No. 15-16909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOE I, DOE II, IVY HE, DOE III, DOE IV, DOE V, DOE VI, ROE VII, CHARLES LEE, ROE VIII, DOE IX, LIU GUIFU, WANG WEIYU, and those individuals similarly situated,

Plaintiffs-Appellants,

v.

CISCO SYSTEMS, INC., JOHN CHAMBERS, and FREDY CHEUNG,

Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District Of California At San Jose

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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March 2, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Cisco Systems, Inc. states that it has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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PRELIMINARY STATEMENT

This appeal arises from a final order of the District Court for the Northern District of California (Davila, J.) (ER15-28) dismissing a complaint whose allegations are based principally on the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which grants jurisdiction to federal district courts "of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States." The complaint alleges that Cisco Systems, Inc. ("Cisco") supposedly aided and abetted harms inflicted by Chinese police and prison officials upon Chinese nationals in China. Although Cisco does not in any way minimize the grave suffering plaintiffs allege, this case does not belong in a U.S. court. As the district court correctly found, plaintiffs' allegations all concern international law violations in China with no plausible or meaningful connection to the United States. As the district court also correctly found, the allegations fail to set forth any facts supporting an inference of purposeful or knowing facilitation of harm by Cisco. The district court's decision should be affirmed on either or both those grounds. The district court considered this Court's intervening decision in *Doe v. Nestlé USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) ("*Nestlé II*"), and carefully applied that decision in its order denying plaintiff's motion for reconsideration (ER5-14). That decision too was entirely correct.

Were there any doubt that the grounds for the decision below are correct (there is not), the decision also may be affirmed on the independent ground that the

complaint is nonjusticiable. Cisco's sales to the People's Republic of China ("PRC") fully comply with U.S. trade and export control law as set by Congress and the President. Plaintiffs are not free to inject U.S. courts into the Nation's foreign policy by seeking a judicial embargo on such lawful sales.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the presumption against the extraterritorial application of U.S. law bars ATS claims that (a) allege international law violations committed by Chinese officials against Chinese nationals in China and (b) have no strong or direct connection to the United States.

2. Whether ATS aiding and abetting claims are insufficient where they fail to allege (a) any purpose to facilitate international law violations or knowledge that a product having lawful uses would be used to commit such violations (*mens rea*), or (b) that a product having lawful uses substantially facilitated those violations (*actus reus*).

3. Whether (a) the TVPA does not provide for aiding and abetting claims and (b) even if it did, TVPA claims fail where they lack facts supporting *mens rea* and *actus reus*.

4. Whether ATS and TVPA claims are nonjusticiable where they involve sales to a foreign government that are lawful under U.S. trade regulations, thus

implicating (a) the political question doctrine, (b) the act of state doctrine, and/or (c) principles of international comity.

COUNTERSTATEMENT OF THE CASE

A. The Complaint's Allegations

Plaintiffs allege that Chinese public security officers, officers of a subdivision ("Office 610") of the Chinese Communist Party ("CCP"), and other officers subjected them to police brutality, torture, forced labor, beatings, forced religious conversions, and other acts in Chinese police stations, labor camps, and detention centers. ER39, 78-94 (Second Amended Complaint ("SAC")) (¶¶ 41-42, 230-356). None of those acts is alleged to have been committed by, planned by, directed by, or even known to the Cisco defendants; plaintiffs concede (Br. 3) that all relevant abuse was "principally carried out by officials and agents of" the PRC's law enforcement agencies.

There is also no dispute that certain activities relating to Falun Gong have been illegal in the PRC since 1999. SER4-6 (Declaration of John (Hejun) Chu in Support of Defendants' Motion to Dismiss) (¶¶ 12-21).[1] The PRC has identified Falun Gong organizations as illegal and prohibited certain Falun Gong activities, and the PRC

[1] Cisco submitted Mr. Chu's expert report with its motion to dismiss. SER1-12; *see* Fed. R. Civ. P. 44.1. Plaintiffs did not challenge Mr. Chu's report or submit their own report.

Supreme Court has issued a notice identifying Falun Gong as a cult banned by the PRC's national legislative organ. *Id*.

The PRC's Criminal Law specifies penalties for violations of these laws, including imprisonment and reeducation through forced labor. SER7-11 (¶¶ 22-39). Such penalties are not unique to Falun Gong. SER10 (¶ 34). However abhorrent such statutes might appear in U.S. eyes, the PRC adopted them based on its view that Falun Gong is a "'cult that seriously endangers the Chinese society and people,' … by inciting lawless and disruptive acts including sabotage and suicide bombings." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1300 (N.D. Cal. 2004) (quoting statement of PRC Government).

Although the SAC alleges various acts of torture and brutality at the hands of Chinese officials, *see*, *e.g.*, ER32, 38-40 (¶¶ 6, 37-47), any such conduct is illegal under Chinese law, *see* SER2-3, 10-11 (¶¶ 7, 36-39).[2]

The SAC makes only limited reference to Cisco and its executives. Cisco is a technology company that manufactures the routers, switches, and related hardware that comprise the basic architecture of internet networking.[3] Plaintiffs allege in the

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[2] China also signed and ratified the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *ratified* Oct. 4, 1988, 1465 U.N.T.S. 85.

[3] *See Global Internet Freedom: Corp. Resp. & the Rule of Law: Hearing Before the Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary*, 110th Cong.

(*footnote continued*)

SAC that the Cisco defendants helped design, market, and implement the "Golden Shield"—an e-government project initiated by the Chinese government to increase central police efficiency and coordination. ER45, 47-48, 54, 63, 65 (¶¶ 75, 81-84, 104, 140, 152). Plaintiffs allege further that, beginning in 2001, "Public Security officers, Party officials, and Office 610 agents routinely profiled, analyzed, and shared information on Falun Gong practitioners acquired through the Golden Shield, developed and implemented by Cisco, in order to facilitate their identification, tracking, detention, and ideological conversion and related forms of torture." ER56 (¶ 111). Plaintiffs do not allege any facts supporting the conclusion that defendants knew or intended that the Golden Shield would be used for purposes other than the lawful apprehension of individuals suspected of violating Chinese law.

The SAC characterizes the Golden Shield as a "surveillance and internal security network" (ER30 (¶ 1)) that "perform[s] … standard crime control police functions" (*id.* (¶ 2)) and serves "Chinese security objectives" (ER42 (¶ 59)) by "integrat[ing] … public security command and dispatch centers, intelligence and information analysis centers, mobile and front line police technology" (ER53 (¶ 98(g))

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at 86 (May 20, 2008) (statement of Mark Chandler, Sr. V.P. and Gen. Counsel, Cisco Sys., Inc.) ("Chandler Testimony"). Plaintiffs (Br. 28-29) and the district court (ER16 n.1) refer to Mr. Chandler's testimony. Mr. Chandler's written and oral testimony is available at http://www.gpo.gov/fdsys/pkg/CHRG-110shrg45688/pdf/CHRG-110shrg45688.pdf.

to enable authorities to "identify," "locate," "log," "profile," "track," "monitor," "investigate," and "surveil" individuals suspected of criminal wrongdoing (ER45-48, 50-53, 56, 58 (¶¶ 72, 79, 82, 83, 85, 91, 97, 111-13, 124)). As the SAC states, these capabilities support standard police activities to "'fight [] against crime.'" ER71 (¶ 190).

As the congressional testimony of Cisco Senior Vice President and General Counsel Mark Chandler (*see supra* n.3) makes clear, the security and filtering features of Cisco products are generic and not customized for particular users:

> First, Cisco sells the same products globally, built to global standards, thereby enhancing the free flow of information.
>
> Second, Cisco's routers and switches include basic features that are essential to fundamental operation of the Internet by blocking hackers from interrupting services, protecting networks from viruses.
>
> Third, those same features without which the Internet could not function effectively can, unfortunately, be used … for political and other purposes.
>
> Fourth, … Cisco does not customize or develop specialized or unique filtering capabilities in order to enable different regimes to block access to information.
>
> And, fifth, Cisco is not a service or content provider, nor are we a network manager who can determine how those features are used.

Chandler Testimony at 13. The technology is the "basic intrusion protection and site filtering that all Internet routing products contain, such as used by libraries to block pornography." *Id.* at 14.

The SAC alleges that the Cisco defendants supervised customization of the Golden Shield from the United States so that Chinese security officers could identify, track, monitor, and log the internet activities of Falun Gong practitioners. *See*, *e.g.*, ER45-53, 59-61 (¶¶ 75-98, 126-33). But nowhere do plaintiffs allege any particularized activity by defendants in the United States tied to the alleged violations committed by Chinese actors on Chinese soil.

B. Cisco's Compliance With U.S.-China Trade Policy

Congress and the Executive Branch have enacted foreign trade policy measures that balance trade with China with human rights concerns. Those measures expressly permit companies like Cisco to sell to Chinese government purchasers the routers, switches and other hardware that enable Internet communication. Following the Tiananmen Square protests of 1989, Congress passed the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991 (the "Tiananmen Act"). *See* Pub. L. No. 101-246, 104 Stat. 15 (1990). The Act (1) recites detailed congressional "findings" condemning the Chinese Government and others in connection with the events at Tiananmen Square, *id.* § 901(a) at 80; (2) states that "it is essential" that the U.S. "speak in a bipartisan and unified voice in response to the events in the [PRC]," *id.* § 901(b)(3) at 81; (3) instructs that the President should "continue to emphasize" human rights in discussions with China, *id.* § 901(b)(4) at 81; and (4) restricts trade with China, including by banning the export of specified crime control or detection

instruments or equipment to the PRC in the absence of an express report by the President to the Congress stating either that the PRC had made progress on political reform or that the ban was operating against the United States' national interest, *id.* § 902(a)(4) at 83.

