

Nos. 19-416 and 19-453

IN THE
Supreme Court of the United States

NESTLÉ USA, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents*.

CARGILL, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents*.

On Writs of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF FOR *AMICI CURIAE*
CENTER FOR JUSTICE & ACCOUNTABILITY
AND HUMAN RIGHTS FIRST
IN SUPPORT OF RESPONDENTS**

Carmen K. Cheung
Counsel of Record
Elzbieta T. Matthews
Daniel McLaughlin
Katerina L. Siefkas
CENTER FOR JUSTICE &
ACCOUNTABILITY
One Hallidie Plaza
Suite 750
San Francisco, CA 94102
415.544.0444
ccheung@cja.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

 I. Congress Recognized Aiding and Abetting as a Viable Mode of Liability In Enacting the TVPA, a Statute That Complements the Remedies Available Under the ATS. 5

 A. Congress Enacted the TVPA to Supplement, Not Restrict, the ATS. 7

 B. The TVPA Provides a Civil Remedy for Torture and Extrajudicial Killings Committed Abroad, Including Through Aiding and Abetting Liability. 12

 II. Aiding and Abetting Liability Under the Alien Tort Statute Furthers Important U.S. Interests. 17

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

<i>Abebe-Jiri v. Negewo</i> , No. 1:90-cv-2010-GET, 1993 WL 814304 (N.D. Ga. Aug. 20, 1993), <i>aff'd sub nom. Abebe-Jira v. Negewo</i> , 72 F.3d 844 (11th Cir. 1996).....	19
<i>Adhikari v. Daoud & Partners</i> , 697 F. Supp. 2d 674 (S.D. Tex. 2009)	11
<i>Aldana v. Del Monte Fresh Produce, N.A., Inc.</i> , 416 F.3d 1242 (11th Cir. 2005)	11, 15
<i>Ali Shafi v. Palestinian Authority</i> , 686 F. Supp. 2d 23 (D.D.C. 2010)	11
<i>Aziz v. Alcolac, Inc.</i> , 658 F.3d 388 (4th Cir. 2011).....	15
<i>Cabello Barrueto v. Fernández-Larios</i> , 205 F. Supp. 2d 1325 (S.D. Fla. 2002), <i>aff'd sub nom. Cabello v. Fernández-Larios</i> , 402 F.3d 1148 (11th Cir. 2005)	15
<i>Cabello v. Fernández-Larios</i> , 402 F.3d 1148 (11th Cir. 2005)..... <i>passim</i>	
<i>Chavez v. Carranza</i> , 413 F. Supp. 2d 891 (W.D. Tenn. 2005), <i>aff'd</i> 559 F.3d 484 (6th Cir. 2009).....	12
<i>Chavez v. Carranza</i> , 559 F.3d 486 (6th Cir. 2009).....	15

<i>Doe v. Drummond Co.</i> , 782 F.3d 576 (11th Cir. 2015).....	16
<i>Doe v. Nestlé, S.A.</i> , 748 F. Supp. 2d 1057 (C.D. Cal. 2010) <i>rev'd on other grounds</i> 776 F.3d 1013 (9th Cir. 2014)	11
<i>Doe v. Qi</i> , 349 F. Supp. 2d 1258 (N.D. Cal. 2004).....	18
<i>Doe v. Rafael Saravia</i> , 348 F. Supp. 2d 1112 (E.D. Cal. 2004)	19, 22, 23, 24
<i>Enahoro v. Abubakar</i> , 408 F.3d 877 (7th Cir. 2005).....	11
<i>In re Estate of Marcos, Human Rights Litigation</i> , 25 F.3d 1467 (9th Cir. 1994)	6
<i>Filártiga v. Peña-Irela</i> , 630 F.2d 876 (2d Cir. 1980).....	3, 6
<i>Hilao v. Estate of Marcos</i> , 103 F.3d 767 (9th Cir. 1996)	10, 16, 18
<i>Kadic v. Karadžić</i> , 70 F.3d 232 (2d Cir. 1995)	10
<i>Kiobel v. Royal Dutch Petroleum</i> , 569 U.S. 108 (2013)	<i>passim</i>
<i>Lizarbe v. Hurtado</i> , No. 07-21783-CIV-JORDAN, 2007 WL 9702177 (S.D. Fla. Nov. 21, 2007)	18

<i>Lizarbe v. Rondon</i> , 642 F. Supp. 2d 473 (D. Md. 2009) <i>aff'd in part, appeal dismissed in part</i> , 402 F. App'x 834 (4th Cir. 2010)...	17, 18
<i>Mamani v. Sánchez Bustamante</i> , 968 F.3d 1216 (11th Cir. 2020).....	16
<i>Mehinovic v. Vuckovic</i> , 198 F. Supp. 2d 1322 (N.D. Ga. 2002)	15, 19
<i>Mohamad v. Palestinian Authority</i> , 566 U.S. 449 (2012).....	<i>passim</i>
<i>Salim v. Mitchell</i> , 268 F. Supp. 3d 1132 (E.D. Wash. 2017)	18
<i>Samantar v. Yousuf</i> , 560 U.S. 305 (2010)	1
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004)	<i>passim</i>
<i>Tel-Oren v. Libyan Arab Republic</i> , 725 F.2d 774 (D.C. Cir. 1984).....	8
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018)	1
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. 338 (2011)	10
<i>Wiwa v. Royal Dutch Petroleum Co.</i> , No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002)	13

