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**SUMMARY**

**Civil Rights**

Jury’s finding of unreasonable force does not preclude grant of qualified immunity (Hemetewa, J.)

**Reese v. County of Sacramento**

9th Cir.; April 23, 2018; 16-16195

The court of appeal affirmed in part and reversed in part a judgment and remanded. The court held that the jury’s finding that a police officer violated plaintiff’s right to be free from excessive force under the Fourth Amendment did not preclude a finding that the officer was nonetheless entitled to qualified immunity.

Officers went to Robert Reese’s apartment in response to a report of a “crazy” man from that apartment firing a gun outside the apartment. Reese, who had been having an argument with an acquaintance, answered the door holding a knife, expecting it to be the person he had been arguing with. Seeing the knife, one of the officers immediately fired at Reese. Officer Zachary Rose advanced into the apartment, expecting to see Reese shot and incapacitated. Instead, he saw Reese standing upright in the apartment. He could not see Reese’s hands. Rose immediately fired his handgun, aiming it at Reese’s chest. Reese was struck and injured, but not killed. He sued the officers and the County of Sacramento, alleging Fourth Amendment excessive force and violation of the Bane Act. The jury returned a verdict in favor of Reese and against Rose and the county on both claims. The jury specifically found that Reese did not pose an immediate threat of death or serious physical injury to Rose at the time Rose fired at him.

The trial court granted defendants’ motion for judgment as a matter of law, finding that Rose was entitled to qualified immunity. The court also granted summary judgment on Reese’s Bane Act claim. Reese appealed.

The court of appeals affirmed in part and reversed in part, holding that the jury’s finding that Rose violated Reese’s right to be free from excessive force under the Fourth Amendment did not preclude a finding that Rose was nonetheless entitled to qualified immunity. The question of whether Reese’s right was “clearly established” was solely for the judge to decide, not the jury. The district court was thus within its authority to determine, as a matter of law, whether Rose was entitled to qualified immunity, notwithstanding the jury’s finding that he violated Reese’s Fourth Amendment right to be free from excessive force. The district court erred, however, in granting summary judgment in defendants’ favor on Reese’s Bane Act claim. The Bane Act requires “a specific intent to violate the arrestee’s right to freedom from unreasonable seizure.” but does not require a showing of coercion independent from the constitutional violation. Because the district court’s ruling was based on an erroneous conclusion that the Bane Act required a showing of independent coercion, it was error. Further, taking the evidence in the light most favorable to Reese, it was not impossible for a reasonable jury to conclude that Deputy Rose had a specific intent to violate Reese’s Fourth Amendment rights. The court remanded Reese’s Bane Act claim for a new trial.

**Criminal Appeals**

Defendant not entitled to recall of remittitur to apply SB 620 to final judgment (Robie, Acting P.J.)

**People v. Harris**

C.A. 3rd; April 23, 2018; C079470

The Third Appellate District denied a motion to recall the remittitur. The court held that a defendant was not entitled to recall of the remittitur in her case to permit application of Senate Bill No. 620, which took effect nearly a year after defendant’s conviction became final.

A jury found Colleen Harris guilty of the first degree murder of her husband, and found true an allegation that Harris discharged a firearm causing death. She was sentenced to 50 years to life. The judgment was upheld on appeal. Remittitur issued in November 2016, and Harris’ case was final in early 2017.

Senate Bill No. 620 took effect on January 1, 2018. Harris filed a motion to recall the remittitur to either permit briefing on the application of SB 620 to her case, or remand the case to the trial court to exercise its discretion as to whether to strike the firearm enhancement under the amendment. Acknowledging that recalling a remittitur is an extraordinary remedy generally available in a limited number of instances, Harris relied on the narrow exception espoused by the Supreme Court in People v. Mutch (1971) 4 Cal.3d 389.

The court of appeal denied the motion, holding that Mutch did not apply. Mutch applies only where “the error is of such dimensions as to entitle the defendant to a writ of habeas corpus.” More specifically, it applies where “there is no material dispute as to the facts” relating to the underlying judgment of conviction, and “it appears that the statute under which [defendant] was convicted did not prohibit his conduct.” The excess of jurisdiction exception applied in Mutch thus applies only when legal error occurred in the trial court, and the appellate court determines, based on the undisputed facts, the defendant suffered a conviction for conduct that did not amount to a crime under the relevant penal statute. This exception did not apply here. Harris did not claim the court erred when it imposed her sentence because SB 620 took effect only after her case was final.
Evidence

Parol evidence admissible to prove fraud (Moore, J.)

IIG Wireless, Inc. v. Yi

C.A. 4th; March 27, 2018; G053393

The Fourth Appellate District affirmed a judgment. The court held that the trial court properly admitted parol evidence offered to show fraud.