The list of restricted crime control equipment is maintained by the Executive Branch acting through the U.S. Commerce Department. *See* 15 C.F.R. § 742.7 (2010). The purpose of the list is to "support … U.S. foreign policy to promote the observance of human rights throughout the world." *Id.* § 742.7(a). The list focuses on weapons and other physical instruments of crime control, but does *not* include software and technology products. *See, e.g., id.* §§ 742.7(a)(2) (shotguns); (a)(1) (police batons, whips, helmets, shields) (incorporating Export Control Classification Numbers in 15 C.F.R. Pt. 774, Supp. 1, including 0A978 & 0A979). The Commerce Department expressly remarked in a 2010 rule that it would *not* add software and technology products to the list, instead leaving for a

> subsequent proposed rule … potential expansion of [the list, including consideration of] … whether, and, if so, the extent to which … communications equipment should be added …; [and] the degree to which software and technology related to [already listed devices] should [themselves] be listed and how such software and technology should be described….

Revisions to Commerce Control List, 75 Fed. Reg. 41078-01, 41078 (July 15, 2010).[4]

President George H. W. Bush reaffirmed China's most-favored nation trade status just three months after passage of the Tiananmen Act, confirming U.S. recognition that restrictions on the sale of certain products to Chinese entities should not bar a robust economic relationship with China as to other products. *See* Presidential Determination No. 90-21, 55 Fed. Reg. 23183 (May 24, 1990). That status was made permanent in legislation signed by President Clinton in 2000. *See* Pub. L. No. 106-286, 114 Stat. 880 (2000).

C. The District Court's Decisions

On September 5, 2014, the district court entered a final order (ER15-28) granting defendants' motion to dismiss the SAC with prejudice (ER28). *First*, the court held that the ATS allegations are impermissibly based on extraterritorial conduct. ER21-25. The court relied upon the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which held the ATS presumptively inapplicable to extraterritorial conduct and upheld the dismissal of an

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[4] While plaintiffs suggest (Br. 45) that a newly proposed rule might change the calculus, the Executive Branch withdrew that proposal after receiving "more than 260 comments, virtually all of them negative." *Wassenaar: Cybersecurity and Export Control: Joint Hearing Before the Subcomm. on Info. Tech. of the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Cybersecurity, Infrastructure Prot., and Sec. Techs.*, 114th Cong. at 3-4 (Jan. 12, 2016), *available at* https://oversight.house.gov/wp-content/uploads/2016/01/Wolf-DOC-Statement-1-12-Wassenaar.pdf.

ATS complaint brought by Nigerian plaintiffs against a British/Dutch company for conduct occurring on Nigerian soil. While noting (ER22-23) that, since *Kiobel*, almost all ATS cases involving conduct occurring outside the United States have been dismissed, the court also noted (ER21) that *Kiobel*'s presumption against the extraterritorial application of the ATS might in some rare cases be overcome where "the claims touch and concern the territory of the United States … with sufficient force to displace the presumption," 133 S. Ct. at 1669. But the court found (ER23-24) that the SAC does not satisfy that exception, for "[d]efendants' creation of the Golden Shield system, even as specifically customized for Chinese authorities and even if directed and planned from San Jose, does not show that human rights abuses perpetrated in China against [p]laintiffs touch and concern the United States with sufficient force to overcome the ATS's presumption" (ER24).

Second, the court held the SAC also insufficient to allege that the Cisco defendants aided and abetted Chinese officials' alleged international law violations. As to *mens rea*, the court found (ER26-27) that, even if the ATS requires only knowledge rather than purpose, defendants' mere "customization, marketing, design, testing, and implementation of the Golden Shield system," accompanied by "conclusory allegations," is "not enough to support an inference of knowledge on the part of [d]efendants that torture or other human rights abuses would be committed against [p]laintiffs." ER27. The court also held (ER26-27) that plaintiffs had failed to

allege the requisite *actus reus*, for the SAC's allegations fail to support any inference that defendants' conduct had a "substantial effect on the perpetration of alleged violations against [p]laintiffs."

While the SAC also makes claims under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 (note), the district court dismissed those claims, holding (ER25) that aiding-and-abetting liability is not available under this Court's TVPA precedent.[5]

Plaintiffs moved for reconsideration of their allegations in light of this Court's intervening decision in *Nestlé II*, 766 F.3d 1013. In an order entered August 31, 2015 (ER9-13), the district court denied the motion, noting (ER10) that its earlier decision was fully consistent with guidelines this Court provided as to *mens rea* in *Nestlé II* because the court had "already applied the more lenient knowledge standard and held that [p]laintiffs failed to sufficiently plead that [d]efendants knew their product would be used beyond its security purposes to commit human rights violations." The court further distinguished the factors considered by this Court in *Nestlé II* by finding (ER10-11) that the SAC insufficiently alleged that Cisco or its executives (1) obtained any "direct benefit from the persecution of Falun Gong practitioners," (2) had any

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[5] The court also dismissed (ER27-28) plaintiffs' remaining claims, including their Electronic Communication Privacy Act claim and assorted state law claims, which plaintiffs have not appealed.

"influence or leverage over the Chinese Government so as to dictate its policies regarding Falun Gong," or (3) took any action "to shape American policy" towards China's treatment of Falun Gong. As to *actus reus* (ER11-12) and extraterritoriality (ER13), the court found that *Nestlé II* did not change the legal standards it had previously applied, and reiterated its prior conclusions.

SUMMARY OF ARGUMENT

I. Plaintiffs' ATS claims are barred by the presumption against extraterritorial application of U.S. law reaffirmed in *Kiobel*. Those claims rest on acts perpetrated by Chinese officials upon Chinese nationals in Chinese prisons and detention centers, with no relation to U.S. territory. Plaintiffs' vague and conclusory allegations that Cisco engaged in generic U.S.-based marketing and development activities, as the district court correctly concluded (ER24), "do[] not show that human rights abuses perpetrated in China against [p]laintiffs touch and concern the United States with sufficient force to overcome the ATS's presumption against extraterritorial application." The decision below should be affirmed on that ground.

II. Further, plaintiffs' ATS allegations fail to state a claim for aiding and abetting. The standard for *mens rea* should be "purpose," but even if a more lenient "knowledge" standard is applied, plaintiffs fail to allege any particularized facts showing that defendants knew that networking technology would be used to arrest Chinese nationals whom Chinese authorities would then subject to torture or other

international law violations. And even if plaintiffs need allege only a "causal link" to satisfy the *actus reus* standard, defendants' provision of generic technology products having entirely lawful uses cannot establish that link. As the district court correctly found, plaintiffs fail to make any nonconclusory allegations suggesting that defendants took steps beyond the provision of a general tool for lawful-law enforcement and crime-control purposes. This holding too is an independent basis to affirm. The plaintiffs' additional secondary liability allegations similarly fail.

III. The district court likewise properly dismissed plaintiffs' claims under the TVPA, which does not provide for aiding and abetting claims. Even if it did, plaintiffs' claims fail to allege *mens rea* or *actus reus* for the same reasons as the ATS claims fail to do so.

IV. Alternatively, this Court may affirm the judgment on the ground that plaintiffs' claims are nonjusticiable—a ground not reached below. U.S. trade laws enacted by Congress and the President expressly permit U.S. companies to sell technology like Cisco's to the government of China. The political branches have struck a deliberate balance between economic engagement with China and concern about China's regard for human rights. Effecting a judicial embargo contradicting that foreign policy choice should be avoided by dismissal under the political question, act of state, and/or international comity doctrines.

STANDARD OF REVIEW

"[C]onclusory statements" or "legal conclusions" couched as factual allegations are not sufficient to support a claim under Rule 8(a). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a plaintiff's well-pleaded factual, nonconclusory allegations must be accepted as true, "speculation" or "mere conjecture … does not meet that burden." *Mujica v. AirScan Inc.*, 771 F.3d 580, 592 (9th Cir. 2014) (citing *Iqbal*, 556 U.S. at 678). Further, where there are two possible explanations, only one of which results in liability, plaintiffs must allege "[s]omething more … such as facts tending to *exclude* the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996-98 (9th Cir. 2014) (emphasis added, quotation marks omitted).[6]

The Court may affirm "on any ground supported by the record, even if the district court did not rely on the ground." *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (quotation marks omitted); *see also Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014); *Mujica*, 771 F.3d at 584.

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[6] Plaintiffs miscite (Br. 8) *Eclectic* for the proposition that, where there are two explanations, a complaint cannot be dismissed unless the alternative "is so convincing that the plaintiff's explanation is rendered implausible." *Eclectic* did not endorse that test; rather it dismissed the plaintiffs' claims because their allegations did not "tend to exclude the alternative explanation." 751 F.3d at 1000.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' ATS CLAIMS BASED ON *KIOBEL*'S PRESUMPTION AGAINST EXTRATERRITORIALITY

As the U.S. Supreme Court ruled unanimously in *Kiobel*, the longstanding "presumption against extraterritoriality applies to claims under the ATS," 133 S. Ct. at 1669 (citing *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)), and thus the ATS does not allow for suits "seeking relief for violations of the law of nations occurring outside the United States," *id*. Because plaintiffs allege injuries suffered in China at the hands of Chinese police, Chinese detention authorities and the Chinese justice system, *Kiobel* disposes of this case. As the district court properly recognized, the ATS does not apply to such extraterritorial conduct.

Plaintiffs nonetheless seek to characterize this case as fitting within an exception to *Kiobel*, which noted that, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* (citing *Morrison*, 561 U.S. at 266-73). But even assuming all facts alleged in the SAC were true (they are not), they fail to sufficiently "touch and concern the territory of the United States." The SAC makes no nonconclusory allegations connecting any Cisco acts within the United States to the alleged human rights violations by Chinese officials in Chinese prisons and Chinese detention centers. It is the "rare case" that can rebut the presumption

against extraterritoriality, requiring a "strong and direct connection" between U.S. conduct and the alleged human rights violation. *Warfaa v. Ali*, Nos. 14-1810, 14-1934, 2016 WL 373716, at *4-5 (4th Cir. Feb. 1, 2016). Plaintiffs' allegations fall far short of any such standard.