Yousuf v. Samantar, No. 1:04-cv-1360
 (LMB/JFA), 2012 WL 3730617 (E.D. Va.
 Aug. 28, 2012), *appeal dismissed* No. 12-
 2178 (4th Cir. Feb. 3, 2014)..... 14, 16, 18

STATUTES

28 U.S.C. § 1350 1
 28 U.S.C. § 1350 note *passim*

LEGISLATIVE HISTORY

132 CONG. REC. 12949 (daily ed. June 6, 1986) 8
 H.R. REP. NO. 102-367 (1991) *passim*
 S. REP. NO. 102-249 (1991) *passim*
*Torture Victim Protection Act Hearing of 1989:
 Hearing on S. 1629 and H.R. 1662 Before
 the Subcomm. on Immigr. & Refugee
 Affs. of the S. Comm. on the Judiciary,
 101st Cong. 51 (1990) 9*
*Torture Victim Protection Act: Hearings &
 Markup Before the H.R. Comm. on
 Foreign Affs. & Its Subcomm. on Hum.
 Rts. & Int'l Orgs., 100th Cong. 1 (1988) 10*
 Torture Victim Protection Act of 1991, Pub. L.
 No. 102-256, 106 Stat. 73 (1992)..... 7

OTHER AUTHORITIES

Camila Domonoske, <i>Oscar Romero, Pope Paul VI Elevated to Sainthood</i> , NPR (Oct. 14, 2018, 10:39 AM).....	23
Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.....	14
Final Judgment, <i>Jean v. Dorélien</i> , No. 03-20161-CIV-KING/GARBER, (S.D. Fla. Aug. 16, 2007)	18
John Q. Barrett, <i>The Nuremberg Roles of Justice Robert H. Jackson</i> , 6 WASH. U. GLOBAL STUD. L. REV. 511, 519-20 (2007).....	14
Philip Mariani, Comment, <i>Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act</i> , 156 U. PA. L. REV. 1383 (2008)	11
Random House Webster’s College Dictionary (1999)	13
Second Amended Complaint, <i>Cabello v. Fernández-Larios</i> , 402 F.3d 1148 (S.D. Fla. Sept. 17, 2001) (No. 99-0528-civ-LENARD).....	20
Second Amended Complaint, <i>Jean v. Dorélien</i> , 431 F.3d 776 (S.D. Fla. Mar. 11, 2004) (No. 03-20161-CIV-KING/GARBER)	18

Ved P. Nanda & David K. Pansius, 2
Litigation of International Disputes in
U.S. Courts, § 9:9 (2010 supp.)..... 11

INTEREST OF AMICI CURIAE¹

Amicus the Center for Justice & Accountability (“CJA”) is a U.S.-based human rights organization dedicated to deterring torture, crimes against humanity, extrajudicial killings, and other serious human rights abuses. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks truth, justice, and redress for survivors. Since its founding in 1998, CJA has worked to advance the rights of survivors, and has represented survivor-plaintiffs in numerous lawsuits filed in federal courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, against individuals who came to the United States after committing, ordering, commanding, or aiding and abetting grave human rights abuses abroad.

CJA has appeared before this Court on behalf of survivors of atrocities committed under Somali dictator Siad Barre in *Samantar v. Yousuf*, 560 U.S. 305 (2010), and as *amicus curiae* on issues related to the ATS, the TVPA, and international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012), and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represents that all parties have consented to the filing of this brief.

Amicus Human Rights First (“HRF”) is a non-profit, nonpartisan international human rights organization based in New York, Washington, D.C., and Los Angeles. Since 1978, Human Rights First has worked to protect fundamental human rights. It promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law. HRF, then known as the Lawyers Committee for Human Rights, played an important role in promoting the adoption of the TVPA. HRF also operates one of the nation’s largest programs for pro bono legal representation of refugees, including victims of torture.

HRF appeared as *amicus curiae* before this Court on issues related to the ATS, the TVPA, and international law in *Kiobel*, 569 U.S. 108 (2013), and *Mohamad*, 566 U.S. 449 (2012).

Petitioners present the Court with two questions for review, namely whether: (1) the presumption against extraterritoriality applicable to ATS claims is displaced by the facts alleged by Respondents; and (2) there exists a bar to liability under the ATS for domestic corporations. *See* Brief for Petitioner Cargill, Inc. (“Cargill Brief”) at (*i*); Brief for Petitioner Nestlé USA, Inc. (“Nestlé Brief”) at (*i*). In support of their position that domestic corporations are not subject to the ATS, Petitioners point to the fact that the TVPA creates a civil cause of action against natural persons only. Cargill Brief at 46-47; Nestlé Brief at 42-43.

