09-2778-cv(L), 09-2779-cv(CON), 09-2780-cv(CON), 09-2781-cv(CON), 09-2783-cv(CON), 09-2785-cv(CON), 09-2787-cv(CON), 09-2792-cv(CON), 09-2801-cv(CON), 09-3037-cv(CON)

United States Court of Appeals

for the

Second Circuit

SAKWE BALINTULO, as personal representative of Saba Balintulo, DENNIS VINCENT FREDERICK BRUTUS, MARK FRANSCH, as personal representative of Anton Fransch, ELSIE GISHI, LESIBA KEKANA, ARCHINGTON MADONDO, as personal representative of Mandla Madondo, MPHO ALFRED MASEMOLA, MICHAEL MBELE,

(For Continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

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Plaintiffs-Appellees,

– v. –

DAIMLER AG, FORD MOTOR COMPANY, INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendants-Appellants,

GENERAL MOTORS CORPORATION, RHEINMETALL AG,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* National Foreign Trade Council, U.S. Council for International Business, Organization for International Investment, and National Association of Manufacturers state that each is a non-profit corporation. None has a parent corporation and, because they are all non-stock corporations, no publicly held corporation owns 10% or more of any of their stock. (USA*Engage is not a corporation; it is a unit of the National Foreign Trade Council.)

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The National Foreign Trade Council, USA*Engage, the U.S. Council for International Business, the Organization for International Investment, and the National Association of Manufacturers respectfully submit this brief as *amici curiae* supporting Appellants. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).[1]

INTEREST OF *AMICI CURIAE*

Amici curiae and their members have a vital interest in the issues raised by this appeal. Over the past two decades, scores of U.S. and international companies have been sued under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, for allegedly aiding and abetting human rights violations by foreign governments. In many cases, the suits challenge trade with countries where the political branches have expressly decided to encourage commercial engagement. Those suits not only strain foreign relations. They also cause irreparable damage to the Executive Branch's policy of engagement, and serious economic harm by deterring the foreign trade the Executive Branch has chosen to promote. Because the district court's decision in this case greatly exacerbates those harms, *amici* urge this Court to review that decision and reverse it.

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[1] Appellees have consented to filing without waiving their argument that this Court lacks jurisdiction over this appeal.

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

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

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

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

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

increase understanding about the vital role of manufacturing to America's economic future.

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

INTRODUCTION AND SUMMARY

The Nation's well-being depends more on foreign trade with each passing day. But judicial decisions, like the one under review in this case, can improperly undermine both that trade and U.S. foreign policy by failing to dismiss suits that directly impinge on the ability of the U.S. government to conduct foreign affairs. The Supreme Court requires district courts to provide "case-specific deference" to

the political branches' judgment in such cases. The district court failed to adhere to that principle of deference here.

Foreign trade has become increasingly important to the United States. From 1950 to 2005—a period roughly spanning the alleged conduct underlying this suit—this Nation's "global exports grew from $58 billion to $13 trillion." U.S. Trade Representative, *2007 Trade Policy Agenda and 2006 Annual Report of the President of the United States on the Trade Agreements Program* 1 (2007) (hereinafter "*USTR 2006 Report*"). That trade dramatically improved the Nation's economy: "Trade liberalization in the last ten years has helped raise U.S. GDP by nearly 40 percent and boosted job growth by over 13 percent." *Id*. Global commerce "has raised real incomes, restrained prices, introduced greater product variety, spurred technological advances and innovation, and raised living standards." Council of Economic Advisors, *Economic Report of the President* 167 (2007).

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

The district court's decision, if left standing, would make that critical reliance all but impossible. Indeed, the district court's decision opens the door to imposing liability *because of* reliance on the U.S. government's foreign policy with respect to foreign commerce. This suit is premised on the theory that the defendants "aided and abetted" violations of international law by South Africa's former apartheid regime. The Executive Branch, however, long ago adopted a policy of commercial engagement with apartheid South Africa. For that and related reasons, the U.S. government has objected to this suit going forward. South Africa's current democratic government similarly objected, on the grounds that the suit is an affront to its sovereignty and is likely to discourage foreign investment in South Africa. Unless reversed by this Court, that decision will convert the foreign policies of the U.S. government into an afterthought. Allowing suits such as this one to go forward in the face of the Executive Branch's objections would expose companies to years of litigation and adverse publicity, deterring them from engaging in the *very trade* upon which the Executive Branch's policy of commercial engagement relies.