Plaintiffs try to fill the gaps in their complaint with "inferences" that might somehow connect defendants' development of a public security network to their injuries at the hands of Chinese authorities. But "highly circumstantial allegations" about actions taken in the United States cannot support a "sweeping inference" of participation in acts taken abroad. *Mujica*, 771 F.3d at 592 n.6. Thus, for the reasons that follow, the district court's extraterritoriality ruling should be affirmed.

A. The Alleged International Law Violations That Are The "Focus" Of The ATS Took Place In China

Whether any exception to *Kiobel* applies here turns not just on whether *any* conduct took place in the United States but rather on whether any conduct that was the specific "'focus' of congressional concern" in enacting the ATS took place in the United States. *Morrison*, 561 U.S. at 266 (cited in *Kiobel*, 133 S. Ct. at 1669). As this Court noted in *Nestlé II*, "courts first determine the 'focus of congressional concern' for a statute, and allow the statute to be applied to a course of conduct if the events coming within the statute's focus occurred domestically." 766 F.3d at 1027. For example, *Morrison* held that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities," 561 U.S.

at 266, thus finding domestic activities insufficient to support securities fraud claims involving sales on an Australian securities exchange.[7] Similarly, in *Kiobel*, the Court made clear that the focus of the ATS is on the alleged *violations of the law of nations*, and thus the "claims" of international law violations *themselves* must "touch and concern the territory of the United States." 133 S. Ct. at 1669 (citing *Morrison*, 130 S. Ct. at 266-73).

Plaintiffs argue (Br. 38-39) that *Kiobel* does not require such a focus on the international law violations themselves, suggesting that this was merely the view of a concurrence. *See* 133 S. Ct. at 1670 (Alito, J., concurring) (ATS claims are impermissibly extraterritorial "unless the domestic conduct is sufficient to violate an

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[7] Post-*Morrison* decisions routinely reject attempts to bring U.S. claims against extraterritorial activities. *See, e.g., Archut v. Ross Univ. Sch. of Veterinary Med.*, 580 F. App'x 90, 90-91 (3d Cir. 2014) (unpublished) (affirming dismissal of extraterritorial claims brought under the Rehabilitation Act and Americans with Disabilities Act , notwithstanding that defendant received federal financial assistance and had U.S. corporate parent); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 769 F.3d 1371, 1378-81 (Fed. Cir. 2014) (foreign sale of U.S. good covered by U.S. patent extraterritorial under § 271(a) of Patent Act, notwithstanding U.S.-based pricing and contracting negotiations); *Loginovskaya v. Batratchenko*, 764 F.3d 266, 275 (2d Cir. 2014) (rejecting claim under Commodities Exchange Act as extraterritorial, notwithstanding plaintiff's wiring of funds to New York bank account); *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216-17 (2d Cir. 2014) (Securities Exchange Act § 10(b) claim extraterritorial, even though transaction occurred in U.S. and deceptive statements came into U.S., because "[t]he complaints concern statements made primarily in Germany with respect to stock in a German company"); *Meng-Lin v. Siemens AG*, 763 F.3d 175, 180 (2d Cir. 2014) (Dodd-Frank Act's anti-retaliation provision claim extraterritorial, even though defendant's securities listed on U.S. exchange).

international law norm"). Plaintiffs are incorrect. As the Second Circuit has noted, whether or not *Kiobel* "adopt[ed] Justice Alito's broader reasoning," it "did not reject it either." *Balintulo v. Daimler AG* ("*Balintulo I*"), 727 F.3d 174, 191 n.26 (2d Cir. 2013). Moreover, this Court noted in *Nestlé II* that *Morrison*'s "focus" test is "informative precedent for discerning the content of" *Kiobel*'s "touch and concern" language. 766 F.3d at 1028. As the partial concurrence in *Nestlé II* asked, "[w]hy else would the Supreme Court direct us to *Morrison* precisely when it was discussing claims that allegedly 'touch and concern' the United States?" 766 F.3d at 1035 (Rawlinson, J., concurring in part and dissenting in part); *see also id.*, 788 F.3d 946, 953-54 (9th Cir. 2015) (Bea., J., dissenting from denial of rehearing *en banc*) (similar).

Straightforward application of the *Kiobel*/*Morrison* "focus" test requires dismissal of plaintiffs' ATS claims here. The ATS focuses on international law violations, and, as in *Kiobel*, plaintiffs' alleged international law violations "took place outside the United States." 133 S. Ct. at 1669. The SAC alleges that Chinese government officials violated the human rights of Chinese detainees in China. *See* ER78-94 (¶¶ 227-356). China's alleged violations of the human rights of its citizens do not "touch and concern" U.S. territory at all, let alone with "sufficient force" to displace the *Kiobel* presumption. For similar reasons, the overwhelming majority of courts reviewing ATS complaints post-*Kiobel* have dismissed ATS claims premised

on international law violations suffered abroad, even where there are some alleged U.S. contacts. *See Mujica*, 771 F.3d at 594-96 & n.11 (dismissing ATS claims against U.S. corporations "based solely on conduct that occurred in Colombia" and listing cases).[8]

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[8] *See also, e.g.*, *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013) (*en banc*) (affirming dismissal of ATS claims involving conduct in Papua New Guinea, even where defendant had substantial U.S. operations and assets); *Warfaa*, 2016 WL 373716, at *5-6 (affirming dismissal of ATS claims brought against U.S. resident); *Doe v. Drummond Co.* ("*Drummond*"), 782 F.3d 576, 582-601 (11th Cir. 2015) (affirming dismissal of ATS claims alleging that U.S. corporation and executives aided and abetted Colombian military by "making decisions" from the U.S.); *Baloco v. Drummond Co.* ("*Baloco*"), 767 F.3d 1229, 1237-39 (11th Cir. 2014) (affirming dismissal of ATS claims against U.S. corporations and executives despite allegations that defendants agreed in the United States to provide substantial support to Colombian military); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189, 1191 (11th Cir. 2014) (affirming dismissal of ATS claim against a U.S. corporation because "[a]ll the relevant conduct … took place" in Colombia); *Adhikari v. Daoud & Partners*, 95 F. Supp. 3d 1013, 1020-21 (S.D. Tex. 2015) (dismissing ATS claim against a U.S. corporation that contracted with the U.S. government for injuries suffered in Nepal, Jordan, and Iraq); *William v. AES Corp.*, 28 F. Supp. 3d 553, 568 (E.D. Va. 2014) (dismissing ATS claims against a U.S. corporation because "alleged acts giving rise to Plaintiffs' claims" occurred in Cameroon, notwithstanding allegations that the corporation entered into a contract with the Cameroon government and profited from its Cameroon subsidiary); *Mamani v. Berzain*, 21 F. Supp. 3d 1353, 1367-68 (S.D. Fla. 2014) (dismissing ATS claim where "none of the alleged tortious conduct in this case occurred in this country," but rather in Bolivia) (citing cases); *Sikhs for Justice Inc. v. Indian Nat'l Cong. Party*, 17 F. Supp. 3d 334, 345 (S.D.N.Y. 2014) (dismissing ATS claims because "the performing actors and the actual conduct at issue occurred entirely" in India); *Gang v. Zhizhen*, No. 04-cv-1146, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013) (dismissing ATS claims where "[t]he tortious conduct" against Falun Gong occurred in China, even though defendant allegedly "directed" propaganda to U.S.); *Tymoshenko v. Firtash*, No. 11-cv-2794, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013) (dismissing ATS claims where

(*footnote continued*)

B. The Alleged International Law Violations Bear No Significant Connection To The United States

In place of the focus test, plaintiffs urge (Br. 41-42) a "fact-intensive inquiry" that they claim would link Cisco's domestic conduct to the actions of Chinese authorities in China. But the district court below already conducted a careful, fact-specific review, concluding that the SAC failed to allege any such nexus with particularity. Contrary to plaintiffs' suggestion (Br. 42 n.21; *see also* EarthRights Br. 15-26), a defendant's status as a U.S. corporation, while not "irrelevant," *Mujica*, 771 F.3d at 594 n.9, merits little weight in the "touch and concern" analysis, *see Mastafa v. Chevron Corp.*, 770 F.3d 170, 189 (2d Cir. 2014). And as the district court correctly held (ER23-25), a U.S. corporation's generic development, manufacturing, or marketing activity within the United States cannot transform an ATS claim about a foreign government's conduct within its own borders into one that "touches and concerns U.S. territory."

"tortious conduct at issue" occurred in Ukraine, notwithstanding defendant's alleged "use of New York bank accounts"); *Kaplan v. Cent. Bank of Islamic Rep. of Iran*, 961 F. Supp. 2d 185, 204-05 (D.D.C. Aug. 20, 2013) (dismissing ATS claims based on "attacks … allegedly funded by Iran, launched from Lebanon, and [that] targeted Israel" even though "some of the individuals affected by the attacks [were] American"); *Chen v. Shi*, No. 09-cv-8920, 2013 WL 3963735, at *2, *7 (S.D.N.Y. Aug. 1, 2013) (dismissing ATS claims brought by Falun Gong practitioners residing in U.S. because "all of the abuses took place in China"); *cf. Daimler AG v. Bauman*, 134 S. Ct. 746, 750-51, 762-63 (2014) (ATS claims against U.S. corporation based on conduct "occurring entirely outside the United States" rendered "infirm" by *Kiobel*).