Amici the Solicitor General of the United States and the Cato Institute go even further. In asking the Court to find that claims for aiding and abetting

violations of the laws of nations are not cognizable under the ATS, they argue that the TVPA – and by extension the ATS – does not permit aiding and abetting liability. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners (“Solicitor General Brief”) at 25; Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners (“Cato Institute Brief”) at 9.

The Petitioners’ characterization of the interaction between the ATS and the TVPA is misleading, and the assertion of *amici* the Solicitor General and the Cato Institute that the TVPA does not permit aiding and abetting liability runs counter to the TVPA’s legislative intent, this Court’s interpretation of the statute, and the reasoning of every Court of Appeals to consider the issue.

Amici have a strong interest in the proper resolution of questions related to the ATS and the TVPA, including the interrelationship between the two statutes and their incorporation of aiding and abetting liability.

SUMMARY OF ARGUMENT

Following the seminal decision in *Filártiga v. Peña-Irela*, 630 F.2d 876 (2d Cir. 1980), the ATS has served an essential function by enabling federal courts to impose liability on those responsible for serious human rights abuses, providing redress to survivors, deterring future violations, and ensuring that the United States does not serve as a safe haven for human rights abusers.

In 1991, Congress adopted the TVPA to reinforce, supplement, and enhance the remedies

afforded under the ATS. While foreign nationals were able to pursue civil remedies in U.S. courts for serious human rights abuses such as torture or extrajudicial killing under the ATS, U.S. citizens had no comparable right against individuals otherwise subject to the jurisdiction of U.S. courts. The TVPA addressed this omission in federal law by establishing a right of action for torture and extrajudicial killing committed abroad, thereby affording U.S. citizens similar rights for a subset of claims already granted to foreign nationals under the ATS.

Congress intended the TVPA to supplement, not supplant, the remedies available under the ATS. For almost 30 years, the ATS and TVPA have served complementary and essential functions holding perpetrators of gross human rights abuses accountable and making truth, justice, and redress possible for survivors. *See* Section I(A).

The TVPA provides for liability against those who aid and abet torture and extrajudicial killing abroad. The TVPA's plain meaning and legislative history make clear it was enacted to permit "lawsuits against persons who *ordered, abetted, or assisted*" in the violations at issue. S. REP. NO. 102-249 at 8 (1991) (emphasis added). In *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012), this Court affirmed that "the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing" *Id.* at 458. The availability of aiding and abetting liability under the TVPA reflects Congress' understanding at the time of the TVPA's enactment that claims for aiding and abetting violations of the

law of nations would have been cognizable if brought pursuant to the ATS. *See* Section I(B).

Eliminating aiding and abetting liability under the ATS would deprive victims of the most serious rights abuses of a remedy in U.S. courts, and would upend the long-standing policy of the United States to deny safe haven to human rights abusers. The importance of preserving aiding and abetting claims under the ATS is made clear through the history of cases successfully brought by CJA against notorious human rights abusers living in the United States, including Armando Fernández-Larios, a member of the Chilean “Caravan of Death,” and Alvaro Rafael Saravia Merino, who coordinated the 1980 assassination of then-Archbishop Oscar Romero in El Salvador, who was canonized to sainthood in 2018. *See* Section II.

ARGUMENT

I. Congress Recognized Aiding and Abetting as a Viable Mode of Liability In Enacting the TVPA, a Statute That Complements the Remedies Available Under the ATS.

As this Court has established, the ATS gives federal courts the power to recognize certain violations of international law as federal common law. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). The set of claims that can be brought under the ATS is narrow. *See Sosa*, 542 U.S. at 731-32 (urging lower courts to refrain from

recognizing claims “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”); *Kiobel*, 569 U.S. at 124-25 (causes of action under the ATS must sufficiently “touch and concern” the United States).

This Court’s rulings have been informed by the history of human rights litigation under the ATS, beginning in 1980 with the watershed decision in *Filártiga v. Peña-Irela*, 630 F.2d 876 (2d Cir. 1980). In that case, the Second Circuit Court of Appeals upheld claims brought under the ATS against a former Paraguayan police officer living and working in the United States for torture and extrajudicial killing he committed in Paraguay. *See id.* at 887-88. Since *Filártiga*, victims of the most serious human rights abuses have successfully brought claims under the ATS against individuals found in the United States for atrocities committed extraterritorially. *See Sosa*, 542 U.S. at 732 (holding that the ATS provides jurisdiction for such violations, and endorsing *Filártiga* and *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), which recognized a cause of action under the ATS arising from extrajudicial killing and torture committed abroad).

Congress enacted the TVPA to complement and reinforce the remedies available under the ATS and articulated in *Filártiga* and its progeny. A plain reading of the TVPA and an examination of its legislative history make clear that Congress intended the statute to encompass liability for individuals who aided and abetted torture and extrajudicial killing abroad.