John Yi, Jimmy Hu, and Seung Lee were the founding shareholders of IIG Wireless, Inc., a distributor and retailer for cellular phones, equipment and plans for MetroPCS. IIG initially issued 100,000 common shares of stock, with 20,000 going to Yi, and 40,000 each to Hu and Lee. According to Yi, however, because he was required to personally guarantee all leases for the company’s 30 stores, they later reached a written agreement to re-allocate the shares, with Hu and Lee each receiving 30,000 shares and Yi receiving 40,000. IIG later sued Yi, alleging, among other things, that he took shares to which he was not entitled. At trial, Hu and Lee testified that they never agreed that Yi would receive 40,000 shares. Rather, he was allocated several thousand “treasury” shares that he was to hold for IIG.

The jury rendered judgment in favor of IIG on its claim, among others, that Yi had taken treasury shares to which he was not entitled. The jury also rendered judgment in favor of Yi on certain cross-claims against IIG, with a net judgment in favor of IIG. Both parties appealed.

The court of appeal affirmed, holding that the trial court did not err in admitting Hu and Lee’s testimony regarding the treasury shares. This testimony was not, as Yi contended, inadmissible parol evidence. Although IIG did not contest Yi’s claim that the shareholder agreements at issue were integrated agreements, it argued that the testimony was nonetheless admissible under Code Civ. Proc. §1856(g), which sets forth an exception to the parol evidence rule for the introduction of extrinsic evidence to establish fraud. The court agreed, noting that the parol evidence rule was never intended to be used as a shield to prevent proof of fraud. The court further rejected Yi’s contention that this exception applies only where the validity of the underlying agreement is at issue. The challenged testimony was thus admissible to prove fraud. The court rejected both parties’ additional claims of error as similarly without merit.

International Law

Foreign corporations may not be defendants in suits brought under Alien Tort Statute (Kennedy, J.)

Jesner v. Arab Bank, PLC

U.S. Sup. Ct.; April 24, 2018; 16–499

Petitioners filed suits under the Alien Tort Statute (ATS), alleging that they, or the persons on whose behalf they assert claims, were injured or killed by terrorist acts committed abroad, and that those acts were in part caused or facilitated by respondent Arab Bank, PLC, a Jordanian financial institution with a branch in New York. They seek to impose liability on the bank for the conduct of its human agents, including high-ranking bank officials. They claim that the bank used its New York branch to clear dollar-denominated transactions that benefited terrorists through the Clearing House Inter-bank Payments System (CHIPS) and to launder money for a Texas-based charity allegedly affiliated with Hamas. While the litigation was pending, this Court held, in Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, that the ATS does not extend to suits against foreign corporations when “all the relevant conduct took place outside the United States,” id., at 124, but it left unresolved the Second Circuit’s broader holding in its Kiobel decision: that foreign corporations may not be sued under the ATS. Deeming that broader holding binding precedent, the District Court dismissed petitioners’ ATS claims and the Second Circuit affirmed.

Held: The judgment is affirmed.

808 F. 3d 144, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, concluding that foreign corporations may not be defendants in suits brought under the ATS. Pp. 6–11, 18–19, and 25–27.

(a) The Judiciary Act of 1789 included what is now known as the ATS, which provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. The ATS is “strictly jurisdictional” and does not by its own terms provide or delineate the definition of a cause of action for international-law violations. Sosa v. Alvarez-Machain, 542 U. S. 692, 713–714. It was enacted against the backdrop of the general common law, which in 1789 recognized a limited category of “torts in violation of the law of nations,” id., at 714; and one of its principal objectives was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to have one might cause another nation to hold the United States responsible for an injury to a foreign citizen, see id., at 715–719. The ATS was invoked but a few times over its first 190 years, but with the evolving recognition—e.g., in the Nuremberg trials—that certain crimes against humanity violate basic precepts of international law, courts began to give some redress for violations of clear and unambiguous international human-rights protections. After the Second Circuit first permitted plaintiffs to bring ATS actions based on modern human-rights laws, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), creating an express cause of action for victims of torture and extrajudicial killing in violation of international law. ATS suits became more frequent; and modern ATS litigation has the potential to involve
groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. In Sosa, the Court held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, 542 U. S., at 732, but it explicitly held that ATS litigation implicates serious separation-of-powers and foreign-relations concerns, id., at 727–728. The Court subsequently held in Kiobel that “the presumption against extraterritoriality applies to [ATS] claims,” 569 U. S., at 124, and that even claims that “touch and concern the territory of the United States . . . must do so with sufficient force to displace” that presumption, id., at 124–125. Pp. 6–11.

(b) Sosa is consistent with this Court’s general reluctance to extend judicially created private rights of action. Recent precedents cast doubt on courts’ authority to extend or create private causes of action, even in the realm of domestic law, rather than leaving such decisions to the Legislature, which is better positioned “to consider if the public interest would be served by imposing a new substantive legal liability,” Ziglar v. Abbasi, 582 U. S. ____, ____ (internal quotation marks omitted). This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations. Thus, in Correctional Services Corp. v. Malesko, 534 U. S. 61, 72, the Court concluded that Congress, not the courts, should decide whether corporate defendants could be held liable in actions under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388.