To the contrary, to overcome the presumption against extraterritoriality, an ATS plaintiff must allege both "extensive United States contacts" and "a strong and direct connection to the United States." *Warfaa*, 2016 WL 373716, at *4. Moreover, an ATS plaintiff must plead "'sufficient *factual matter*'" tying a defendant's U.S. conduct directly to the alleged foreign human rights violation. *Mujica*, 771 F.3d at 592 (quoting *Iqbal*, 556 U.S. at 678); *see also Drummond*, 782 F.3d at 593 ("the domestic conduct alleged must meet a 'minimum factual predicate' to warrant the extraterritorial application"). An ATS plaintiff may not rely on speculation or "circumstantial allegations" that a defendant's U.S. conduct is causally linked to the alleged international law violations. *Mujica*, 771 F.3d at 592 n.6 (holding that plaintiffs' "highly circumstantial allegations do not support a sweeping inference that Defendants, through actions in the United States, took sufficient part in the bombing" that was alleged to violate international law); *Drummond*, 782 F.3d at 598 (holding that "allegations of domestic conduct and connections" that were "not particularly extensive or specific" could not overcome the presumption that arose from the "extraterritorial location of the deaths").

As the district court correctly found, the SAC fails to allege any U.S. conduct with a "strong and direct" connection to the alleged Chinese human rights abuses. As noted, the overwhelming majority of the paragraphs in the 459-paragraph complaint allege conduct by Chinese authorities toward Chinese nationals *in China*. *See, e.g.*,

ER30-35, 37-41, 45-51, 53-58, 66-72, 74, 77-95, 99-111 (¶¶ 1, 3, 5-6, 9-21, 29, 37-38, 40-51, 76-90, 99-101, 104-06, 109-24, 158-83, 185-95, 207, 223-356, 359, 375, 382-83, 387-88, 392-94, 398, 401-02, 405-06, 410, 414, 419, 425-30, 434-38, 443-46). Moreover, as the SAC itself alleges, the Golden Shield was marketed, designed, and implemented by Cisco employees located *in China*. *See*, *e.g.*, ER57 (¶ 117) (Chinese employees "design[ed], develop[ed], and implement[ed] the apparatus"); ER65 (¶ 151) ("As early as 1999, Defendants in San Jose through employees in China entered into an agreement with Public Security officials to construct the core network of the Golden Shield," and Cisco's China-based "marketing and sales team" worked "directly … with Public Security officers in regions across China"); ER74 (¶ 205) (Cisco manufactured "Golden Shield parts and other technology … in China"); ER43 (¶ 65) (alleging statements made by an allegedly "high-level" Cisco engineer in China).

In contrast, the SAC's substantive allegations concerning U.S.-based activity boil down to, at best, just a handful of paragraphs. And even those few paragraphs consist of vague, conclusory allegations that Cisco supposedly undertook from its San Jose headquarters "development of relationships to ensure future business opportunities" in China (ER44 (¶ 69)); "direction and control" of Cisco's Chinese operations (ER45 (¶ 75)); "study" of Chinese government objectives (ER46 (¶ 79)); "research[] and develop[ment]" activities (ER50 (¶ 95)); "express or implied

authority" over Chinese employees (ER51 (¶ 97(b)); "orchestrat[ion]" and "supervi[sion]" of the acts of Chinese affiliates (ER59-60 (¶¶ 126-27, 129)); and efforts to "plan[] … market strategy for China" (*id.* (¶ 128)).

Such general, high-level and circumstantial allegations of domestic conduct are routinely rejected as insufficient to overcome the *Kiobel* presumption. *See*, *e.g.*, *Mujica*, 771 F.3d at 592 & n.6 (finding insufficient allegations that are circumstantial and speculative); *Drummond*, 782 F.3d at 598 (finding insufficient allegations of domestic conduct that are "not particularly extensive or specific"); *Baloco*, 767 F.3d at 1236-38 (finding insufficient allegations that U.S. defendants participated in discussions about paying for alleged extrajudicial killing in Colombia); *Cardona*, 760 F.3d at 1191 (finding insufficient allegations that a U.S. corporation, from its U.S. offices, reviewed, approved, and concealed a scheme of payments and weapons shipments to Colombian terrorist organizations).

In contrast, post-*Kiobel* examples of decisions finding the presumption rebutted are exceedingly rare, and involve U.S.-based conduct that is a far cry from the routine corporate activities alleged in the SAC.[9] Plaintiffs rely heavily (Br. 42-45) on one

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[9] *See*, *e.g.*, *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 322-23 (D. Mass. 2013) (presumption rebutted where defendant "plann[ed] and manag[ed]," from the United States, an anti-gay "campaign of repression in Uganda" including directly advising Ugandan government; conferring directly with the Ugandan Parliament about legislation promoting the death penalty for homosexuality; and revising draft anti-gay

(*footnote continued*)

such exception, *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014), but that case bears no resemblance to the facts pleaded here. In *Al Shimari*, the Fourth Circuit allowed ATS claims to proceed against an American military contractor ("CACI") for allegedly aiding and abetting torture during interrogations at Abu Ghraib prison in Iraq. The court there found the presumption rebutted only because of such unique factors as CACI's contract with the U.S. Government to provide for "interrogation services," *id*. at 530-31; decisions by CACI's managers in the United States giving "tacit approval to the acts of torture" committed by its U.S. employees and attempts to "cover up" those employees' misconduct, *id.* at 531; and the fact that Abu Ghraib could be considered *de facto* U.S. territory, *id.* at 531 n.8.

Plaintiffs err in analogizing (Br. 42-43) their case to *Al Shimari*. As noted, in *Al Shimari*, the international law violations were allegedly committed by CACI's own employees, who were U.S. citizens, under a U.S. contract with the U.S. Government to conduct "interrogation services," with security clearance from the Department of

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legislation); *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (presumption rebutted where defendant alleged to have plotted terrorist attack while in United States, directed at U.S. embassy); *Krishanthi v. Rajaratanam*, No. 09-cv-5395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014) (presumption rebutted where U.S. defendants supported a designated foreign terrorist organization by hosting meetings in their U.S. home, creating U.S. corporations to fund the group, and providing funds to bribe U.S. officials). The district court specifically compared the facts alleged here to those alleged in *Sexual Minorities* and *Mwani*, and found that there was no comparable "nexus between the Defendants' actions and the alleged violations committed by Chinese actors on Chinese soil." ER23.

Defense, which CACI tried to cover up from the United States. 758 F.3d at 530-31. Here, by contrast, the SAC nowhere alleges that any Cisco executive or other employees ever personally committed any human rights abuses against plaintiffs, nor that Cisco approved (or tried to cover up) torture and other alleged abuses by PRC officials.

Plaintiffs (Br. 40) and *amicus* EFF (at 7-8) similarly misplace reliance on *Balintulo v. Ford Motor Co.* ("*Balintulo II*"), 796 F.3d 160 (2d Cir. 2015). That decision affirmed *dismissal* of ATS claims against Ford and IBM for supposedly aiding and abetting the apartheid regime in South Africa, mostly on extraterritoriality grounds, *see* 796 F.3d at 168 (Ford), 169-70 (IBM). In the case of one allegation against IBM, *Balintulo II* found that, even if IBM's U.S. actions produced identity documents that were "'the very means'" of violating black South Africans' human rights, *id*. at 167 (quoting plaintiffs' brief), plaintiffs' ATS claims were nonetheless deficient for failure to allege that IBM had any "purpose" to advance South Africa's human rights abuses, as required by the Second Circuit's *mens rea* standard, *id.* at 170. The same is true here. *See infra* Part II.A. In any event, Cisco's technology is not alleged here to have been "the very means" by which Chinese officials committed abuses against plaintiffs.

For these reasons, the district court correctly concluded that plaintiffs failed to overcome the ATS's presumption against extraterritorial application. ER24. Nor may

plaintiffs salvage their ATS claims by imputing to Cisco the conduct of its *non-party* subsidiary, Cisco China Networking Technologies, Inc. ("Cisco China"), as Cisco's "alter ego" or "agent." ER62-65 (¶¶ 136-49). Conclusory allegations about an overseas subsidiary's actions cannot form the basis for disregarding the corporate form and finding its parent liable. *See, e.g.*, *Balintulo I*, 727 F.3d at 192 ("Because the defendants' putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law … the defendants cannot be *vicariously liable* for that conduct under the ATS."); *Balintulo II*, 796 F.3d at 168 (rejecting alter ego and veil-piercing theories of liability based on allegations that parent "controlled" its overseas subsidiary).

II. THE DISTRICT COURT CORRECTLY DISMISSED THE ATS CLAIMS FOR FAILURE TO ALLEGE AIDING AND ABETTING

Even if plaintiffs' ATS claims were not barred as impermissibly extraterritorial (they are), the SAC was properly dismissed for failure to state claims for aiding and abetting liability. The district court correctly recognized that the Golden Shield "can be used for many crime-control purposes in China without permitting torture or other human rights abuses." ER27. Based on that recognition, the court found that, even applying the most lenient *mens rea* standard, plaintiffs "failed to sufficiently plead that [d]efendants knew their product would be used beyond its security purposes to commit human rights violations." ER10. Moreover, even applying the most lenient *actus reus* standard, the court concluded that "the allegations in the SAC do not show

that [d]efendants' conduct had a substantial effect on the perpetration of alleged violations against [p]laintiffs." ER26-27. Both rulings were correct, and each provides an independent basis for affirmance.

A. Plaintiffs' Allegations Fail To Satisfy Any Requisite *Mens Rea*

As this Court well knows, the issue of the proper *mens rea* standard for ATS liability has divided the circuits, with some requiring that a defendant have the *purpose* (*i.e.*, specific intent) to facilitate an alleged international law violation,[10] and others holding it sufficient that a defendant have *knowledge* that its conduct will contribute to that violation.[11] This Court declined to formally elect either standard in *Nestlé II*. *Compare* 766 F.3d at 1024 (holding the complaint sufficient even under a purpose standard), *with* 766 F.3d at 1029-30 (Rawlinson, J., concurring in part and dissenting in part) ("I would definitely and unequivocally decide that the purpose standard applies"). Nonetheless, as plaintiffs' own *amicus* suggests (EFF Br. 9), *Nestlé II* "leaned toward" a purpose standard, and if the Court does reach the issue here, it should expressly adopt that standard.