That harm is exacerbated by the widespread confusion over aiding and abetting liability under the ATS. Plaintiffs often accuse corporations of "aiding and abetting" human rights violations by countries with problematic human rights records—countries that include many of this Nation's most important trading

partners. Whether aiding and abetting liability exists under the ATS and, if so, the standard that applies are questions of crucial importance to firms engaged in international trade.

The district court's decision in this case, moreover, cannot be effectively reviewed after a final judgment—the harms come from the fact that the actions are pending as much as from any eventual merits resolution. All requirements of the collateral order doctrine are satisfied; this Court has appellate jurisdiction. *Amici* therefore urge the Court to review and reverse the district court's decision.

ARGUMENT

The district court's refusal to defer to the Executive Branch's foreign policy determinations damages international trade. It undermines this Nation's foreign policies. It harms foreign relations. And it requires immediate review in this Court.

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

Confronted by a rapidly changing and complex global environment, the Nation's political branches must regularly determine how to respond to injustices abroad. "In implementing its human rights and democracy strategy, the United States employs a wide range of diplomatic, informational, and economic tools to

advance its foreign policy objectives." U.S. Dep't of State, *Supporting Human Rights and Democracy: The U.S. Record 2004-2005*, at ii-iii (2005).

In some circumstances, the political branches may decide to impose trade restrictions or even complete embargoes to encourage political reform. *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701); Prohibiting Trade and Certain Transactions Involving Libya, Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986). Often, however, the Executive Branch determines that the best policy is commercial engagement. Engagement can expand U.S. influence on a foreign government, improve living standards and educational opportunities for foreign citizens, and profoundly affect the attitudes of foreign citizens and government officials. "Economic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reform, and the fight against corruption, and it reinforces the habits of liberty." Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). Sometimes the Executive Branch may pursue both strategies, imposing limited sanctions crafted to ensure that the United States maintains influence while making clear that it disapproves of disregard for human rights. *See, e.g.*, Dianne E. Rennack, *China: Economic Sanctions* 4-9 (2005).

Whether trade sanctions are ever an effective strategy for improving human rights is a topic of considerable debate,[2] and *amici* have routinely opposed such measures on policy grounds. But the Constitution commits resolution of such foreign policy issues to the political branches. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

Respect for that constitutional design is critical to international trade. When the political branches impose economic sanctions, they at least provide clear, up-front notice of what trade is prohibited—notice that an after-the-fact lawsuit under the ATS cannot provide. Where the Executive Branch has chosen a policy of engagement, companies must be able to rely on that foreign policy decision as well. Indeed, a policy of engagement ultimately depends on such reliance. The Executive Branch can encourage firms to engage in foreign commerce to promote

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

U.S. interests abroad (and has programs designed to do so[3]), but it cannot force firms to trade. Legal decisions that threaten litigation for engaging in foreign trade that the political branches have decided to permit or even encourage undermine the country's foreign policies and irreparably harm international trade.

One need not look far to see the impact. In response to the prevalence of legal suits within the United States for extraterritorial conduct, a legal journal has warned in-house counsel for multinationals to pay "close attention to [ATS] suits," observing that, "[i]f your corporation has deep pockets and high public visibility, it's a safe assumption that it could become the target of litigation related to a supplier's labor conditions in the developing world." Aaron Schindel *et al.*, *Workers Abroad, Trouble at Home*, 14 Corporate Counsel 65, 65 (2007). Similar

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[3] For example, the U.S. Trade Representative has created a public/private advisory system to help develop trade policy. *See USTR 2006 Report*, *supra*, at 235-40. The Department of Commerce manages a comprehensive website to "assist American businesses in planning their international sales strategies." *Export.gov Helps American Companies Succeed Globally*, http://www.export.gov/about/index.asp. And the State Department recognizes conduct by firms that promote U.S. interests overseas. *See, e.g.*, *2003 Award for Corporate Excellence: ChevronTexaco Corporation*, *at* http://www.america.gov/st/washlife-english/2003/October/20031015185119samohtj0.6833612.html; *see also* Trade Promotion Coordinating Comm., *The 2007 National Export Strategy* 20 (2007) ("[T]he trade promotion agencies of the Federal Government are pursuing a number of initiatives to ensure that American companies can take advantage of growing emerging markets.").

warnings from other sources abound.[4] Perceptions of this legal climate have real consequences in terms of where corporations invest or expand.