A. Congress Enacted the TVPA to Supplement, Not Restrict, the ATS.

In 1991, Congress enacted the Torture Victim Protection Act to codify and supplement the remedies available under the Alien Tort Statute. In 1992, President George H.W. Bush signed the TVPA into law. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

The TVPA’s first goal was to endorse and codify the cause of action recognized by *Filártiga* under the ATS for claims against individuals for torture and extrajudicial killing. H.R. REP. NO. 102-367 at 3 (1991) (“The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act)”); S. REP. NO. 102-249 at 4 (1991) (“The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, [the ATS]”); *see also* 28 U.S.C. § 1350 note, § 2(a).² Congress enacted this statute as a bulwark against potential judicial curtailment of these claims under the ATS, and in so doing made clear that the cause of action already recognized under the ATS included claims

² Section 2(a) of the TVPA provides:

LIABILITY—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death. 28 U.S.C. § 1350 note, section 2(a).

against those who carry out torture or extrajudicial killings, and those who “ordered, abetted or assisted” these atrocities. S. REP. NO. 102-249 at 4-5, 8-9 (explaining the scope of liability under the TVPA and expressing concern about the D.C. Circuit’s decision in *Tel-Oren v. Libyan Arab Republic*, 725 F.2d 774 (D.C. Cir. 1984), which questioned the availability of a private right of action under the ATS for torture); *see also* H.R. REP. NO. 102-367 at 3-4.³

Next, the TVPA sought to address a significant gap in U.S. law. While foreign nationals had the ability to pursue civil remedies in U.S. courts for serious human rights abuses such as torture or extrajudicial killing, U.S. citizens had no comparable right. The TVPA was meant to redress this limitation by extending a right of action to U.S.

³ In submitting the bill to the Senate, Senator Specter (R.) acknowledged the goal of the TVPA was to remove any uncertainty with respect to civil claims for torture and extrajudicial killing.

The landmark case of *Filártiga v. Pena-Irala* confirmed that official torture is in fact a violation of the law of nations Since that holding, several recent decisions have questioned whether th[e ATS] provides a clear basis for future suits in U.S. federal courts. In *Tel-Oren v. Libyan Arab Republic*, for example, judges dismissed an action brought under section 1350 and noted the lack of clear congressional guidance on the subject The legislation I am introducing today . . . seeks to clarify this area of law.

132 CONG. REC. 12949 (daily ed. June 6, 1986) (internal citations omitted).

nationals for torture and extrajudicial killing, and thereby affording them the same access to remedy already granted to foreign nationals through the ATS. H.R. REP. NO. 102-367 at 4 (“The TVPA would . . . enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.”).⁴

In enacting the TVPA, Congress affirmed the important function served by the ATS – to provide federal courts with the power to remedy violations of customary international law as they existed in 1991 and as they crystallize in the future. The TVPA’s legislative history is explicit that “claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATS]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” H.R. REP. NO. 102-367 at 4; *see*

⁴ *See also Torture Victim Protection Act Hearing of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigr. & Refugee Affs. of the S. Comm. on the Judiciary, 101st Cong. 51 (1990)* (“The Lawyers Committee believes that the Torture Victim Protection Act affords Congress the opportunity to both reaffirm the principles underlying the *Filártiga* decision and its progeny, and to provide a clear statement of legislative and political support for victims of human rights abuse who are able to bring a case against their oppressors. The Torture Victim Protection Act will not replace the 200-year old Alien Tort Claims Act. Instead, it will make relief clearly available to United States citizens as well as aliens who are the victims of torture or extrajudicial killing abroad.”).

also S. REP. NO. 102-249 at 4-5 (“Section 1350 has other important uses and should not be replaced [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.”).⁵ Thus, Congress enacted the TVPA without amending or repealing any portion of the ATS.

Courts of Appeals to consider the issue have similarly concluded that the TVPA was designed to supplement and extend the ATS, rather than to displace it. *See e.g., Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (“The TVPA creates no new liabilities nor does it impair rights. Rather, the TVPA extended the ATCA, which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killings in United States courts.”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (“The TVPA . . . was intended to codify judicial decisions recognizing such a cause of action under the Alien Tort Claims Act.” (citation omitted)), *abrogated in part on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Kadic v. Karadžić*, 70

⁵ *See also Torture Victim Protection Act: Hearings & Markup Before the H.R. Comm. on Foreign Affs. & Its Subcomm. on Hum. Rts. & Int’l Orgs.*, 100th Cong. 1 (1988) (statement of Rep. Yatron, Member, House Subcomm. on Hum. Rts. & Int’l Orgs.) (“It is not the intent of the Congress to weaken [the ATS], but to strengthen and clarify it[.] Federal courts should not allow congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them[.]”).