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[10] *See Balintulo II*, 796 F.3d at 167 ("The *mens rea* standard for accessorial liability in ATS actions is 'purpose rather than knowledge alone.'") (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ("*Talisman*"), 582 F.3d 244, 259 (2d Cir. 2009)); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399-401 (4th Cir. 2011) (adopting purpose standard).

[11] *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39 (D.C. Cir. 2011) (adopting knowledge standard); *Drummond*, 782 F.3d at 608-09 (applying knowledge standard).

This result follows inexorably from *Nestlé II*'s own recognition that "[c]ustomary international law—not domestic law—provides the legal standard" for *mens rea*. 766 F.3d at 1023. Sources of customary international law apply the purpose standard. *See, e.g.*, Rome Statute of the International Criminal Court ("Rome Statute"), 37 I.L.M. 999 (1998), art. 25(3)(c) (aiding and abetting liability exists where that person acts "[f]or the *purpose* of facilitating the commission of such a crime") (emphasis added).[12] As *Nestlé II* noted, "it appears that the Rome Statute rejects a knowledge standard and requires the heightened *mens rea* of purpose." 766 F.3d at 1023.[13] And although some international tribunals have applied a knowledge standard,[14] such rulings are not universally accepted or sufficiently well defined to make the knowledge standard an actionable international law norm under the Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), as this Court acknowledged in *Nestlé II*, 766 F.3d at 1019, 1024.

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[12] *See also, e.g.*, U.N. Transitional Admin. in E. Timor, Regulation No. 2000/15, § 14.3(c) (June 6, 2000) (aiding and abetting liability where person has "the *purpose* of facilitating" crime's commission) (emphasis added); *The Hechingen & Haigerloch Case*, 7 J. Int'l Crim. Just. 131, 150 (2009) (applying purpose standard for aiding and abetting).

[13] *Nestlé II* thus rejects the premises relied on by the sister circuits that have adopted the "knowledge" standard: *Doe v. Exxon* did so based on the view that the Rome Statute is irrelevant to the inquiry, 654 F.3d at 39, and *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005), did so based on "federal common law," *Drummond*, 782 F.3d at 608-09.

[14] *See Amicus Curiae* Brief of Former Amb. Scheffer at 5-10.

There can be no serious dispute that the SAC fails to satisfy the purpose standard. It nowhere alleges that defendants specifically intended that Chinese authorities torture or harm Falun Gong members.[15] Nor could it do so, as any such suggestion would be as offensive as it is implausible. The district court agreed. ER10 ("Even if this court were to apply the more stringent purpose standard, … even considering the guidelines provided by the Ninth Circuit, [p]laintiffs' pleading remains insufficient."); ER10-11 (applying *Nestlé II*).

But this Court need not resolve the choice between the purpose and knowledge standards in order to affirm, for even if the *knowledge* standard is applied, the SAC's aiding and abetting allegations are fatally deficient. As the district court correctly found (ER27), even crediting the allegations that defendants supposedly designed, marketed, and customized the Golden Shield to assist the PRC's Public Office in identifying, monitoring and surveilling Falun Gong practitioners, the SAC fails to allege any facts suggesting that defendants knew that Chinese officials would go *beyond* those security and law-enforcement purposes to commit torture or other international law violations.

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[15] Plaintiffs suggest (Br. 32-36) that the purpose standard may require only intent to facilitate the act in question, not intent to facilitate the violation of international law. But *Nestlé II* analyzed whether the complaint there adequately alleged defendants' "purpose to support child slavery," 766 F.3d at 1024, *i.e.*, whether the alleged aiders and abettors had the same purpose as the principals.

Plaintiffs' arguments to the contrary (Br. 25-32) are unavailing. *First*, plaintiffs claim (Br. 25-26) that "the nature" and "designs" of the Golden Shield—such as the inclusion of "Falun Gong-specific features," customized digital "Falun Gong signatures," and "Falun Gong databases"—support an inference that defendants knew that Chinese officials would torture or abuse those detained for practicing Falun Gong. *See, e.g.*, ER31, 46-54, 56-58, 60, 65, 77 (SAC ¶¶ 5, 80, 85, 87-91, 94, 97-101, 113-15, 117, 122, 131, 152, 224); *see also* EFF Br. 12-14 (similar as to Cisco's "marketing"). But such allegations at most support the inference that defendants knew that the Golden Shield would be used to apprehend practitioners of Falun Gong (a practice that "is tied specifically to Internet use," ER31 (SAC ¶ 3)), not that Chinese officials would torture or abuse those apprehended.

Second, plaintiffs assert (Br. 28) that defendants admitted knowledge of the PRC's alleged human rights violations. But plaintiffs point to no allegation that defendants admitted knowing that China's public security officers would *use the Golden Shield* to effectuate torture or other mistreatment of Falun Gong practitioners in Chinese prisons in violation of Chinese law. And even if Cisco knew that its technology would further its clients' "objectives," the SAC alleges no facts suggesting

any knowledge that those objectives went beyond legitimate law enforcement and crime control.[16]

Third, plaintiffs argue (Br. 29-30) that the "persecution and torture" of Falun Gong believers has been "widely reported" in the United States. But again, even if true, there is no allegation of any reportage in the United States, widely or otherwise, that *the Golden Shield*, let alone any Cisco equipment, was in any way used to persecute or torture Falun Gong practitioners. The only allegations plaintiffs cite are: (1) a conclusory paragraph asserting, without support, that "use of the Golden Shield apparatus to further the persecutory campaign against Falun Gong … has also been reported widely in western media outlets," ER41 (SAC ¶ 51); and (2) three articles, none of which is referenced in the SAC (and thus cannot be considered here) that do not reference use of the Golden Shield to abuse Falun Gong practitioners. The same is true about plaintiffs' reference (Br. 31) to grants of asylum, which have no factual connection to the Golden Shield. Mere awareness of the existence of a general problem is the type of "highly circumstantial" allegation that cannot support

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[16] Plaintiffs refer (Br. 28-29) to a slide in a 90-page presentation that referenced the PRC's stance on hostile religious organizations. But as Cisco SVP Chandler explained, that presentation, prepared by a Chinese engineer, at most described "the role that Cisco's standard networking products could play in facilitating communication" in general, and "no reference was made to an application of our products to goals of censorship or monitoring. *We do not know how the Chinese Government implemented filtering or censorship*[.]" Chandler Testimony at 13-14 (emphasis added).

"sweeping inferences" of knowledge of specific acts for which defendants could be liable. *Mujica*, 771 F.3d at 592 & n.6.

Fourth, plaintiffs argue (Br. 31-32) that defendants' "management structure and business model" permit an inference of knowledge of the Golden Shield's facilitation of plaintiffs' torture. But there is not a single nonconclusory factual allegation supporting such an inference—every factual allegation equally supports the inference that defendants' business model and structure advanced the PRC's use of the Golden Shield as a security tool for apprehending lawbreakers.

For these reasons, the district court correctly ruled that plaintiffs' "conclusory allegations and inferences of knowledge pled in the SAC do not sufficiently show that [d]efendants had knowledge of the violations." ER27. As the district court explained, the allegations in the SAC fail to show that defendants "knew that their product would be used beyond its security purpose—the apprehension of individuals suspected of violating Chinese law through identifying, locating, profiling, tracking, monitoring, investigating, and surveillance of such individuals—to commit the alleged violations of torture and forced conversion." *Id.* And "[e]ven if [d]efendants knew that the Golden Shield was used by Chinese authorities to apprehend individuals, including [p]laintiffs, there is no showing that [d]efendants also knew that [p]laintiffs might then be tortured or forcibly converted." *Id.* Thus, plaintiffs failed to plausibly allege aiding and abetting even under the most generous *mens rea* standard.

B. Plaintiffs' Allegations Fail To Satisfy Any Requisite *Actus Reus*

Independently, the Court should affirm on the ground that the SAC fails to adequately allege the *actus reus* for aiding and abetting, which requires the provision of "substantial" "assistance or other forms of support to the commission of a crime," *Nestlé II*, 766 F.3d at 1026. Customary international law suggests that such assistance "must be 'specifically'—rather than 'in some way'—directed towards" the commission of that crime, *Prosecutor v. Perišić*, No. IT-04-81-A, ¶ 27 (ICTY Feb. 28, 2013), a standard explicitly adopted (contrary to the suggestion of one of plaintiffs' *amici* (Scheffer Br. 20-21)), in "many" international law judgments, *Perišić* ¶ 28 n.70. Under such a "specific direction" test, the SAC clearly fails to allege *actus reus*, for the allegations nowhere specify that defendants provided substantial assistance "specifically directed" toward China's commission of human rights violations.

But even if this Court were to favor a more lenient standard for *actus reus*, the judgment should be affirmed. For example, while *Nestlé II* "decline[d] to adopt an *actus reus* standard for aiding and abetting liability under the ATS," 766 F.3d at 1026, it suggested "more of an emphasis on the existence of a causal link" than on "specific direction," *id.* (citing *Prosecutor v. Taylor*, No. SCSL-03-01-A (SCSL Sept. 26, 2013)). Even assuming a "causal link" is easier to show than a "specific direction," *but see Perišić* ¶ 38 (treating the "existence of specific direction" as probative of "the culpable link"), plaintiffs fail to plausibly allege any sufficient causal link between

defendants' lawful provision of security technologies and the injuries plaintiffs suffered at the hands of Chinese authorities.

