No. 11-649

IN THE
Supreme Court of the United States

RIO TINTO PLC AND RIO TINTO LIMITED,
Petitioners,

v.

ALEXIS HOLYWEEK SAREI, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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The en banc Ninth Circuit held below that federal courts are authorized by the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to imply, without any guidance from Congress, a federal-common-law action by foreign citizens against a foreign corporation implicating the conduct of a foreign sovereign on its own soil. Respondents believe that decision unworthy of this Court's review because (they assert) it is fully consistent with this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and is generally "unremarkable." Opp. 1. But while the Ninth Circuit's decision is not unique, it is nevertheless extraordinary, and threatens to undermine U.S. foreign relations, and to interfere with the foreign-policy prerogatives of the political branches—precisely the result this Court cautioned federal courts to avoid in *Sosa*. 542 U.S. at 727-28.

There is a glaring omission from respondents' brief: nowhere do they even acknowledge, much less deal with, the views of the United States, as well as its close foreign allies, urging review of the issues presented here. Those views have been stated repeatedly:

• In its recent amicus curiae submission in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 ("U.S. *Kiobel* Br."), the United States explained that the first two questions Rio Tinto presents—"whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country" (U.S. *Kiobel* Br. 13); and "whether or when a cause of action should be recognized for theories of secondary liability such as aiding and abet-

ting" (*id.* at 12-13)—are "important" yet "unanswered by this Court." *Id.*

• The United States filed an unsolicited, certiorari-stage amicus brief urging this Court to grant review of the two questions above, arguing that ATS cases such as this one—involving the conduct of foreign sovereigns on their own soil concerning their own citizens—pose a severe and significant threat to U.S. foreign policy and foreign relations. Pet. 17-19, 31-32.

• The United States has consistently sought dismissal of this complaint (Pet. 10, 23, 34), and the United Kingdom, Australia, and now the Netherlands, have urged this Court to grant certiorari in this case and reverse the decision below. *See* UK/AUS Br. 4-6; Br. of Governments of the United Kingdom and the Kingdom of the Netherlands as Amici Curiae, *Kiobel*, No. 10-1491 ("UK/NED *Kiobel* Br."), at 31-32.

The importance of the questions presented here for U.S. foreign policy, and for the separation of powers, is self-evident. Respondents' complaint asks a U.S. district court to declare that two foreign sovereigns and close U.S. allies—Australia and Papua New Guinea ("PNG")—committed genocide and war crimes. That kind of extraordinary judicial power should not be implied without this Court's consideration. The case at least must be held pending the Court's resolution of the corporate liability question in *Kiobel*—even respondents do not deny that much. But they do deny that the other questions presented merit review. Respondents are wrong. Certiorari should be granted.

I. TERRITORIAL SCOPE OF ATS CLAIMS

The United States recognizes that the question of the ATS's territorial scope is both "unanswered" and "important." U.S. *Kiobel* Br. 12-13. Beyond ignoring the United States' views, respondents mischaracterize the question presented, misread *Sosa*, and misconstrue the controlling legal principles.

1. Respondents frame the question presented as whether "the ATS can [e]ver be used to redress extraterritorial tort violations" (Opp. 14), and argue that this question is already decided because "the tortious conduct alleged in *Sosa* occurred in a foreign country" (*id.* at 16). Respondents are incorrect. First, *Sosa* had no cause to decide the extent of the ATS's extraterritorial reach, because it dismissed the complaint on another ground. 542 U.S. at 738. Second, and in any event, the question presented here is not merely whether the ATS can ever reach into another sovereign's territory, but whether the ATS supports implying an action under federal common law (i.e., U.S. law) that implicates the conduct of a foreign sovereign on its own soil directed at its own citizens. Pet. i. That question was not presented in *Sosa*—the defendants in *Sosa* were Mexican civilians who were allegedly hired by the *U.S.* DEA to abduct the plaintiff, and "who were not affiliated with either government." *Alvarez-Machain v. United States*, 331 F.3d 604, 609-11 (9th Cir. 2003).