ATS litigation harms trade by foreign multinational corporations as well. It deters those corporations from doing business in the United States for fear of subjecting themselves to jurisdiction in ATS suits based on alleged misconduct elsewhere. As the Secretary General of the International Chamber of Commerce has explained, "the practice of suing EU companies in the US for alleged events occurring in third countries could have the effect of reducing investment by EU companies in the United States . . . if one of the consequences would be exposure to the Alien Tort Statute." Letter from Maria Livanos Cattaui to Romano Prodi, President, European Commission (Oct. 22, 2003), http://www.iccwbo.org/icccbhc/index.html; *see also* Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 257 (2004).

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[4] The President of the U.S. Council for International Business has warned that the ATS "threatens to make it virtually impossible for companies, foreign or American, to invest anywhere in the world for fear that they will be subjected to frivolous lawsuits in U.S. courts." U.S. Council for Int'l Bus., *Business Groups Urge Supreme Court to Curtail Abuse of Alien Tort Statute* (Jan. 23, 2004), http://www.uscib.org/index.asp?DocumentID=2815. And a retired U.S. military officer has argued that ATS litigation will impair defense contractors' ability to function abroad. *See* Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, 16 St. Thomas L. Rev. 627, 665 (2004); *see also* Gary Hufbauer & Nicholas Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. Int'l Econ. L. 245, 252-58 (2004).

Those concerns are well-founded. Even meritless ATS lawsuits exact a significant toll. ATS lawsuits based on events halfway across the globe "run up massive costs because they involve numerous pre-discovery motions, overseas discovery, expert witnesses in foreign and international law, and near certainty of appeal." Hufbauer & Mitrokostas, *supra*, at 252-53. The reputational consequences are more dramatic still. Suits based on serious human rights abuses by foreign governments can damage a business irreparably, even where the allegations of corporate complicity are dubious. In many cases, negative publicity is the intended result of ATS litigation: "[The] real intent, it seems, is to rely on an extensive legal discovery process to uncover matters that embarrass companies and delay their business plans." 151 Cong. Rec. 11,435 (2005) (statement of Sen. Feinstein).

In 2001 and 2002, for example, labor-rights lawyers filed ATS suits against Coca-Cola Co. and Drummond Co., claiming that the companies were complicit in anti-union violence in Colombia. *See Sinaltrainal v. Coca-Cola Co.*, No. 01-3208 (S.D. Fla. filed July 20, 2001); *Rodriguez v. Drummond Co.*, No. 7:02-cv-00665 (N.D. Ala. filed Mar. 14, 2002). Plaintiffs' counsel publicly acknowledged that they "[we]re not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media"—for the defendants, the suits were "public relations disasters waiting to happen."

Daniel Kovalik, *Colombia, Human Rights, and U.S. Courts* (Apr. 25, 2002), *at* http://www.clas.berkeley.edu/Events/spring2002/04-25-02-kovalik/index.html. Advocacy groups called for boycotts of Coke products. *See Campaign for a Coca-Cola Free Campus*, http://www.killercoke.org/pdf/campguide.pdf (campus-activism packet) (last visited Aug. 21, 2009); *Colleges, Universities and High Schools Active in the Campaign to Stop Killer Coke*, http://www.killercoke.org/active-in-campaign.htm (last visited Aug. 21, 2009). And a Danish energy company suspended coal purchases from Drummond. *See* Mike Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case*, Platts Coal Outlook, Nov. 27, 2006, at 6, *available at* 2006 WLNR 21355024.