Neither the language of the ATS nor precedent supports an exception to these general principles in this context. Separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS, which implicates foreign-policy concerns that are the province of the political branches. And courts must exercise “great caution” before recognizing new forms of liability under the ATS. Sosa, supra, at 728. The question whether a proper application of Sosa would preclude courts from ever recognizing new ATS causes of action need not be decided here, for either way it would be inappropriate for courts to extend ATS liability to foreign corporations absent further action from Congress. Pp. 18–19.

(c) The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring. Petitioners are foreign nationals seeking millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank’s New York branch and a brief allegation about a charity in Texas. At a minimum, the relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank.

For 13 years, this litigation has caused considerable diplomatic tensions with Jordan, a critical ally that considers the litigation an affront to its sovereignty. And this is not the first time that a foreign sovereign has raised objections to ATS litigation in this Court. See Sosa, supra, at 733, n. 21. These are the very foreign-relations tensions the First Congress sought to avoid.

Nor are the courts well suited to make the required policy judgments implicated by foreign corporate liability. Like the presumption against extraterritoriality, judicial caution under Sosa “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.” Kiobel, supra, at 124. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS. Pp. 25–27.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE and JUSTICE THOMAS, concluded in Parts II–A, II–B–2, II–B–3, and III:

(a) Before recognizing an ATS common-law action, federal courts must apply the two-part test announced in Sosa. The threshold question is whether a plaintiff can demonstrate that the alleged violation is “ ‘of a norm that is specific, universal, and obligatory,’ “ 542 U. S., at 732. Assuming that such a norm can control, it must be determined whether allowing the case to proceed under the ATS is a proper exercise of judicial discretion or whether caution requires the political branches to grant specific authority before corporate liability can be imposed. Id., at 732–733, and nn. 20–21. With regard to the first Sosa question, the Court need not resolve whether corporate liability is a question governed by international law or whether that law imposes liability on corporations, because, as shown by the parties’ opposing arguments, there is at least sufficient doubt on the point to turn to Sosa’s second question: whether the Judiciary must defer to Congress to determine in the first instance whether that universal norm has been recognized and, if so, whether it should be enforced in ATS suits. Pp. 11–18.

(b) Especially here, in the realm of international law, it is important to look to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. The logical statutory analogy for an ATS common-law action is the TVPA—the only ATS cause of action created by Congress rather than the courts. Drafted as “an unambiguous and modern basis for [an ATS] cause of action,” H. R. Rep. No. 102–367, p. 3, the TVPA reflects Congress’ considered judgment of the proper structure for such an action. Absent a compelling justification, courts should not deviate from that model. Relevant here, the TVPA limits liability to “individuals,” a term which unambiguously limits liability to natural persons, Mohamad v. Palestinian Authority, 566 U. S. 449, 453–456. Congress’ decision to exclude liability for corpora-
discretion also counsel against allowing liability under the ATS for foreign corporations, absent congressional instructions. Corporate liability under the ATS has not been shown to be essential to serving that statute’s goals, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable, and plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions for the international community and for Congress. And this complexity makes it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal court. Pp. 23–25.

(d) In making its determination, Congress might decide that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that compensation for injured persons will be a cost of doing business. Or Congress could conclude that neutral judicial safeguards may not be ensured in every country and that, as a reciprocal matter, ATS liability for foreign corporations should be subject to some limitations or preconditions. Finally, Congress might find that corporate liability should be limited to cases where a corporation’s management was actively complicit in the crime. Pp. 27–29.

JUSTICE ALITO concluded that the outcome in this case is justified not only by “judicial caution” but also by the separation of powers. Assuming that Sosa v. Alvarez-Machain, 542 U. S. 692, correctly held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action under the ATS, this Court should not create such causes of action against foreign corporate defendants. The objective for courts in any case requiring the creation of federal common law must be “to find the rule that will best effectuate the federal policy.” Textile Workers v. Lincoln Mills of Ala., 353 U. S. 448, 457. The First Congress enacted the ATS to help the United States avoid diplomatic friction. Putting that objective together with the rules governing federal common law generally, the following principle emerges: Federal courts should decline to create federal common law causes of action whenever doing so would not materially advance the ATS’s objective of avoiding diplomatic strife. Applying that principle here, it is clear that courts should not create causes of action under the ATS against foreign corporate defendants. Customary international law does not generally require corporate liability, so declining to create it under the ATS cannot give other nations just cause for complaint against the United States. To the contrary, creating causes of action against foreign corporations under the ATS may instead provoke exactly the sort of diplomatic strife inimical to the statute’s fundamental purpose. Pp. 1–7.

JUSTICE GORSUCH concluded that there are two more fundamental reasons why this lawsuit should be dismissed. Pp. 1–14.