Although not faced with the question, *Sosa* went out of its way to express serious doubts about recognizing suits "that would go so far as to claim a limit on the power of foreign governments over their own citizens," specifically questioning whether such cases

should be recognized "at all." 542 U.S. at 727-28. The United States has recognized that this question was left open by *Sosa*, *see* U.S. *Kiobel* Br. 12-13, and has expressly urged the Court to answer it, *see* U.S. *Ntsebeza* Br., 2008 WL 408389, at *16-22.

The United States is correct—certiorari should be granted. The Ninth Circuit has authorized federal courts, in a case having nothing to do with the United States and without any congressional guidance, to imply a cause of action that would label U.S. sovereign allies perpetrators of horrific crimes under federal common law and international human-rights law. Whether federal courts are in fact authorized to imply such an action is a question of obvious importance, and should be answered by this Court.

2. The Ninth Circuit's holding concerning the extraterritorial reach of the ATS is clearly incorrect. As the United States explained below:

> [T]he presumption against extraterritorial application of U.S. law absent express direction from Congress, the history of the ATS' enactment, and the Supreme Court's many warnings in *Sosa* necessarily lead to the conclusion that the ATS does not authorize federal courts to fashion federal common law—*i.e.*, law of the United States—to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens.

U.S. 2007 Amicus Br. 3; *see* Pet. 23-27. Respondents' contrary arguments lack merit.

a. To start, it is true but irrelevant that the First Congress intended the ATS to provide jurisdiction

for piracy claims, including piracy occurring outside U.S. territorial waters. Opp. 18-20. The ATS was understood to authorize federal jurisdiction for piracy claims *on the high seas*, where *no* sovereign exercises territorial jurisdiction. *See Sosa*, 542 U.S. at 719; *id.* at 749 (opinion of Scalia, J.); 1 Op. Att'y Gen. 57, 58 (1795); U.S. *Ntsebeza* Br., 2008 WL 408389, at *13 n.4. Even if piracy was an act that could occur within the territorial boundaries of another sovereign (Opp. 19-20), it does not follow that Congress intended to permit ATS actions arising from such acts. Indeed, Attorney General Bradford's 1795 opinion suggests the opposite. 1 Op. Att'y Gen. at 58. Certainly nothing in the ATS's enactment history indicates that it was intended to support claims—based on piracy or anything else—implicating the conduct of a *sovereign* within its own territory directed toward its own citizens. Pet. 22-25.

b. Respondents next argue that allowing ATS claims arising from acts occurring wholly within other sovereign jurisdictions "'would reflect the contemporaneous understanding that … a transitory tort action arising out of activities beyond the forum state's territorial limits could be tried in the forum state.'" Opp. 18-19 (quoting *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 24-25 (D.C. Cir. 2011)). Under the contemporaneous understanding of the transitory-tort doctrine, an alien complaining about a wrong committed in a foreign country could invoke a state or federal forum—but the applicable law in such an action was "the law of the place of the act." *Slater v. Mex. Nat'l R.R. Co.*, 194 U.S. 120, 126 (1904). That principle has no application to extraterritorial ATS claims, which require application of the substantive

federal common law *of the United States* to conduct within a foreign sovereign's territory. Just as the transitory-tort doctrine does not support extraterritorial tort claims under federal statutory law, *see Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010), it does not support extraterritorial tort claims under federal common law either.

c. Respondents similarly err in arguing that "since the 'norms being applied under the ATS are international, not domestic,' and therefore involve no imposition of substantive U.S. law within a foreign country, 'the primary considerations underlying the presumption against extraterritoriality … do not come into play.'" Opp. 20 (quoting App. 11a). To the precise contrary, the federal-common-law action authorized under the ATS *is* substantive federal law, and its extension to foreign soil implicates serious foreign-policy and separation-of-powers principles. Indeed, the policies underlying the presumption against extraterritoriality apply a fortiorari to this case and those like it, because respondents' complaint "would go so far as to claim a limit on the power of foreign governments over their own citizens." *Sosa*, 542 U.S. at 727; *see* U.S. *Ntsebeza* Br., 2008 WL 408389, at *18; Pet. 24-28.