Years later, the Coca-Cola suit was dismissed, *see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); 474 F. Supp. 2d 1273 (S.D. Fla. 2006), and a jury rejected all the claims against Drummond, *see* Kyle Whitmire, *Alabama Company Is Exonerated in Murders at Colombian Mine*, N.Y. Times, July 27, 2007, at C2. The Eleventh Circuit subsequently affirmed the disposition of both cases. *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Sinaltrainal v. Coca-Cola Co.*, ___ F.3d ___, 2009 WL 2431463 (11th Cir. Aug. 11, 2009). But vindication in the courts could not undo the economic and reputational damage the suits had caused.

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

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

designed to help. As those examples make clear, the Executive Branch's policy of constructive engagement simply cannot succeed if the judiciary is willing to entertain costly and engagement-deterring lawsuits based on the very conduct—trade and investment—the Executive Branch sought to promote.

B. The District Court's Decision Impedes Foreign Policy and Imposes Grave Uncertainty And Costs On International Trade

The district court's decision profoundly damages both the Executive Branch's foreign policies and international trade. The Supreme Court previously singled out this very lawsuit as an instance where deference to the political branches was appropriate. *See Sosa*, 542 U.S. at 733 n.21. Throughout this litigation, South Africa has urged that this suit "preempt[s] [its] ability . . . to handle domestic matters" and "discourage[s] needed investment in the South African economy." *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004). The United States has likewise urged that this suit hampers its "policy of encouraging positive change in developing countries via economic investment." *Id.* The district court, however, gave unduly short shrift to the Executive Branch's views, demoting that critical inquiry into a virtual afterthought. *See* S.A.-111-12 & n.349 (dismissing the Executive Branch's view that this litigation would deter foreign investment as based on an "erroneous premise," and characterizing as merely "speculative" its concerns that the pendency of this

litigation would adversely affect its conduct of foreign relations with South Africa). And the court refused to dismiss these actions, consigning the defendants to years of further litigation, despite clear statements from the U.S. and South African governments objecting to the pendency of these suits.

Because ATS suits are uniquely damaging and costly even when wholly meritless, that decision will deeply chill foreign trade—even foreign trade that the political branches seek to promote. Companies like Drummond and Coca-Cola will think twice about trade with countries like Colombia, and energy companies will refuse to lend assistance to third-world nations seeking to develop their resources, if the regular cost of doing so (with their own government's blessing) is never-ending, costly litigation and irreparable reputational injury. *See* pp. 9-13, *supra*. Simply put, U.S. companies will be significantly less likely to participate in this Nation's policy of constructive engagement in the future if they have reason to fear being subjected to the sort of protracted litigation the district court's decision threatens here. The Executive Branch's interest in ensuring that foreign trade follows its foreign policy can be vindicated only if courts defer to that policy promptly and conclusively. The district court's treatment of the Executive Branch's views fell short of those requirements.

It is no answer to suggest, as plaintiffs might, that the substantive standard for aiding-and-abetting will protect those who are innocent of wrongdoing.

Allegations of mental states (particularly the mental state of a large, multi-national corporation with myriad officers) are notoriously difficult to refute. And the requirement that "defendants 'substantially assisted' violations of the law of nations and knew that their assistance would be substantial," SPA-111, provides no comfort at all. Under that standard, even routine commercial transactions can give rise to aiding-and-abetting claims. Plaintiffs in ATS cases regularly allege that the defendant "knew" that the foreign government committed human rights abuses and "knew" that the economic benefits of international trade would, even if only indirectly, assist those offenses. The Executive Branch's foreign and trade policies cannot be effective if the price of compliance is lawsuits that cannot be terminated except through a full-fledged trial.

Indeed, the Executive Branch's own foreign policy statements are often cited as evidence that a corporation "knew" human rights abuses would occur. *See, e.g.*, Complaint at ¶¶ 6, 88, *Mother Doe I v. Al Maktoum*, No. 06-22253 (S.D. Fla. filed Sept. 7, 2006) (relying on State Department Country Reports as evidence of "active participation of the United Arab Emirates' elite in the trafficking and enslavement" of underage camel jockeys); *cf. Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1299-1303 (C.D. Cal. 2000) (relying on State Department communications as evidence that defendant knew about potential violations of customary international law). Surely something in the legal system has malfunctioned when

the Executive Branch acknowledges human rights abuses in a country and encourages private firms to trade with the country as a strategy to improve conditions, but plaintiffs can then sue those same firms for doing so because the firms should have "known" about the human rights abuses from the Executive Branch's own foreign policy publications.