(a) This Court has suggested that Congress originally enacted the ATS to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conduct extended to aliens, interference with ambassadors, and piracy. Sosa v. Alvarez-Machain, 542 U. S. 692, 715. Here, the plaintiffs seek much more. They want the federal courts to recognize a new cause of action, one that did not exist at the time of the statute’s adoption, one that Congress has never authorized. They find support in a passage suggesting that the ATS may afford federal judges “discretion [to] consider [creating] new cause[s] of action” if they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three specified] 18th-century torts.” Id., at 725. This is doubtful, for the people’s elected representatives, not judges, make the laws that govern them. But even accepting Sosa’s framework, a proper application of that framework would preclude courts from recognizing any new causes of action under the ATS. When courts are confronted with a request to fashion a new cause of action, “separation-of-powers principles are or should be central to the analysis.” Ziglar v. Abassi, 582 U. S. ___. The first and most important question is whether Congress or the courts should decide, and the right answer “most often will be Congress.” Ibid. There is no reason to make a special exception for the ATS, which was designed as “a jurisdictional statute creating no new causes of action.” Sosa, 542 U. S., at 724. The context in which any Sosa discretion would be exercised confirms the wisdom of restraint. The “practical consequences” that might follow a decision to create a new ATS cause of action, see id., at 732–733, would likely involve questions of foreign affairs and national security—matters implicating the expertise and authority not of the Judiciary but of the political branches. Pp. 2–5.

(b) Another independent problem is that this suit is by foreigners against a foreigner over the meaning of international norms. The original understanding of the ATS, which was but one clause in one section of the Judiciary Act of 1789, likely would have required a domestic defendant in order to comply with the requirements of the Diversity-of-Citizenship Clause of Article III. Precedent interpreting a neighboring provision of the Judiciary Act confirms that conclusion. See Mossman v. Higgins, 4 Dall. 12, 14. In any event, separation-of-powers limits on the judicial function and deference to the political branches should lead federal courts to require a domestic defendant before agreeing to exercise any Sosa-generated discretion to entertain an ATS suit. Pp. 5–14.

KENNEDY, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B–1, and II–C, in which ROBERTS, C. J., and THOMAS, ALITO, and GORSUCH, JJ., joined, and an opinion
with respect to Parts II–A, II–B–2, II–B–3, and III, in which ROBERTS, C. J., and THOMAS, J., joined. THOMAS, J., filed a concurring opinion. ALITO, J., and GORSUCH, J., filed opinions concurring in part and concurring in the judgment. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, BREYER, and KAGAN, JJ., joined.

**Patent Litigation**

**Inter partes review of patent claims does not violate Article III or Seventh Amendment (Thomas, J.)**

**Oil States Energy Services, LLC v. Greene’s Energy Group, LLC**

U.S. Sup. Ct.; April 24, 2018; 16–712

Inter partes review authorizes the United States Patent and Trademark Office (PTO) to reconsider and cancel an already-issued patent claim in limited circumstances. See 35 U. S. C. §§311–319. Any person who is not the owner of the patent may petition for review. §311(a). If review is instituted, the process entitles the petitioner and the patent owner to conduct certain discovery, §316(a)(5); to file affidavits, declarations, and written memoranda, §316(a)(8); and to receive an oral hearing before the Patent Trial and Appeal Board, §316(a)(10). A final decision by the Board is subject to Federal Circuit review. §§318, 319.

Petitioner Oil States Energy Services, LLC, obtained a patent relating to technology for protecting wellhead equipment used in hydraulic fracturing. It sued respondent Greene’s Energy Group, LLC, in Federal District Court for infringement. Greene’s Energy challenged the patent’s validity in the District Court and also petitioned the PTO for inter partes review. Both proceedings progressed in parallel. The District Court issued a claim-construction order favoring Oil States, while the Board issued a decision concluding that Oil States’ claims were unpatentable. Oil States appealed to the Federal Circuit. In addition to its patentability arguments, it challenged the constitutionality of inter partes review, arguing that actions to revoke a patent must be tried in an Article III court before a jury. While the case was pending, the Federal Circuit issued a decision in a separate case, rejecting the same constitutional arguments raised by Oil States. The court then summarily affirmed the Board’s decision in this case.

**Held:**

1. Inter partes review does not violate Article III. Pp. 5–17.

   (a) Under this Court’s precedents, Congress has significant latitude to assign adjudication of public rights to entities other than Article III courts. *Executive Benefits Ins. Agency v. Arkison*, 573 U. S. ___, ___. Inter partes review falls squarely within the public-rights doctrine. The decision to grant a patent is a matter involving public rights. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO’s authority to conduct that reconsideration. Pp. 5–10.


   (ii) Inter partes review involves the same basic matter as the grant of a patent. It is “a second look at an earlier . . . grant,” *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. ___, ___, and it involves the same interests as the original grant, see *Duell*, supra, at 586. That inter partes review occurs after the patent has issued does not make a difference here. Patents remain “subject to [the Board’s] authority” to cancel outside of an Article III court, *Crowell*, supra, at 50, and this Court has recognized that franchises can be qualified in this manner, see, e.g., *Louisville Bridge Co. v. United States*, 242 U. S. 409, 421. Pp. 8–10.