This is so because, as the district court correctly recognized (ER12, 26-27), Cisco's networking technologies are designed and used for lawful purposes. As the court explained (ER27), "[t]he product produced by [d]efendants—even as specifically customized—can be used for many crime-control purposes in China without permitting torture or other human rights abuses." International law recognizes that the "provision of general assistance which could be used *for both lawful and unlawful activities* will not be sufficient, alone," to establish *actus reus*. *Perišić* ¶ 44 (emphasis added); *see also, e.g.*, *Taylor* ¶ 390 & n.1231 ("The jurisprudence is replete with examples of acts that may have had some effect on the commission of the crime, but which were found not to have a sufficient effect on the crime for individual criminal liability to attach.") (listing cases); *United States v. Von Weizsacker*, 14 T.W.C. 621, 622 (1950) ("*Ministries Case*") (acquitting a banker on *actus reus* grounds for issuing a standard loan he knew would be used to finance enterprises that violate international law); *Balintulo II*, 796 F.3d at 170 (dismissing aiding and abetting claim where plaintiffs alleged an insufficient connection between IBM's alleged conduct—"developing hardware and software to collect innocuous population data"—and human rights abuses); *Daobin*, 2 F. Supp. 3d at 729 (no factual

allegations "connect Cisco's legitimate business actions to the Golden Shield thence to CCP's alleged detention, persecution, and torture of Plaintiffs").

Because the Golden Shield can be used for entirely legitimate law enforcement purposes, plaintiffs were obligated to allege additional nonconclusory facts supporting a specific causal link between defendants' service and Chinese officials' human rights violations. As the district court correctly recognized, they failed to do so. The SAC alleges that PRC's Public Security officers used the Golden Shield to "identify," "locate," "log," "profile," "track," "monitor," "investigate," "surveil," "apprehend," "detain," or "interrogate" individuals who are suspected of breaking the law, including by practicing Falun Gong (ER30, 45-48, 50-52, 56-58, 69 (SAC ¶¶ 1, 72, 79, 82, 83, 85, 91, 96, 97, 111-13, 115, 124, 177)), but such lawful law enforcement measures in themselves do not violate international law. And the SAC nowhere provides any additional specific facts to suggest that Cisco provided any substantial assistance to Chinese officials' use of such a lawful product for unlawful purposes like torture; cruel, inhuman, or degrading treatment; forced labor; prolonged detention; crimes against humanity; extrajudicial killing; and enforced disappearance—the international law violations alleged in the SAC.

Plaintiffs' efforts to conjure such additional facts from the SAC are unavailing. *First*, they refer (Br. 14, 16) to allegations concerning databases and monitoring systems that store internet-related information about detained Falun Gong believers.

But neutral technologies that organize or maintain data about arrestees are part of a lawful internet-based security system.

Second, plaintiffs refer (Br. 16-17) to allegations concerning "tailoring" and "customization." But allegations that Cisco tailored and customized its products to allow the CCP and Public Security Office to *identify and monitor* Falun Gong adherents are a far cry from allegations that Cisco tailored or customized its products to allow *torture or other abuses* of detainees. Rather, plaintiffs' "tailoring" allegations merely assert—as they must—that *Chinese authorities* were the ones who committed torture and other abuses. *See*, *e.g.*, ER31, 35 (SAC ¶ 3 (alleging that Cisco's "tailor[ing]" of its product "enabled 610 agents and other Chinese security officers' violations against Falun Gong adherents"), ¶ 22 (alleging that tailoring product "in China … enable[d] Chinese security to suppress Falun Gong")).

Third, plaintiffs argue (Br. 17-18) that defendants, unlike a seller of a "standard product," allegedly: (1) went through a bidding process to meet China's security-specific goals; (2) designed an end-to-end architectural solution; (3) designed a system with elements that are tailored to targeting Falun Gong; (4) recommended features and services in connection with anti-Falun Gong goals; (5) had relationships with high-ranking Party leaders; and (6) continued the business relationship for several years. Nothing in this list, however, connects the creation or customization of a security enforcement system for storing information about those who engage in illegal

behavior to the human rights violations plaintiffs allegedly later suffered at the hands of Chinese police. *See In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009) ("the sale of computers to the South African Defense Forces does not constitute aiding and abetting any and all violations of customary international law that the military committed, as computers are not the means by which those violations were carried out"), *mandamus denied*, *Balintulo I*, 727 F.3d at 193-94 (ATS claims barred by *Kiobel*).

Fourth, plaintiffs assert (Br. 18-19) that defendants "supported, sustained, and enhanced" the capacity of China's security officers to torture Falun Gong practitioners. They fail, however, to cite a single factual allegation in the SAC in support of such a theory. In any event, plaintiffs' theory has no merit—China's Public Security office allegedly used Cisco technology to track and monitor individuals suspected of breaking Chinese law. It is not a violation of international law to track and monitor suspected lawbreakers.[17] For the same reason, plaintiffs' suggestion (Br. 20-21) that Cisco's conduct furthered "a widespread and systematic attack on the civilian population" cannot be squared with the fact that, under Chinese law, Falun

[17] Although plaintiffs analogize (Br. 18-19) the Golden Shield to cases where "turning over a list of specific individuals" supported liability, in those cases the defendant "was present" at the removal and killing, *Prosecutor v. Rukundo*, No. ICTR-2001-70-A, ¶ 176 (ICTR Oct. 20, 2010) or was "an active leader and commander" who ordered executions, *Einsatzgruppen*, 4 T.W.C. 568, 569 (1948). Nothing close to such facts is alleged here.

Gong is an illegal practice. Nor do plaintiffs plausibly allege that defendants "had an important influence on" the underlying violations tantamount to having committed the violations themselves. *Prosecutor v. Simić*, No. IT-95-9-A, ¶ 116 (ICTY Nov. 28, 2006).[18]

Fifth, plaintiffs err in suggesting any analogy to cases finding *actus reus* for aiding and abetting international law violations. For example, they misplace reliance (Br. 13-14, 27-28) on *In re Tesch*, 1 L.R.T.W.C. 93 (1946) ("*Zyklon B*"), which held that, where the defendant's activity has a lawful purpose, the plaintiff must come forward with specific facts showing a causal link to a human rights violation. There, prosecutors of those who supplied gas to Nazi death camps specifically demonstrated that, even though an insecticide could be used "for normal purposes," defendants had provided the gas to the S.S., proposed using the gas to kill human beings, recommended that the gas be "release[d] … in an enclosed space," and "undertook to train the S.S. men in this new method of killing human beings." *Id.* at 95-96. Further, the gas was the "killing agent, the means by which a violation of the law of nations

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[18] Contrary to plaintiffs' argument (Br. 20-21), *Simić* did not find the *actus reus* element satisfied based on the defendant's "work[ing] together" with police; rather, it was because the defendant "had a strong influence over the unlawful arrests and detention," which was "tantamount to a finding that he lent positive assistance to these acts." *Id.* ¶ 114; *see also Prosecutor v. Furundžija*, No. IT-95-17/1-T, ¶ 233 (Dec. 10, 1998) ("Having a role in a system without influence would not be enough to attract criminal responsibility."). Plaintiffs offer no allegations that could possibly support a finding that Cisco had a "strong influence" over the PRC's alleged acts of torture.

was committed." *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d at 258. No such allegations rebutting the lawful use of internet technologies are remotely present here.

Likewise, plaintiffs go astray in citing (Br. 9-13, 16, 18-21) *Prosecutor v. Taylor*. There, the tribunal ruled that the relevant "causal link" for *actus reus* is "a criminal link" between "the accused and the commission of the crime." *Id.* ¶ 390. *Taylor* held that requirement satisfied based on the provision of "arms and ammunition, military personnel, operational support and advice and encouragement" to the principal perpetrators, *id.* ¶ 395—and not based merely on the provision of satellite phones to the principal perpetrators as plaintiffs wrongly suggest (Br. 19). Obviously, the SAC makes no similar allegations about providing military support.

The district court thus correctly found that the SAC fails to allege any requisite causal link between Cisco's sale of lawful technologies and subsequent violations by Chinese authorities.

C. Additional Justifications Support Dismissal Of Plaintiffs' ATS Secondary Liability Claims

Apart from upholding the district court's proper dismissal of plaintiffs' ATS aiding and abetting claims for failure to adequately allege *mens rea* and *actus reus*, this Court should reject all of plaintiffs' additional arguments in support of any secondary liability claims under the ATS.

1. Aiding And Abetting Claims Are Not Actionable Under The ATS

Although *Nestlé II* and *Mujica* assume that aiding and abetting liability is available under the ATS, this Court may still decide whether the silence of the ATS on the subject (*see* 28 U.S.C. § 1350) in fact precludes judicial implication of such liability.[19] If reached, that question should be answered in the affirmative. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Supreme Court held that there is a presumption against inferring private rights of action for aiding and abetting absent a plain statement by Congress. *Id.* at 182 ("[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors."). The absence of any explicit text in the ATS providing for aiding and abetting liability thus should dispose of ATS aiding and abetting claims at the threshold.

Central Bank has even greater force in the ATS context in light of *Sosa*'s admonition that only a "modest number" of claims may be brought under the ATS

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[19] An earlier panel of the Ninth Circuit deemed aiding and abetting claims available under the ATS, *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1078 (9th Cir. 2006), but that decision was later superseded and then vacated *en banc*, 499 F.3d 923 (2007). The *en banc* panel later held aiding and abetting claims available, 671 F.3d 736, 749 (2011), but that decision was vacated by the Supreme Court, 133 S. Ct. 1995 (2013).

without legislative authorization, with any "innovative" interpretations left to the legislative process. *Sosa*, 542 U.S. at 724-28. On that basis, the Executive Branch has argued against recognizing aiding and abetting claims under the ATS. *See*, *e.g.*, Br. of United States as Amicus Curiae in Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919, at 8-11 (U.S. Feb. 11, 2008), *available at* 2008 WL 408389; Br. for United States as Amicus Curiae at 12-28, *Talisman*, 582 F.3d 244, *available at* 2007 WL 7073754.

Some courts have attempted to distinguish *Central Bank* in the ATS context on the basis that the ATS implements the law of nations, which in turn recognizes aiding and abetting liability. *See*, *e.g.*, *Aziz*, 658 F.3d at 396; *Exxon*, 654 F.3d at 28-29. But while *Sosa* looks to international law to determine the "possibility of a private right of action," 542 U.S. at 738 n.30, it also looks to U.S. law considerations and "practical consequences," *id.* at 732, before deciding whether such a possible international law claim should be recognized. *Central Bank* precludes ATS aiding and abetting liability at *Sosa*'s second and more demanding step.