d. Finally, respondents note that Congress in the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, ratified extraterritorial suits for torture and extrajudicial killing. Respondents say federal courts should do the same in ATS claims under federal common law. Opp. 20-21. That argument is doubly flawed. First, there is no question that *Congress*—after fully weighing the foreign-policy consequences—may authorize extraterritorial civil actions

of the sort recognized in the TVPA. That does not remotely suggest that *courts* should do so on their own. Second, while the TVPA allows extraterritorial civil claims for torture and extrajudicial killing, it does so with significant limitations, including (1) prohibiting suits against corporations, *see* Resp. Br., *Mohamad v. Palestinian Authority*, No. 11-88; U.S. Amicus Br., *Mohamad*, No. 11-88, and (2) requiring exhaustion of local remedies as a prerequisite to suit, 28 U.S.C. § 1350 note, § 2(b). If courts were to follow the TVPA's guidance in fashioning federal common law to govern other human-rights norms, the courts would be compelled to follow the limitations Congress established as well. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-27 (1990); Rio Tinto Amicus Br., *Kiobel*, No. 10-1491, at 14-16. Under the limitations Congress imposed on TVPA claims, this suit should be dismissed.

II. SECONDARY LIABILITY UNDER THE ATS

1. Respondents contend that this Court should deny review of the question whether the ATS supports theories of secondary liability like aiding and abetting because several courts of appeals have ratified such theories. Opp. 25. But respondents do not deny that the courts of appeals have split on the mental state required under such theories. Pet. 30. And as with the question of the ATS's territorial scope, the United States has urged this Court to grant certiorari and hold that the ATS does not support theories of secondary liability, *see* U.S. *Ntsebeza* Br., 2008 WL 408389, at *8-11, and it has recently reaffirmed that this question is both "unanswered" and "important," U.S. *Kiobel* Br. 12-13.

2. Review also should be granted because the decision below is incorrect. As the United States has explained, this Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), makes clear that "the creation of civil aiding-and-abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction." U.S. *Ntsebeza* Br., 2008 WL 408389, at *8.

Citing the D.C. Circuit decision in *Exxon Mobil*, 654 F.3d at 28-32, respondents say that *Central Bank* is inapposite because aiders and abettors are recognized as liable under international criminal law, so aiding and abetting liability should be recognized under the ATS. Opp. 26. The relevant question, however, is whether federal courts should recognize an implied *civil* action for theories of secondary liability. *Central Bank* rejected civil aiding-and-abetting liability under § 10(b) of the Exchange Act even though criminal aiding-and-abetting liability would exist for the same conduct. 511 U.S. at 190-91. Civil aiding-and-abetting under the ATS likewise should be rejected, regardless whether criminal aiding-and-abetting liability would exist for the same conduct.

Secondary ATS liability would represent "a vast expansion of federal law" (*id.* at 183) far beyond the narrow action this Court contemplated in *Sosa*, and "without the check imposed by prosecutorial discretion" that obtains in criminal cases (*Sosa*, 542 U.S. at 727). Given *Central Bank*'s strong presumption against implying secondary liability even in the case

of a congressionally conferred cause of action, the same result should apply a fortiori when exercising the "great caution" *Sosa* requires before implying new actions under the ATS. *Id.* at 728.

3. Respondents also contend that this case presents a poor vehicle for resolving the question presented. Their arguments are unpersuasive.

a. Respondents first contend that the allegations in this case are "primarily those of direct, rather than secondary, liability." Opp. 23. Not so, as respondents' own description of the case makes abundantly clear. As incendiary as their allegations are, nowhere do respondents describe any action by Rio Tinto as the direct cause of their alleged injuries. Rather, they argue that Rio Tinto "provided the [PNG] military with attack helicopters and vehicles," and "assisted with troop transport, munitions and housing." *Id.* at 8. They allege that the PNG military "massacred" the Bougainvillean population "[w]ith substantial assistance from Rio Tinto." *Id.* And they allege that throughout the PNG civil war, "Rio continued to provide military and financial assistance to the [PNG] Defense Forces." *Id.* at 8-9. The United States also has recognized that respondents' claims "are based principally on acts allegedly committed by the Papua New Guinea army," and that respondents "seek to hold Rio Tinto vicariously liable for those harms." U.S. 2006 Amicus Br. 22. The district court agreed. App. 587a ("Plaintiffs do not dispute that their war crimes allegations involve actions taken by the [PNG military] rather than Rio Tinto."); App. 604a (noting that war crimes allegations are the same as allegations for crimes against humanity, including genocide).