   (b) Three decisions that recognize patent rights as the “private property of the patentee,” *United States v. American Bell Telephone Co.*, 128 U. S. 315, 370, do not contradict this conclusion. See also *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 609; *Brown v. Duchesne*, 19 How. 183, 197. Nor do they foreclose the kind of post-issuance administrative review that Congress has authorized here. Those cases were decided under the Patent Act of 1870 and are best read as describing the statutory scheme that existed at that time. Pp. 10–11.

   (c) Although patent validity was often decided in 18th-century English courts of law, that history does not establish that inter partes review violates the “general” principle that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,’” *Stern v. Marshall*, 564 U. S. 462, 484. Another means of canceling a patent at that time—a petition to the Privy Council to vacate a patent—closely resembles inter partes review. The parties have cited nothing to suggest that the Framers were not aware of this common practice when writing the Patent Clause, or that they excluded the practice from the scope of the Clause. Relatedly, the fact that American courts have traditionally adjudicated patent validity in this country does not mean that they must forever do so. See *post*, at 8–10. Historical practice is not decisive here because matters governed by the public-rights doctrine may be assigned to the Legislature, the Executive, or the Judiciary. *Ex parte Bakelite Corp.*, supra, at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today. Pp. 12–15.

   (d) Finally, the similarities between the various procedures used in inter partes review and procedures typically
used in courts does not lead to the conclusion that inter partes review violates Article III. This Court has never adopted a “looks like” test to determine if an adjudication has improperly occurred outside an Article III court. See, e.g., Williams v. United States, 289 U. S. 553, 563. Pp. 15–16.

(e) This holding is narrow. The Court addresses only the constitutionality of inter partes review and the precise constitutional challenges that Oil States raised here. The decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. Pp. 16–17.

2. Inter partes review does not violate the Seventh Amendment. When Congress properly assigns a matter to adjudication in a non-Article III tribunal, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” Gran-financiera, S. A. v. Nordberg, 492 U. S. 33, 52–53. Thus, the rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge. P. 17.


THOMAS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., joined.

**Patent Litigation**

**Patent Office must decide patentability of all challenged claims on inter partes review (Gorsuch, J.)**

**SAS Institute Inc. v. Iancu**

U. S. Sup. Ct.; April 24, 2018; 16–969

Inter partes review allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office. At the outset, a party must file a petition to institute review, 35 U. S. C. §311(a), that identifies the challenged claims and the grounds for challenge with particularity, §312(a)(3). The patent owner, in turn, may file a response. §313. If the Director of the Patent Office determines “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition,” §314(a), he decides “whether to institute . . . review . . . pursuant to [the] petition,” §314(b). “If . . . review is instituted and not dismissed,” at the end of the litigation the Patent Trial and Appeal Board “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” §318(a).

Petitioner SAS sought review of respondent Complement Soft’s software patent, alleging that all 16 of the patent’s claims were unpatentable. Relying on a Patent Office regulation recognizing a power of “partial institution,” 37 CFR §42.108(a), the Director instituted review on some of the claims and denied review on the rest. The Board’s final decision addressed only the claims on which the Director had instituted review. On appeal, the Federal Circuit rejected SAS’s argument that §318(a) required the Board to decide the patentability of every claim challenged in the petition.

Held: When the Patent Office institutes an inter partes review, it must decide the patentability of all of the claims the petitioner has challenged. The plain text of §318(a) resolves this case. Its directive is both mandatory and comprehensive. The word “shall” generally imposes a nondiscretionary duty, and the word “any” ordinarily implies every member of a group. Thus, §318(a) means that the Board must address every claim the petitioner has challenged. The Director’s “partial institution” power appears nowhere in the statutory text. And both text and context strongly counsel against inferring such a power.

The statute envisions an inter partes review guided by the initial petition. See §312(a)(3). Congress structured the process such that the petitioner, not the Director, defines the proceeding’s contours. The ex parte reexamination statute shows that Congress knew exactly how to authorize the Director to investigate patentability questions “[o]n his own initiative, and at any time,” §303(a). The inter partes review statute indicates that the Director’s decision “whether” to institute review “pursuant to [the] petition” is a yes-or-no choice. §314(b).

Section 314(a)’s requirement that the Director find “a reasonable likelihood” that the petitioner will prevail on “at least 1 of the claims challenged in the petition” suggests, if anything, a regime where a reasonable prospect of success on a single claim justifies review of them all. Again, if Congress had wanted to adopt the Director’s claim-by-claim approach, it knew how to do so. See §304. Nor does it follow that, because §314(a) invests the Director with discretion on the question whether to institute review, it also invests him with discretion regarding what claims that review will encompass. The rest of the statute confirms, too, that the petitioner’s petition, not the Director’s discretion, should guide the life of the litigation. See, e.g., §316(a)(8).

The Director suggests that a textual discrepancy between §314(a)—which addresses whether to institute review based on claims found “in the petition”—and §318(a)—which addresses the Board’s final resolution of the claims challenged “by the petitioner”—means that the Director enjoys the power to institute a review covering fewer than all of the claims challenged in the petition. However, the statute’s winnowing mechanism—which allows a patent owner to concede one part of a petitioner’s challenge and “[c]ancel any challenged patent claim,” §316(d)(1)(A)—fully explains why Congress adopted the slightly different language.