2. ATS Liability Is Not Available Against Corporate Defendants

Separately, plaintiffs' ATS claims against Cisco fail because the ATS does not provide for liability against corporate defendants. *See Kiobel*, 621 F.3d 111, 149 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659. Although this Court has held that "the analysis proceeds norm-by-norm [and] there is no categorical rule of corporate

immunity or liability," *Nestlé II*, 766 F.3d at 1022 (corporate liability available for slavery, without addressing other norms), Cisco respectfully submits that this should be revisited for the reasons presented in the dissent from the denial of rehearing *en banc*, 788 F.3d at 954-56.

3. Plaintiffs Fail To Allege Acts Under Color Of State Law

The ATS provides relief only for violations of international law, and most international law norms (including torture, crimes against humanity, and most of the others asserted here) are limited to acts committed under color of state law. *See, e.g.*, *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 501-02 (9th Cir. 1992) (torture); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 319 (2d Cir. 2007) (absent allegations of acts "committed during war or an armed conflict," claim for crimes against humanity requires allegation of state action) (citing *Kadic v. Karadžić*, 70 F.3d 232, 244 (2d Cir. 1995)). This requires a relationship so close that the defendant's acts can fairly be characterized as being taken jointly with the state; a mere contractual relationship is not enough. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (affirming dismissal of ATS claims for systematic intimidation, kidnapping, detention, torture, and murder where wrongful allegedly acts were taken by "paramilitary security forces" associated with, but not a part of, Colombian state).

The SAC fails to allege any joint action between defendants and the Chinese authorities who allegedly injured plaintiffs, nor acts by defendants in concert or intertwined with those of the Chinese government. At best, plaintiffs allege a commercial relationship where certain products were sold through intermediaries to governmental entities that later used those products to identify plaintiffs and then commit separate acts of wrongdoing. And to the extent plaintiffs allege any wrongful acts by the Chinese state, there are no allegations that defendants knew about, assisted with, or had any direct role in the specific violent acts alleged.

4. Plaintiffs Fail To Adequately Allege Conspiracy Or Joint Criminal Enterprise

In two passing sentences, plaintiffs ask (Br. 48) that the case be remanded to address claims that defendants "participated in a conspiracy or joint criminal enterprise to carry out the underlying violations." No remand is warranted.

First, those forms of secondary liability are unavailable under the ATS and TVPA for reasons discussed above and below. *See* Parts II.C.1-3, III.

Second, such claims, like aiding and abetting, require satisfaction of the *mens rea* of "purpose." *See, e.g.*, *Talisman*, 582 F.3d at 259-60; *Prosecutor v. Tadić*, No. IT-94-1-A, ¶ 229(iv) (ICTY July 15, 1999) (analogous claims require proof of "intent to perpetrate the crime"). But even under the more lenient "knowledge" standard, plaintiffs' claims do not satisfy this standard for the same reasons discussed above. *See supra* Part II.A (*mens rea*). At best, plaintiffs allege that defendants agreed to

provide technology and related services to enable the PRC's law enforcement activities; there is no allegation of defendants' "agreement" to physically injure the plaintiffs, or of any "overt acts" by defendants to accomplish that result. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1084 n.7 (9th Cir. 2010).

Third, in any event, each paragraph of the SAC that plaintiffs cite (Br. 48)—is purely conclusory, coming nowhere near satisfying *Iqbal*. *See* ER101-06 (¶¶ 385, 390, 396, 399, 403, 408, 412, and 416). This alone supports dismissal.

5. Plaintiffs' Allegations Against Cisco's Executives Are Insufficient

Independently, the Court should affirm the judgment below as it applies to Cisco CEO John Chambers and executive Fredy Cheung in their individual capacities. The SAC does not allege that Mr. Chambers or Mr. Cheung knew of the wrongful acts alleged in the SAC's ATS claims. For example, the SAC relies on generic allegations that Mr. Chambers directed and supervised Cisco's China operations, and that Mr. Cheung oversaw Cisco's work in China on the Golden Shield. *See, e.g.*, ER36, 73,75 (¶¶ 24, 25, 198, 210, 212). Such generalized allegations, premised on speculation and conjecture without a single factual allegation particularizing their supposed participation in the principal violations, are insufficient because they "do not permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679; *see also Mujica*, 771 F.3d at 592; *Mamani v. Berzain*, 654 F.3d 1148, 1153-54 (11th Cir. 2011).

III. THE DISTRICT COURT CORRECTLY DISMISSED THE TVPA CLAIMS

There is no dispute here that the plaintiffs' TVPA claims cannot apply to Cisco, for the Supreme Court has unanimously held that the TVPA, by applying only to "natural persons," does not apply to corporate entities. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012). Dismissal of the TVPA claims against the individual Cisco executive defendants (ER25) should also be affirmed.

A. Secondary Liability Claims Are Not Actionable Under The TVPA

This Court has already noted that the TVPA "does not contemplate" aiding and abetting liability because the text of the TVPA "limits liability to an individual who subjects another to torture." *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1128 (9th Cir. 2010) (alteration and quotation marks omitted). This interpretation of the TVPA is most naturally read as limiting liability to primary wrongdoers only. Thus, the district court correctly held that, "[i]n light of [*Bowoto*'s] wording," secondary liability claims, including aiding and abetting, "cannot be brought under the TVPA." ER25. In addition, as discussed above (*see supra* Part II.C.1), a statute does not confer civil aiding and abetting liability unless Congress expressly provides for it. *Central Bank*,

511 U.S. at 182, 185. The TVPA's text is silent on aiding and abetting liability. That should end the matter.[20]

Plaintiffs' reliance (Br. 47) on a single decision by the Eleventh Circuit is unavailing. *Drummond* held that aiding and abetting liability is cognizable because "the TVPA and its legislative history in no way disavow reliance on traditional theories of tort liability for secondary actors." 782 F.3d at 607. But this ignores *Central Bank*, which held that, unlike other forms of secondary liability, aiding and abetting liability must be textually conferred.[21] That the Senate Report references those who "aided" torture, S. Rep. No. 102-249, at 8 (1991), but the statute's text contains no such language confirms that had Congress intended to include aiding and abetting, it would have done so. *Mohamad*, 132 S. Ct. at 1709 ("reliance on

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[20] Most courts agree. *See, e.g.*, *Exxon*, 654 F.3d at 58; *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 618 (S.D.N.Y. 2012) ("The text of the TVPA is silent as to aiding and abetting, and such silence should not be interpreted as granting and authorizing that liability."); *Weisskopf v. United Jewish Appeal-Fed. of Jewish Philanthropies of N.Y.*, 889 F. Supp. 2d 912, 924 (S.D. Tex. 2012) (TVPA "does not permit liability for aiding and abetting"); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010) (same), *aff'd*, 770 F.3d 170 (2d Cir. 2014).

[21] *Drummond* relied heavily on *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014), which held that the TVPA provides for *agency* liability because Congress had not specified any intent that traditional agency principles should not apply. *Id.* at 52-53. But *Drummond* overlooked that *Chowdhury* explicitly distinguished agency from *aiding and abetting* liability, which "is generally presumed not to apply in civil suits." *Id.* at 53 n.10 (citing *Central Bank*).

legislative history is unnecessary in light of the [TVPA]'s unambiguous language") (quotations and citation omitted).

B. Plaintiffs Fail To Allege Facts Supporting TVPA Aiding And Abetting

For all the reasons set forth above (*see supra* Parts II.A-B, C.3-5), the TVPA claims against the individual executives were properly dismissed for the independent reasons that the SAC does not sufficiently allege: (1) the requisite purpose or knowledge by defendants; (2) any act remotely connecting them with the harms inflicted in China by Chinese officials; (3) facts demonstrating they acted under the color of state law, *see Drummond*, 782 F.3d at 603 n.37; or (4) any other nonconclusory facts sufficient to hold an executive liable under the TVPA.

IV. THE JUDGMENT MAY BE AFFIRMED ON THE ALTERNATIVE GROUND OF NONJUSTICIABILITY

Were there any doubt about the above grounds for affirmance (there is not), the judgment still should be affirmed on the alternative ground that plaintiffs' claims are not properly justiciable by a U.S. court. As the district court observed, "[t]he manner in which the Chinese Government chooses to enforce its laws is a political question that is better suited for our executive and legislative branches of government." ER11.

A. The Political Question Doctrine Warrants Dismissal

As the Supreme Court has noted, judicial abstinence is appropriate for those political questions that require the Nation to speak with one voice in "foreign relations,"[22] touch upon "the respect due coordinate branches of government," and create the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962). While any one of the *Baker* criteria suffices for dismissal, *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990), the complaint here implicates all those criteria.

Here, the Legislative and Executive branches have expressly enacted U.S. export laws governing sales to China, carefully designed to strike a balance between the Nation's policy of economic and political engagement with China and concerns about China's respect for civil and human rights. That policy reflects an express decision not to ban exports to China of software or technology products. *See supra*

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[22] *Cf. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (political question exists where court is "being asked to supplant a foreign policy decision of the political branches with the [court's] own unmoored determination" of what U.S. policy should be); *Mingtai Fire & Marine Ins. Co. v. United Parcel Serv.*, 177 F.3d 1142, 1144 (9th Cir. 1999) ("It is axiomatic that 'the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] that the propriety of the exercise of that power is not open to judicial review.'") (citation omitted); *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) ("[i]n our system of government, the Executive is 'the sole organ of the federal government in the field of international relations'") (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

pp. 7-9. U.S. companies like Cisco are entitled to rely upon U.S. trade regulations permitting sales to Chinese police agencies of internet infrastructure components that Congress and the Commerce Department have specifically chosen not to regulate.