F.3d 232, 241 (2d Cir. 1995) (“Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.” (citations omitted)); *see also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (finding that the plaintiffs could bring separate claims for torture under both the TVPA and the ATS and that the TVPA did not amend the ATS); *but see Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005) (“We find that the [TVPA] does, in fact, occupy the field”, holding that claims for torture can only be brought under the TVPA not the ATS).⁶

⁶ This latter holding is an outlier in the jurisprudence on the relationship between the ATS and TVPA and has been highly criticized. *Doe v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1115 n.55 and accompanying text (C.D. Cal. 2010) *rev'd on other grounds* 776 F.3d 1013 (9th Cir. 2014) (citing Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1386 (2008) (“the Seventh Circuit’s preclusive interpretation . . . produces an inappropriate result for courts to follow”); Ved P. Nanda & David K. Pansius, 2 *Litigation of International Disputes in U.S. Courts*, § 9:9, n.366 and accompanying text (2010 supp.) (“The text projects that in the long run Judge Cudahy’s [dissenting] argument [from *Enahoro*] will prevail in most circuits. Congress did not repeal the AT[S]. *Sosa* did not reject the proposition that torture was an actionable norm under the AT[S]. *Sosa* also indicated no disagreement with the case law that had consistently treated the AT[S] and TVPA as mutually coexisting.”)); *see also Ali Shafi v. Palestinian Authority*, 686 F. Supp. 2d 23, 27-29 (D.D.C. 2010) (refusing to adopt *Enahoro*’s holding); *Adhikari v.*

In *Sosa*, this Court affirmed and acknowledged the complementary and yet distinct roles of the ATS and TVPA, recognizing that “Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.” 542 U.S. at 725. Rather, Congress had reaffirmed the ATS through the TVPA: Congress “not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.” *Id.* at 731.

B. The TVPA Provides a Civil Remedy for Torture and Extrajudicial Killings Committed Abroad, Including Through Aiding and Abetting Liability.

Amici the Solicitor General and the Cato Institute claim that the TVPA does not permit aiding and abetting liability, and as a result, neither should the ATS. *See* Solicitor General Brief at 25 (“Finally, congressional action provides an additional reason to abstain from implying a cause of action for aiding and abetting. The TVPA does not provide for aiding-and-abetting liability, see 28 U.S.C. 1350 note”); Cato Institute Brief at 9 (“Congress in the TVPA did not provide for aiding and abetting liability”).

Daoud & Partners, 697 F. Supp. 2d 674, 687-88 (S.D. Tex. 2009) (same); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005), *aff’d* 559 F.3d 484 (6th Cir. 2009) (same). *Amici* submit this decision was wrongly decided, contrary to Congress’ intent and this Court’s holding in *Sosa*, 542 U.S. at 728, 731.

By its express terms, the TVPA extends liability not just to individuals who personally *commit* the act of torture, but to anyone who “*subjects*” another to torture. Section 2(a), the liability provision, states that “[a]n individual who . . . *subjects* another individual to torture . . . shall be liable for damages” 28 U.S.C. 1350 note, § 2(a) (emphasis added). Under its dictionary definition, the verb “subject” means “to cause someone ‘to undergo the action of something specified; to expose . . . to make liable or vulnerable.’” *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *15 (S.D.N.Y. Feb. 28, 2002) (quoting Random House Webster’s College Dictionary (1999) and noting that “[t]he legislative history of the TVPA supports this reading”).

The legislative history of the TVPA further underscores the statute’s reach. The Senate Report accompanying the TVPA states clearly that the statute permits “lawsuits against persons who *ordered, abetted, or assisted in the torture.*” S. REP. NO. 102-249 at 8 (Section IV.E. Scope of liability) (emphasis added).

This extension of liability to all responsible parties reflects Congress’ abhorrence of torture. It is also a recognition of customary international law, and the types of claims available under the ATS as violations of the law of nations. *See* S. REP. NO. 102-249 at 9 (recognizing forms of secondary liability, stating: “[u]nder international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them”). As detailed in the

Brief of International Law Professors and Practitioners as *Amicus Curiae* in Support of Respondents, the existence of aiding and abetting liability and other forms of secondary liability under the law of nations had been well-established by the time of the TVPA’s enactment. The Nuremberg Charter, whose drafters included Justice Robert H. Jackson⁷, specifically provided liability for “leaders, organisers [sic], instigators and accomplices” of the crimes enumerated in the Charter. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The Convention Against Torture – which the TVPA was designed to implement⁸ – also condemns not only “all acts of torture” but also any “*act by any person which constitutes complicity or participation in the torture.*” S. REP. NO. 102-249 at 9 n.16 (quoting Art. 4(1) of the Convention Against Torture (emphasis in Senate Report)).

And indeed, in the decades since *Filártiga*, courts across the United States have confirmed the availability of aiding and abetting liability under the ATS. See *Yousuf v. Samantar*, No. 1:04-cv-1360 (LMB/JFA), 2012 WL 3730617, at *10-11 (E.D. Va. Aug. 28, 2012), *appeal dismissed* No. 12-2178 (4th Cir. Feb. 3, 2014) (finding that “[a]iding and abetting liability is well established under the

⁷ See John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUD. L. REV. 511, 519-20 (2007).

⁸ “This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990.” S. REP. NO. 102-249 at 3.

ATS[]” and noting that “virtually every court to address the issue’ has ‘recognized secondary liability for violations of international law since the founding of the Republic”) (quoting *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 396 (4th Cir. 2011)); *Cabello Barrueto v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1332 (S.D. Fla. 2002), *aff’d sub nom. Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005) (“many federal courts have recognized that the ATCA reaches conspiracies and accomplice liability”); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002), *abrogated in part on other grounds by Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (“United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law”); *see also infra* Section II.