By refusing to nip such claims in the bud, the decision below would deprive companies of the ability to rely (except to their detriment) on the Executive Branch's foreign policies. More problematic still, the decision would thereby remove an arrow from the Executive Branch's foreign policy quiver. The U.S. government can and does use access to trade as a foreign policy tool. Yet the district court's refusal to dismiss claims like those now pending necessarily would create a regime in which the Executive Branch's foreign policy decisions would be replaced with an unpredictable patchwork of after-the-fact judicial sanctions under the ATS. The Executive Branch's determinations on trade and engagement cannot have their desired effect—no one will actually trade and engage—if the judiciary will entertain suits that effectively contradict the Executive Branch's policy judgments.

Throughout the world, the United States often chooses to pursue engagement rather than isolation when dealing with countries that have problematic human rights records. China, for example, is an important trading partner. U.S. Dep't of

State, *Background Note: China* (Jan. 2009), http://www.state.gov/r/pa/ei/bgn/18902.htm. But China's "human rights record remain[s] poor," and includes such abuses as forced labor. U.S. Dep't of State, *2006 Country Reports on Human Rights Practices: China* ¶ 2 (2007). The United States has responded with targeted sanctions in specific instances. *See* Rennack, *supra*, at 4-9. But, by and large, the government pursues a policy of engagement: "China's integration into the global economy and progressive embrace of market principles have been encouraged by more than 25 years of U.S. political and economic engagement, pursued on a largely bipartisan basis across administrations." U.S. Trade Representative, *U.S.-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement* 3 (2006).

The Executive Branch has determined that continued engagement will improve China's respect for human rights. Announcing China's admission to the World Trade Organization, then-President Bush expressly linked trade with political reform: "WTO membership . . . will require China to strengthen the rule of law and introduce certain civil reforms, such as the publication of rules." President George W. Bush, *Statement by the President: Ministerial Decision to Admit the People's Republic of China and Taiwan Into the World Trade Organization* (Nov. 11, 2001), *quoted in* China Sec. Rev. Comm'n, *The National Security Implications of the Economic Relationship Between the United States and*

China (July 2002), http://www.uscc.gov/researchpapers/2000_2003/reports/ch3_02.htm. "In the long run, an open, rules-based Chinese economy will be an important underpinning for Chinese democratic reforms." *Id.* The United States has also adopted policies of commercial engagement with countries such as Colombia, Indonesia, and Nigeria,[5] all of which have problematic human rights records.[6]

A policy of commercial engagement cannot function if the threat of protracted litigation deters companies from establishing the economic ties necessary for engagement to work. Moreover, when Western firms pull out of countries with mixed human rights records, other countries are often eager to fill

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[5] *See, e.g.*, U.S. Dep't of State, *Background Note: Colombia* (May 2009), http://www.state.gov/r/pa/ei/bgn/35754.htm (the "United States is Colombia's largest trading partner"; "[p]romoting security, stability, and prosperity in Colombia will continue as long-term American interests"); U.S. Dep't of State, *Background Note: Indonesia* (March 2009), http://www.state.gov/r/pa/ei/bgn/2748.htm ("The United States has important economic, commercial, and security interests in Indonesia"); U.S. Dep't of State, *Background Note: Nigeria* (Apr. 2009), http://www.state.gov/r/pa/ei/bgn/2836.htm ("Nigeria is the United States' largest trading partner in sub-Saharan Africa").

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

the void, and those countries may be much less interested in improving local conditions.[7]

Where the Executive Branch adopts a policy of commercial engagement, courts must respect that judgment—not impose burdens that operate as *de facto* judicial economic sanctions against unpopular foreign governments at the behest of private plaintiffs. If the district court's decision stands, the risk and uncertainty caused by the threat of a possible retroactive judicial embargo will discourage trade. The effect may be a *de facto* present embargo where the Executive Branch has purposely decided not to impose one. By reversing the decision below, this Court would make clear that U.S. foreign policy, including the discretion to use foreign trade as a tool to achieve diplomatic goals, remains the prerogative of the Executive Branch.