Respondents' failure to allege any actual facts establishing direct liability is not surprising. The central premise of their action is that they suffered injuries as a result of the PNG civil war. And they cannot plead around the historical fact that it was the PNG military, allegedly aided by Australia, that fought that war. Accordingly, any liability for Rio Tinto for respondents' civil-war-related injuries would necessarily be derivative of PNG's (and Australia's) conduct.[1]

b. Respondents also contend that review in this case is premature because the case remains at the pleading stage, without any factfinding. Opp. 23-24. But that renders this petition a uniquely *favorable* vehicle. Because no factual disputes need to be resolved, and respondents' allegations must be taken as true, the case presents the cleanest possible legal test of the questions presented. Respondents argue that this Court normally awaits a final judgment before exercising its certiorari jurisdiction (Opp. 24), but there *was* a final judgment below—the district court dismissed the complaint with prejudice. App. 733a-34a. The Ninth Circuit reversed in part, App. 63a, but the case remains on appeal. This Court routinely grants certiorari in these circumstances. *See*, *e.g.*, *Minneci v. Pollard*, 132 S. Ct. 617 (2012); *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011).

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[1] Even if *some* of respondents' most outlandish allegations concerning Rio Tinto's own conduct could be read as supporting direct liability, a ruling that the ATS does not support theories of secondary liability would, at the least, dramatically narrow the scope of the complaint.

c. Finally, respondents maintain that this Court should deny review because they will attempt to amend their complaint on remand. Opp. 24-25. But respondents do not explain how they would amend their complaint, or how any amendment could matter for purposes of the question presented. Again, respondents cannot alter the historical reality that it was the PNG military (allegedly aided by Australia) that actually fought the PNG civil war in which respondents suffered their alleged injuries. In any event, it would be for the district court to decide whether any amendments could be non-futile in light of a holding from this Court that the ATS does not support secondary liability.

III. EXHAUSTION OF LOCAL REMEDIES

The Ninth Circuit held that claims by alien plaintiffs with no nexus to the United States, arising entirely from the conduct of a foreign sovereign on its own soil involving its own citizens, need not be exhausted in local proceedings before an ATS action may be filed. That holding is flatly inconsistent with fundamental principles of international law, with Congress's requirement in the TVPA that available local remedies must be exhausted in *every* case, and with the very principles of international comity the ATS was intended to safeguard. Pet. 32-35.

The question whether exhaustion of local remedies is required in ATS actions is also plainly important and worthy of this Court's review. *Sosa* itself stated that it "would certainly consider this requirement in an appropriate case." 542 U.S. at 733 n.21. The United States argued below that exhaustion of local remedies is required to safeguard inter-

national comity. U.S. 2007 Amicus Br. 7-8. And the United Kingdom, Australia, and the Netherlands have urged the Court to grant certiorari in this case to consider (among other things) the exhaustion question because of its importance to the maintenance of international law and comity. UK/AUS Br. 16-17; UK/NED *Kiobel* Br. 31-32.

U.S. courts must respect the threshold requirements of international law and comity when enforcing international norms, as well as the limits Congress itself has imposed on similar actions. *See Sosa*, 542 U.S. at 760-63 (Breyer, J., concurring). If extraterritorial ATS actions are allowed, they must be subject to local exhaustion, as both the TVPA and international law and comity require.

IV. CORPORATE LIABILITY—*KIOBEL*

As respondents acknowledge, *Kiobel* will decide the corporate liability question presented here. Opp. 33. The petition at least should be held pending *Kiobel*, and should be granted and set for argument if this Court reverses the Second Circuit in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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