In *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012), this Court stated, unanimously, that “Congress is understood to legislate against a background of common law adjudicatory principles,” *id.* at 1709 (quotation marks omitted), and therefore “the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing” *Id.* at 458 (citing *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), which affirmed liability of former Salvadoran military officer under the TVPA (and ATS) for command responsibility over torturers).

Courts of Appeals are aligned in finding that the TVPA extends liability beyond the direct perpetrators of torture and extrajudicial killing, including to those who aid and abet the violations.

See, e.g., Mamani v. Sánchez Bustamante, 968 F.3d 1216, 1220 (11th Cir. 2020) (noting that plaintiffs bringing suit pursuant to the TVPA can “recover based on theories of indirect liability, including aiding and abetting, conspiracy, agency, and command responsibility”); *Doe v. Drummond Co.*, 782 F.3d 576, 607-08 (11th Cir. 2015) (holding that aiding and abetting claims are cognizable under the TVPA); *Yousuf*, 2012 WL 3730617, at *10-13 (citing *Mohamad*, 566 U.S. 449, in support of its finding that plaintiff properly stated a claim for aiding and abetting under the TVPA); *Cabello*, 402 F.3d at 1157 (finding that “the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation”); *Hilao*, 103 F.3d at 776, 779 (affirming jury instructions that stated defendant could be liable under the TVPA for more than his own direct actions).

In enacting the TVPA, Congress intended to codify certain causes of action that could be brought under the ATS in 1991. *See supra* Section I(A) (citing H.R. REP. NO. 102-367 at 4; S. REP. NO. 102-249 at 3). That aiding and abetting liability is explicitly available under the TVPA is a reflection of the legislature’s view of the causes of action permitted under the ATS at the time of the TVPA’s passage, including claims against those who aid and abet violations of the law of nations.

II. Aiding and Abetting Liability Under the Alien Tort Statute Furthers Important U.S. Interests.

Perpetrators of gross human rights abuses do not act in a vacuum – their actions are made possible through the assistance and support of numerous others. In light of this, aiding and abetting liability has become a core tenet of international law and a well-recognized basis for liability under the ATS.⁹ Aiding and abetting liability ensures that participants in atrocity crimes are held accountable and condemns all conduct that significantly contributes to such events. In the context of the ATS, this mode of liability is particularly important because potential ATS plaintiffs frequently have no other recourse against human rights violators who have fled to the United States. Reversing the Ninth Circuit’s holding and adopting the position advanced by certain *amici* to limit liability under the ATS to only direct perpetrators would prevent victims and their families from seeking justice for the harm they suffered, and weaken the ATS’s ability to make certain that no great crime against the law of nations goes unanswered – especially when those culpable have sought refuge in the United States.

⁹ See *supra* at 13-15; *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490 (D. Md. 2009) *aff’d in part, appeal dismissed in part*, 402 F. App’x 834 (4th Cir. 2010) (“numerous U.S. and international bodies have recognized causes of action under ATS/TVPA based on theories of conspiracy and aiding and abetting”); see also Brief of International Law Professors and Practitioners as *Amicus Curiae* in Support of Respondents.

Such a reversal would allow significant conduct to go unpunished and unremedied. *See, e.g., Cabello*, 402 F.3d at 1158-59; *Hilao*, 103 F.3d at 776 (finding the district court properly instructed the jury that Marcos could be liable under the ATS if he had, *inter alia*, aided in the torture, execution and disappearance of Hilao); *Salim v. Mitchell*, 268 F. Supp. 3d 1132, 1153 (E.D. Wash. 2017) (denying Defendant’s motion for summary judgment on claims that they aided and abetted Plaintiffs’ torture by designing and supervising the enhanced interrogation techniques implemented at CIA black sites) (settled before trial); *Yousuf*, 2012 WL 3730617, at *12-13 (finding defendant liable under the ATS for crimes against humanity and war crimes committed during his tenure as Siad Barre’s Minister of Defense and Prime Minister in Somalia); *Lizarbe*, 642 F. Supp. 2d at 490-91 (affirming that aiding and abetting liability is viable under the ATS and noting that as a result “Rivera Rondon is simply wrong when he insists that he cannot be liable because he did not personally commit” the rape, torture, and massacre of villagers in Quebrada de Huancayoc); *Lizarbe v. Hurtado*, No. 07-21783-CIV-JORDAN, 2007 WL 9702177, at *1-2 (S.D. Fla. Nov. 21, 2007) (finding that Hurtado was liable for extrajudicial killing and torture under the ATS and TVPA because he, *inter alia*, “aided and abetted his subordinates in carrying out the killings and torture”); Second Am. Compl. ¶ 28, *Jean v. Dorélien*, 431 F.3d 776 (S.D. Fla. Mar. 11, 2004) (No. 03-20161-CIV-KING/GARBER); *id.*, Final Judgment (S.D. Fla. Aug. 16, 2007); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004) (noting that “[t]he doctrine of aiding and abetting liability applicable