The Director’s policy argument—that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources
on others—is properly addressed to Congress, not this Court. And the Director’s asserted “partial institution” power, which is wholly unmentioned in the statute, is not entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837. Finally, notwithstanding §314(d)—which makes the Director’s determination whether to institute an inter partes review “final and nonappealable”—judicial review remains available consistent with the Administrative Procedure Act to ensure that the Patent Office does not exceed its statutory bounds. *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. ___, distinguished. Pp. 4–14.

825 F. 3d 1341, reversed and remanded.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, and in which KAGAN, J., joined except as to Part III–A.
Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights. The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability in ATS suits, all without any explicit authorization from Congress to do so.

The answer turns upon the proper interpretation and implementation of the ATS. The statute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” §1350. The Court must first ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees. The Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so.

I

A

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-Terrorism Act, 18 U. S. C. §2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. According to the Kingdom of Jordan, Arab Bank “accounts for between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange.” Brief for Hashemite Kingdom of Jordan as Amicus Curiae 2. Petitioners allege that Arab Bank helped finance attacks by Hamas and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners’ allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

Foreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another. Arab Bank and certain amici point out that CHIPS transactions are enormous
both in volume and in dollar amounts. The transactions occur predominantly in the United States but are used by major banks both in the United States and abroad. The CHIPS system is used for dollar-denominated transactions and for transactions where the dollar is used as an intermediate currency to facilitate a currency exchange. Brief for Institute of International Bankers as Amicus Curiae 12–13, and n. 8. In New York each day, on average, about 440,000 of these transfers occur, in dollar amounts totaling about $1.5 trillion. Id., at 14. The “clearance activity is an entirely mechanical function; it occurs without human intervention in the proverbial ‘blink of an eye.’” Ibid. There seems to be no dispute that the speed and volume of these transactions are such that individual supervision is simply not a systemic reality. As noted below, substantial regulations govern these transactions, both in the United States and in Jordan.

In addition to the dollar-clearing transactions, petitioners allege that Arab Bank’s New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111 (CA2 2010). That suit worked its way through the trial court and the Court of Appeals for the Second Circuit. The Kiobel litigation did not involve banking transactions. Its allegations were that holding companies incorporated in the Netherlands and the United Kingdom had, through a Nigerian subsidiary, aided and abetted the Nigerian Government in human-rights abuses. Id., at 123. In Kiobel, the Court of Appeals held that the ATS does not extend to suits against corporations. Id., at 120. This Court granted certiorari in Kiobel, 565 U. S. 961 (2011).

After additional briefing and reargument in Kiobel, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 114, 124–125 (2013). The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that “all the relevant conduct took place outside the United States.” Id., at 124. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in Kiobel affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners’ ATS claims based on the earlier Kiobel holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F. 3d 144 (2015). This Court granted certiorari in the instant case. 581 U. S. ___ (2017).

Since the Court of Appeals relied on its Kiobel holding in the instant case, it is instructive to begin with an analysis of that decision. The majority opinion in Kiobel, written by Judge Cabranes, held that the ATS does not apply to alleged international-law violations by a corporation. 621 F. 3d, at 120. Judge Cabranes relied in large part on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons. Id., at 132–137.

Judge Leval filed a separate opinion. He concurred in the judgment on other grounds but disagreed with the proposition that the foreign corporation was not subject to suit under the ATS. Id., at 196. Judge Leval conceded that “international law, of its own force, imposes no liabilities on corporations or other private juridical entities.” Id., at 186. But he reasoned that corporate liability for violations of international law is an issue of “civil compensatory liability” that international law leaves to individual nations. Ibid. Later decisions in the Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under the ATS. See Flomo v. Firestone Nat. Rubber Co., 643 F. 3d 1013, 1017–1021 (CA7 2011); Doe I v. Nestle USA, Inc., 766 F. 3d 1013, 1020–1022 (CA9 2014); Doe VIII v. Exxon Mobil Corp., 654 F. 3d 11, 40–55 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7(CADC 2013). The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it.

With this background, it is now proper to turn to the history of the ATS and the decisions interpreting it.

B


Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems. In 1784, the French Minister lodged a protest with the Continental Congress after a French adventurer, the Chevalier de Longchamps, assaulted the Secretary of the French Legation in Philadelphia. See Kiobel, 569 U. S., at 120. A few years
later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants. *Ibid.* Under the Articles of Confederation, there was no national forum available to resolve disputes like these under any binding laws that were or could be enacted or enforced by a central government.

The Framers addressed these matters at the 1787 Philadelphia Convention; and, as a result, Article III of the Constitution extends the federal judicial power to “all cases affecting ambassadors, other public ministers and consuls,” and “to controversies . . . between a state, or the citizens thereof, and foreign states, citizens, or subjects.” §2. The First Congress passed a statute to implement these provisions: The Judiciary Act of 1789 authorized federal jurisdiction over suits involving disputes between aliens and United States citizens and suits involving diplomats. §§9, 11, 1 Stat. 76–79.