The decision of another district court dismissing similar claims against Cisco and its executives on political question grounds is instructive. In *Daobin v. Cisco Systems, Inc.*, 2 F. Supp. 3d 717 (D. Md. 2014), Chinese national plaintiffs alleged that China had used the Golden Shield to detect, monitor, detain, suppress, and torture political dissidents. *Id.* at 720. The court ruled that: (1) "the political branches of the U.S. Government have developed a complex set of rules and regulations around what products may be exported to China," *id.* at 724; (2) under §§ 902(a)(4) and 902(b) of the Tiananmen Act, "all specified 'crime control or detection instruments or equipment' were banned from export to China in the absence of an express report by the President to Congress," *id.*; and (3) "Congress and the Commerce Department expressly permit sales to Chinese police agencies of Internet infrastructure components such as the technology at issue here," *id.* The political question doctrine was thus "necessarily implicated" because:

> The Legislative and Executive branches of the Federal Government have emphasized the "essential" need to "speak[] in a bipartisan and unified voice," § 902(b)(3), in the context of PRC actions against its citizens and residents in particular. "In maintaining its controls on crime control and detection items, the United States considers international norms regarding human rights and the practices of other countries that control exports to promote

> the observance of human rights." 15 C.F.R. § 742.7(d). U.S. trade regulations have yet to prohibit exportation of the Cisco technology at issue in this case.

Id. at 725; *see also, e.g.*, *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 554-55 (9th Cir. 2014) (affirming dismissal of ATS claims as "inextricably bound to foreign policy decisions" that "have already been made by[] the political branches"); *You v. Japan*, No. 15-cv-3257, 2015 WL 8648569, at *5 (N.D. Cal. Dec. 14, 2015) (dismissing ATS claims against U.S. corporations on political question grounds because adjudication would undermine "the balance of adjustments and accommodations negotiated and approved by the other two branches" of government); *Al Shimari v. CACI Premier Tech., Inc.*, No. 08-cv-827, 2015 WL 4740217, at *6-9 (E.D. Va. June 18, 2015) (on remand, dismissing ATS claims against CACI on political question grounds because the U.S. military had exercised control over CACI's employees' conduct of interrogations).

The judgment below thus may be affirmed on political question grounds.

B. The Act Of State Doctrine Warrants Dismissal

The act of state doctrine "precludes courts from evaluating the validity of actions that a foreign government has taken within its own borders." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009) (citing *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409 (1990)). It "reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by

foreign states, may interfere with the executive branch's conduct of American foreign policy." *Id.* at 1089 (citing *W.S. Kirkpatrick*, 493 U.S. at 404). Under the doctrine, an action may be barred if: "(1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign's official act." *Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th. Cir. 1997) (quoting *W.S. Kirkpatrick*, 493 U.S. at 405); *see also In re Philippine Nat'l Bank*, 397 F.3d 768, 773 (9th Cir. 2005) ("The act of state doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations.") (alterations omitted).

The SAC questions the validity of public acts taken by the sovereign state of China within its own territory. It necessarily challenges the PRC's decision to make the practice of Falun Gong illegal; to augment the national internet infrastructure through the Golden Shield, which the SAC alleges was taken and implemented at high levels of the Chinese government with the aim of facilitating its policy to outlaw Falun Gong; to prosecute Falun Gong practitioners; and to judicially impose penalties

on Falun Gong practitioners for illegal acts. *See* SER4-8 (¶¶ 12-27).[23] This Court cannot adjudicate plaintiffs' allegations without addressing such official state policies.

For this reason, the decision below may be affirmed on act of state grounds. For example, in another case involving ATS and TVPA claims brought by Falun Gong practitioners against PRC government officials, a court in this Circuit dismissed under the act of state doctrine. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1306 (N.D. Cal. 2004). *Qi* held that defendants' acts toward Falun Gong practitioners rose to the level of an act of the PRC as a sovereign state, *id.* at 1294-95, and assessed the "implications for foreign relations" if the case proceeded, *id.* at 1296-1303. The court placed "serious weight," *id.* at 1298 (as suggested by *Sosa*, 542 U.S. at 733 n.21), on a statement of interest submitted by the U.S. Department of State, which advised:

> [A]djudication of these multiple lawsuits [challenging the legality of the Chinese government's actions against the

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[23] Although the criminalization of disfavored views offends the U.S. Constitution, it is not uncommon in other nations. *See, e.g.*, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1221, 1227 (9th Cir. 2006) (*en banc*) (France "passed [a law] which criminalized speech that denied the existence of the Holocaust or that celebrated Nazism," such that "Internet service providers are forbidden to permit French users to have access to [banned] materials … [and] French users … are criminally forbidden to obtain such [internet] access"); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("However dearly our country holds First Amendment rights … a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'") (cited favorably in *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

> Falun Gong] … is not the best way for the United States to advance the cause of human rights in China. …
>
> … Such litigation can serve to detract from, or interfere with, the Executive Branch's conduct of foreign policy.
>
> … [P]ractical considerations, when coupled with the potentially serious adverse foreign policy consequences that such litigation can generate, would in our view argue in favor of finding the [Falun Gong] suits non-justiciable.

Id. at 1296-97 (quoting Letter from William H. Taft, IV to Assistant Attorney Gen. McCallum of Sept. 25, 2002). *Qi* similarly considered a letter from the PRC opposing adjudication, which stated:

> If the U.S. courts should entertain the "Falun Gong" trumped-up lawsuits, they would send a wrong signal to the "Falun Gong" cult organization and embolden it to initiate more such false, unwarranted lawsuits. In that case, it would cause immeasurable interferences to the normal exchanges and cooperation between China and the United States in all fields, and severely undermine the common interests of the two countries.

Id. at 1300 (quoting Statement of Gov't of PRC).

Although defendants are not government actors, adjudication will necessarily require this Court to assess the merits of the sovereign acts of the PRC in responding to Falun Gong. *See Glen* v. *Club Médditerranée, S.A.*, 450 F.3d 1251, 1256-57 (11th Cir. 2006) (applying act of state doctrine even where government actor was not a party); *Riggs Nat'l Corp. v. Comm'r of I.R.S.*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (same).

For these reasons, the district court in *Daobin* dismissed similar ATS and TVPA claims against Cisco and its executives on act of state grounds, reasoning that "[a]djudication of these claims [against Cisco] would require judging official actions of the Chinese government and its officials in enforcing Chinese law against Chinese citizens in China." 2 F. Supp. 3d at 726. The court concluded:

> There cannot be the slightest doubt that Plaintiffs' allegations of violations "of international law touch … sharply on national nerves", which carry "important … implications … for our foreign relations" with China. [*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, (1964)]. Nor can it be doubted that litigating such issues would raise serious concerns of "the danger of unwarranted judicial interference in the conduct of foreign policy", which the Supreme Court cautioned against in *Kiobel*. 133 S. Ct. at 1664-65.

Id. The same reasoning warrants affirmance of the dismissal here.

C. The International Comity Doctrine Warrants Dismissal

International comity applies where "[a] federal court has jurisdiction but defers to the judgment of an alternative forum" to avoid getting "entangled in international relations." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (internal quotation marks omitted); *see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987) ("[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches

the resolution of cases touching the laws and interests of other sovereign[s]").[24] An international comity analysis asks whether adjudication of the case by a U.S. court "would offend amicable working relationships with [a foreign country]." *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006) (internal quotation marks omitted).

ATS cases implicate just such concerns, and thus warrant review for consistency "with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in the judgment); *Kiobel*, 133 S. Ct. at 1671 (similar). This Court has adopted the framework used in *Ungaro-Benages* as a "useful starting point" for analyzing comity, looking to U.S. interests, the foreign government's interests, and the adequacy of an alternative forum. *Mujica*, 771 F.3d at 603 (quoting *Ungaro-Benages*, 379 F.3d at 1238).[25]

Adjudication of plaintiffs' claims would necessarily entangle this Court in a delicate international relations balance between the United States and China. As

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[24] This Court has recognized two "strains" of the international comity doctrine: (1) "prescriptive comity," which is a canon of construction that guides the reach of a statute; and (2) "adjudicatory comity," which is a discretionary act of deference to decline jurisdiction in a case that is more appropriately adjudicated elsewhere. *Mujica*, 771 F.3d at 598-99. Only the second strain is implicated here.

[25] *Mujica* also confirms that, for the doctrine to apply, there need not be a "true conflict" between domestic and foreign law. 771 F.3d at 603.

noted above, both the U.S. Department of State and the PRC have submitted statements to a federal court objecting to the adjudication of Falun Gong lawsuits in U.S. courts. *See supra* pp. 52-53; *Mujica*, 771 F.3d at 609-12 (dismissing claims under international comity where Department of State and Colombian Government submitted statements against adjudication).[26] Adjudication of whether the PRC complies with its own laws is the sort of "entangle[ment] in international relations" that comity counsels courts to avoid. *Ungaro-Benages*, 379 F.3d at 1237.

For all these reasons, the nonjusticiability of plaintiffs' claims provides an alternative ground for affirmance.

[26] Further, "U.S. courts consistently acknowledge the adequacy of due process in the PRC judicial system." *Folex Golf Indus., Inc. v. China Shipbuilding Indus. Corp.*, No. 09-cv-2248, 2013 WL 1953628, at *4 (C.D. Cal. May 9, 2013) (dismissing claims on international comity), *rev'd on other grounds*, 603 F. App'x 576 (9th Cir. 2015) (unpublished). The same holds true in *forum non conveniens* contexts. *See, e.g.*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434-35 (2007) (dismissing on *forum non conveniens* grounds where "the gravamen of [defendant's] complaint—misrepresentations … to the Guangzhou Admiralty Court in the course of securing arrest of the vessel in China—is an issue best left for determination by the Chinese courts"); *Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 252-53 (4th Cir. 2011) (China provides adequate forum).

CONCLUSION

The judgment should be affirmed.

Dated: March 2, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases pending in this Court.

Dated: March 2, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,970 words (based on the Microsoft Word word-count function) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: March 2, 2016

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CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on March 2, 2016, I electronically filed the foregoing "Answering Brief of Defendants-Appellees" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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