under the ATCA . . . reinforce[d]” the finding of defendant’s liability for actively encouraging repressive acts directed at Falun Gong supporters); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004); *Mehinovic*, 198 F. Supp. 2d at 1355-56 (finding the defendant “aided and abetted Serb military and political forces in committing genocide, war crimes, torture and other wrongful acts against plaintiffs”); *Abebe-Jiri v. Negewo*, No. 1:90-cv-2010-GET, 1993 WL 814304, at *4 (N.D. Ga. Aug. 20, 1993), *aff’d sub nom. Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (holding that “Defendant is responsible under international law for his own acts, for acts which he directed, ordered, aided and abetted or participated in, and for acts committed by forces under his command which he authorized” and finding him liable for, *inter alia*, facilitating the torture of plaintiffs during the Red Terror in Ethiopia).

Armando Fernández-Larios, a former member of a death squad commissioned by the Chilean dictator Augusto Pinochet, is an example of a culpable individual found liable for aiding and abetting torture, extrajudicial killing, crimes against humanity, and cruel, inhuman or degrading punishment. *See Cabello*, 402 F.3d at 1157. In October 1973, under the command of General Sergio Arelleno Stark, Fernández-Larios and the death squad traveled from city to city, torturing and executing political prisoners in what became known as the “Caravan of Death.” *Id.* at 1152. Among these extrajudicial killings was the murder of thirteen political prisoners in Copiapó, Chile. Winston Cabello, an economist who had served the government of the democratically elected President

Salvador Allende before Allende was overthrown by Pinochet, was among those killed. *Id.*

On October 16, 1973, Fernández-Larios and several other members of the death squad retrieved prisoner records from the garrison at Copiapó. From those records, the thirteen prisoners, including Cabello, were selected for death. *Id.* Witnesses testified that Fernández-Larios was with Arelleno when the thirteen were selected and may have even chosen some himself. *Id.* at 1159. Later that evening, Arelleno's death squad ordered some of the prisoners onto a truck, brutally murdering two on the spot. The remaining prisoners were forced to sit with the mangled bodies as they were carted away to a fate unknown. Second Am. Compl. ¶¶ 40-41, *Cabello v. Fernández-Larios*, 402 F.3d 1148 (S.D. Fla. Sept. 17, 2001) (No. 99-0528-civ-LENARD).

The truck carried the prisoners to a location off the main road. There, the prisoners were executed. Cabello refused to leave the truck and was cruelly slashed to death, likely with a *corvo*, a specialized knife designed to cause a slow and excruciating death. While circumstantial evidence suggested Fernández-Larios may have been Cabello's murderer, there was no direct evidence of this. *Cabello*, 402 F.3d at 1158 (discussing the evidence of Fernández-Larios's direct involvement in the killings and concluding that "the evidence supporting direct liability is not as strong as that supporting indirect liability"). The prisoners' bodies were placed in a mass grave and a false narrative was spread that they had died during an attempted escape.

Fernández-Larios never faced accountability in Chile for his role in the Caravan of Death and he resettled in the United States towards the end of the Pinochet regime. He lived in comfortable retirement for over a decade until Cabello's family brought claims against him under the ATS for his role in Cabello's torture and extrajudicial killing. He ultimately was found liable for his role in bringing about that night of cruelty and terror. *See id.* at 1160.

The availability of indirect liability under the ATS was critical to holding him accountable for his actions. Fernández-Larios argued that the plaintiffs had no viable claim because, despite clear evidence of his participation in the gross human rights violations leading up to Cabello's death, the plaintiffs could not show he had personally killed or tortured Cabello. *See id.* at 1157, 1159 ("Because there is sufficient evidence to support a finding of aiding and abetting, the jury's general verdict should stand."). Whether or not Fernández-Larios personally wielded the blade that killed Cabello, what is clear is that he was an active participant in the sequence of events that resulted in Cabello's torture and extrajudicial killing, and the torture and killing of many others. Aiding and abetting liability ensures that individuals like Fernández-Larios cannot escape accountability for their participation in such crimes.

Aiding and abetting liability recognizes that culpability does not require one to be present at the moment a trigger is pulled or a life ended. Alvaro Rafael Saravia Merino, under the command of Major Roberto D'Aubuisson, coordinated the 1980 assassination of Archbishop Oscar Romero of San

Salvador, El Salvador. D'Aubuisson, a retired Salvadorean military officer, created and commanded paramilitary death squads after leaving the military. These death squads carried out extrajudicial killings and other human rights abuses in El Salvador against the paramilitary forces' political opponents. *Saravia*, 348 F. Supp. 2d at 1118. Saravia, also retired from the Salvadorean military, was an integral part of these groups and, in 1980, served as head of security for D'Aubuisson. *Id.*

In the midst of this widespread terror, Archbishop Oscar Romero was a beacon of hope for the people of El Salvador. Horrified by the violence taking place around him, Archbishop Romero spoke out against the brutality of the paramilitary groups through weekly radio homilies broadcast nationwide. *Id.* at 1121. These acts of resistance earned him the enmity of D'Aubuisson, Saravia, and their allies who sought to find a way to silence him. On the day before his assassination, Archbishop Romero gave a particularly impassioned speech urging the death squads to stop their violence against the populace. He counselled them that "[n]o soldier is obliged to obey an order counter to the law of God." *Id.*