The Judiciary Act also included what is now the statute known as the ATS, §9, *id.*, at 76. As noted, the ATS is central to this case and its brief text bears repeating. Its full text is: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350.

The ATS is “strictly jurisdictional” and does not by its own terms provide or delineate the definition of a cause of action for violations of international law. *Sosa*, 542 U. S., at 713–714. But the statute was not enacted to sit on a shelf awaiting further legislation. *Id.*, at 714. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of “torts in violation of the law of nations.” *Ibid.*

In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances it governed individual conduct occurring outside national borders (for example, “disputes relating to prizes, to shipwrecks, to hostages, and ransom bills”). *Id.*, at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which “rules binding individuals for the benefit of other individuals overlapped with” the rules governing the relationships between nation-states. *Id.*, at 715. As understood by Blackstone, this domain included “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conduct, infringement of the rights of ambassadors, and piracy.” *Ibid.* (citing 4 W. Blackstone, Commentaries on the Laws of England 68(1769)). “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS.” 542 U. S., at 715.

This history teaches that Congress drafted the ATS “to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” *Id.*, at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. See *id.*, at 715–719; *Kiobel*, 569 U. S., at 123–124.

Over the first 190 years or so after its enactment, the ATS was invoked but a few times. Yet with the evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international human-rights protections that are clear and unambiguous. In the modern era this began with the decision of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980).

In *Filartiga*, it was alleged that a young man had been tortured and murdered by Peruvian police officers, and that an officer named Pena-Irala was one of the supervisors and perpetrators. Some members of the victim’s family were in the United States on visas. When they discovered that Pena-Irala himself was living in New York, they filed suit against him. The action, seeking damages for the suffering and death he allegedly had caused, was filed in the United States District Court for the Eastern District of New York. The Court of Appeals found that there was jurisdiction under the ATS. For this holding it relied upon the universal acknowledgment that acts of official torture are contrary to the law of nations. *Id.*, at 890. This Court did not review that decision.


After *Filartiga* and the TVPA, ATS lawsuits became more frequent. Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. For example, in *Kiobel* the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for alleged crimes in Nigeria. 569 U. S., at 111–112. The extent and scope of this litigation in United States courts have resulted in criticism here and abroad. See *id.*, at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

In *Sosa*, the Court considered the question whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U. S., at 730–731. The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and
it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the “historical paradigms familiar when §1350 was enacted.” 542 U. S., at 732. The Court was quite explicit, however, in holding that ATS litigation implicates serious separation-of-powers and foreign-relations concerns. Id., at 727–728. Thus, ATS claims must be “subject to vigilant docket keeping.” Id., at 729.

This Court next addressed the ATS in Kiobel, the case already noted. There, this Court held that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts the presumption.” 569 U. S., at 124. The Court added 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., at 124–125.

II

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court’s holding in Kiobel, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various amici urge this as a rationale to affirm here, while the Government argues that the Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in Sosa. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U. S., at 732 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See id., at 732–733, and nn. 20–21. “[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” Id., at 727.

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law. The dispute centers on a footnote in Sosa. In the course of holding that international norms must be “sufficiently definite to support a cause of action,” the Court in Sosa noted that a “related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” Id., at 732, and n. 20.

In the Court of Appeals’ decision in Kiobel, the majority opinion by Judge Cabranes interpreted footnote 20 to mean that corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law. 621 F. 3d, at 127. In Judge Cabranes’ view, “[i]nternational law is not silent on the question of the subjects of international law—that is, those that, to varying extents, have legal status, personality, rights, and duties under international law,” “[n] or does international law leave to individual States the responsibility of defining those subjects.” Id., at 126 (internal quotation marks omitted). There is considerable force and weight to the position articulated by Judge Cabranes. And, assuming the Court of Appeals was correct that under Sosa corporate liability is a question of international law, there is an equally strong argument that petitioners cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations. Indeed, Judge Leval agreed with the conclusion that international law does “not
provide for any form of liability of corporations.” Kiobel, 621 F. 3d, at 186.

I

In modern times, there is no doubt, of course, that “the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights,” leading “the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.” Filartiga, 630 F. 2d, at 890. That principle and commitment support the conclusion that human-rights norms must bind the individual men and women responsible for committing humanity’s most terrible crimes, not just nation-states in their interactions with one another.

“The singular achievement of international law since the Second World War has come in the area of human rights,” where international law now imposes duties on individuals as well as nation-states. Kiobel, 621 F. 3d, at 118.

It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.

The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only. See Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Art. 6, Aug. 8, 1945, 59 Stat. 1547, E. A. S. 472. Later, a United States Military Tribunal prosecuted 24 executives of the German corporation IG Farben. 7 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, pp. 11–60 (1952) (The Farben Case). Among other crimes, Farben’s employees had operated a slave-labor camp at Auschwitz and “knowingly and intentionally manufactured and provided” the poison gas used in the Nazi death chambers. Kiobel, 621 F. 3d, at 135. Although the Military Tribunal “used the term ‘Farben’ as descriptive of the instrumentality of cohesion in the name of which” the crimes were committed, the Tribunal noted that “corporations act through individuals.” 8 The Farben Case, at 1153. Farben itself was not held liable. See ibid.