C. Immediate Review Is Warranted

Appellants have properly sought review in this Court under the collateral order doctrine. "The requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the

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

action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)) (internal quotation marks omitted). There is little doubt about the first two requirements. The district court's order "conclusively determine[d]" that these actions would not be dismissed in view of Executive Branch foreign policy concerns. And that decision, which defies the case-specific deference that the Supreme Court has explicitly required in such circumstances, *see Sosa*, 542 U.S. at 733 n.21, is "completely separate from the merits" question of liability.

The district court's decision also satisfies the third requirement of the collateral order doctrine because it would "be effectively unreviewable" later. In *Will*, the Supreme Court made clear that "some particular value of a high order" must be "marshaled in support of the interest in avoiding trial" before review after final judgment can be characterized as ineffectual. *Will*, 546 U.S. at 352. It specifically listed "separation of powers" as one such interest justifying immediate appealability. *Id.*

In this case, *Sosa*'s admonition of case-specific deference implicates concerns of the highest order, including the separation of powers. Lawsuits like those now pending inherently put Executive Branch foreign policies that depend on increased foreign trade on a collision course with lawsuits seeking to punish

companies for advancing that very trade. *Amici* have demonstrated the deleterious consequences of that collision. The threat to the political branches' prerogative to set foreign policy—and the threat to solid diplomatic relations that comes when those policies are upset—come as much if not more from the pendency of the action than from eventual merits resolution.

Deference to the political branches in an ATS suit must be conferred at the earliest possible time if it is to serve any purpose at all. When, as in this case, the United States and a foreign power both object to the very pendency of litigation, the affront to both sovereigns—and the damage to the Executive Branch's foreign policies—increases with each day the suit proceeds. The adverse impact on foreign commerce likewise can be avoided only by prompt action. Vindication of the defendant after years of litigation is insufficient. The litigation itself imposes massive legal costs, and the reputational harm can be devastating. *See* pp. 9-13, *supra.* The litigation itself—not the result—thus deters trade. Where the Executive Branch determines that trade will promote the interests of the United States (and improve the lot of foreign citizens as well), courts must respect that determination by shutting down inconsistent litigation at the earliest opportunity.

If immediate review were unavailable in cases like this one, the case-specific deference required by the Supreme Court would become a hollow doctrine—one that putatively protects the United States' foreign policy position only after the

harms that the deference is supposed to avoid have come to full fruition. Moreover, and for the same reasons, without immediate appeal in such cases, defendants will be forced to spend millions defending themselves in court, have their reputations tarnished, lose contracts, and suffer boycotts because of a lawsuit that ultimately proves meritless. All those harms to private defendants would come at a great cost to the Executive Branch, whose trade policies would no longer command the respect from those upon which the Executive Branch must rely for effectual implementation. By allowing the pending claims to proceed, the district court's ruling threatens the separation of powers. It deters the constructive commercial engagement that the Executive Branch often promotes. And it undermines the international trade on which our economy depends. The decision below satisfies the requirements of the collateral order doctrine and warrants this Court's immediate review.[8]

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[8] In the alternative, if this Court should determine that it lacks jurisdiction under the collateral order doctrine, it should grant a writ of mandamus. *See In re Repetitive Stress Injury Litig.*, 11 F.3d 368 (2d Cir. 1993) (dismissing appeals for lack of jurisdiction but recharacterizing the attempted appeals as petitions for writs of mandamus and granting those petitions). For the reasons stated in this brief and by Appellants in their brief, Appellants would have no other vehicle to obtain necessary relief, even though their right to that relief is clear under prevailing law. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004) (describing standards for writs of mandamus). Moreover, when a lower court's improper decision would harm important interests of the political branches, as in this case, the justification for a writ of mandamus is amplified. *See id.* at 381.

CONCLUSION

For the foregoing reasons and those set forth in the Appellants' briefs, the judgment of the district court should be REVERSED.

Dated August 24, 2009

Respectfully submitted,

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Dated: August 24, 2009

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Jeffrey A. Lamken

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