, there and in the court of appeals, before this case ever makes its way back to this Court. This suit has already been pending for many years. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43 (S.D.N.Y. 2004) (describing procedural history). It should not require another decade of litigation to vindicate defendants for having followed the Executive's foreign policies.

The Second Circuit's decision, moreover, will remain on the books for years in the interim. The decision causes grave uncertainty over whether companies doing business in other countries can expect prompt relief based on reliance on the Executive's foreign policies. That uncertainty irreparably harms international trade, particularly because the Second Circuit includes New York City, the Nation's international commercial center.

Finally, the Second Circuit's decision to remand is the very error that necessitates review. The court's error was not merely that it failed to give deference to the Executive's foreign policy decisions, but that it refused even to *address* the issue at the earliest opportunity. That fail-

ure to treat deference as a threshold issue that must be addressed at the earliest opportunity itself deters international trade and undermines U.S. foreign policy, and that error can only be meaningfully addressed now, at this stage.

Firms need clear guidance on where they can do business—guidance that must come from the political branches in advance, not from after-the-fact ATS litigation. Firms need to know, not only that they can rely on the Executive's decisions, but that courts will protect their reliance in a timely manner. Otherwise, case-specific deference will be a hollow doctrine—one that protects a defendant's reliance only after the defendant has spent millions defending itself in court, after its reputation has been ruined, and after it has lost contracts and been boycotted because of a lawsuit that ultimately proves meritless. The Second Circuit's ruling deters the constructive commercial engagement that the Executive often promotes, and it undermines the international trade on which our economy depends. That ruling warrants this Court's immediate review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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