On March 24, 1980, D'Aubuisson, Saravia, and others met and determined that Archbishop Romero should be killed that very day. *Id.* Saravia coordinated the logistics of the assassination, including delivering payment to the assassin and arranging for the driver to take the assassin to and from the scene. *Id.* at 1121-22. Saravia also gave the assassin guidance on how to best carry out his task, advising him to aim for the Archbishop's head and not his chest in case the Archbishop was wearing a bulletproof vest. *Id.* at 1122. On Saravia's

instructions, the driver took the assassin to where Archbishop Romero was celebrating mass and waited while the assassin shot and killed Archbishop Romero before returning him to an expectant Saravia. *Id.* The assassin confirmed to Saravia that he had completed his assignment and Saravia reported to D'Aubuisson that the mission had been accomplished. *Id.* at 1122-23.

The effects of the assassination reverberated throughout the country. Archbishop Romero had been a revered and respected figure – a voice for the people and a mediator between the sharply divided political movements in El Salvador. *Id.* at 1137. That he had been so boldly struck down in the midst of celebrating mass showed the people that “no one is sacred,” *id.* at 1138, not even an individual whose bravery and compassion was such that he has since been canonized to sainthood by the Roman Catholic Church.¹⁰ The sacrilege of killing him while in the midst of services demonstrated that this was not simply a strike at one man but at Salvadoreans at large and the church itself. After his death, many priests and church leaders were murdered or forced to flee the country. *Saravia*, 348 F. Supp. 2d at 1140-41. Worshippers in El Salvador practiced their faith in secret. *Id.* at 1141. For many, Archbishop Romero’s death signaled an end to the possibility of

¹⁰ Camila Domonoske, *Oscar Romero, Pope Paul VI Elevated to Sainthood*, NPR (Oct. 14, 2018, 10:39 AM), <https://www.npr.org/2018/10/14/657277667/oscar-romero-pope-paul-vi-elevated-to-sainthood>; *see also Saravia*, 348 F. Supp. 2d at 1136 (noting that as of the time of the opinion, the Catholic Church was considering Romero for sainthood).

non-violent resolution of the Salvadorean conflict and galvanized guerrilla resistance against the military and paramilitary groups, resulting in an 11-year civil war. *Id.* at 1138-39. None of the individuals involved in his killing ever faced any consequences for their actions in El Salvador, where attempts to investigate and bring them to justice were thwarted at every turn.

Saravia moved to the United States where, aside from one aborted extradition attempt in 1987, he lived freely and comfortably. In 1993, an amnesty law passed in El Salvador seemed to foreclose any further extradition attempt and possibility of justice in his home country. *Id.* at 1134-35. He would have continued to live with impunity in the United States but for one final option – a civil suit in a U.S. court. In 2003, a family member of Archbishop Romero brought suit under the ATS for extrajudicial killing and crimes against humanity and under the TVPA for torture. The following year, 24 years after Archbishop Romero’s assassination, a judge found Saravia liable for his role in the crime. *Id.* at 1148 (holding that “Saravia’s role in coordinating and planning the assassination of Archbishop Romero is sufficient to establish liability against him under the TVPA and AT[S]” and finding Saravia liable for, *inter alia*, aiding and abetting extrajudicial killing and crimes against humanity under the ATS). Without employing the principles of indirect liability under the ATS, Saravia’s full responsibility and role in the historic and significant assassination of Archbishop Romero could not have been recognized and adjudged.

Aiding and abetting liability under the ATS ensures that individuals like Saravia and

Fernández-Larios can be held to account for their role in atrocity and that the United States does not serve as a haven for impunity. Eliminating aiding and abetting liability risks allowing them to live freely, sheltered by the United States. Such a result would severely undermine the vital role the ATS has played in holding human rights abusers accountable and in providing redress to victims for more than 30 years, a role affirmed by this Court and Congress. *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring) (noting that “we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest” and that one of the ATS’s “basic purposes” is to “compensat[e] those who have suffered harm at the hands of . . . torturers or other modern pirates”); *see also* H. REP. NO. 102-367 at 4 (examining the history of the ATS and noting that “[t]hat statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”). Such a result cannot be tolerated. The Ninth Circuit’s holding that aiding and abetting is a viable mode of liability under the ATS should be affirmed.

CONCLUSION

For the foregoing reasons, and those put forth by the Respondents and other *amici* in support of Respondents, the judgment of the Ninth Circuit Court of Appeals should be upheld.

Respectfully submitted,

Carmen K. Cheung
Counsel of Record
Elzbieta T. Matthews
Daniel McLaughlin
Katerina L. Siefkas
CENTER FOR JUSTICE & ACCOUNTABILITY
One Hallidie Plaza
Suite 750
San Francisco, CA 94102
415.544.0444
ccheung@cja.org

Counsel for Amici Curiae

October 21, 2020