The international community’s conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.

2

In light of the sources just discussed, the sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position.

Petitioners first point to the International Convention for the Suppression of the Financing of Terrorism. This Convention imposes an obligation on “Each State Party” “to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity,” violated the Convention. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 232. But by its terms the Convention imposes its obligations only on nation-states “to enable” corporations to be held liable in certain circumstances under domestic law. The United States and other nations, including Jordan, may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions. See, e.g., 18 U. S. C. §2333(a) (private right of action under the Anti-Terrorism Act); 31 U. S. C. §5311 et seq. (Bank Secrecy Act); 31 CFR pt. 595 (2017) (Terrorism Sanctions Regulations); Brief for Central Bank of Jordan as Amicus Curiae 5 (describing Jordan’s “comprehensive approach to preventing money laundering and terrorist financing”). The Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention’s text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.

In addition, petitioners and their amici cite a few cases from other nations and the Special Tribunal for Lebanon that, according to petitioners, are examples of corporations being held liable for violations of international law. E.g., Brief for Petitioners 50–51. Yet even assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.

It must be remembered that international law is distinct from domestic law in its domain as well as its objectives. International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators “enem[ies] of all mankind.” Sosa, 542 U. S., at 732 (internal quotation marks omitted). In
the American legal system, of course, corporations are often subject to liability for the conduct of their human employees, and so it may seem necessary and natural that corporate entities are liable for violations of international law under the ATS. It is true, furthermore, that the enormity of the offenses that can be committed against persons in violation of international human-rights protections can be cited to show that corporations should be subject to liability for the crimes of their human agents. But the international community has not yet taken that step, at least in the specific, universal, and obligatory manner required by Sosa. Indeed, there is precedent to the contrary in the statement during the Nuremberg proceedings that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” The Nurnberg Trial, 6 F. R. D. 69, 110 (1946).

Petitioners also contend that international law leaves questions of remedies open for determination under domestic law. As they see it, corporate liability is a remedial consideration, not a substantive principle that must be supported by a universal and obligatory norm if it is to be implemented under the ATS. According to petitioners, footnote 20 in Sosa does no more than recognize the distinction in international law between state and private actors. But, as just explained, there is a similar distinction in international law between corporations and natural persons. And it is far from obvious why the question whether corporations may be held liable for the international crimes of their employees is a mere question of remedy.

In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to Sosa’s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

B

I

Sosa is consistent with this Court’s general reluctance to extend judicially created private rights of action. The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” 542 U. S., at 727 (citing Correctional Services Corp. v. Malesko, 534 U. S. 61, 68 (2001); Alexander v. Sandoval, 532 U. S. 275, 286–287 (2001)). That is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” Ziglar v. Abbasi, 582 U. S. __, ___ (2017) (slip op., at 12) (internal quotation marks omitted). Thus, “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress.” Id., at ___ (slip op., at 13).

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. Thus, in Malesko the Court held that corporate defendants may not be held liable in Bivens actions. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971). Allowing corporate liability would have been a “marked extension” of Bivens that was unnecessary to advance its purpose of holding individual officers responsible for “engaging in unconstitutional wrongdoing.” Malesko, 534 U. S., at 74. Whether corporate defendants should be subject to suit was “a question for Congress, not us, to decide.” Id., at 72.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See infra, at 25–26. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See Kiobel, 569 U. S., at 116–117. That the ATS implicates foreign relations “is itself a reason for a high bar to new private causes of action for violating international law.” Sosa, supra, at 727.

In Sosa, the Court emphasized that federal courts must exercise “great caution” before recognizing new forms of liability under the ATS. 542 U. S., at 728. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of Sosa would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. See, e.g., Miles v. Apex Marine Corp., 498 U. S. 19, 24 (1990); Blue Chip Stamps v. Manor Drug Stores, 421 U. S. 723, 736 (1975). Doing so is even more important in the realm of international law, where “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” Sosa, supra, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to “establish an unambiguous and modern basis for a cause of
action” under the ATS. H. R. Rep., at 3; S. Rep., at 4–5. Congress took care to delineate the TVPA’s boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. *Kiobel*, 569 U. S., at 117. In *Kiobel*, the Court recognized that “[e]ach of these decisions carries with it significant foreign policy implications.” *Ibid.* The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to “individuals,” which, the Court has held, unambiguously limits liability to natural persons. *Mohamad v. Palestinian Authority*, 566 U. S. 449, 453–456 (2012). Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it “would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.” *Sosa*, supra, at 726.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to “individuals” out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation’s employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

At least two flaws inher in this argument. First, in *Mohamad* the Court unanimously rejected petitioners’ account of the TVPA’s legislative history. 566 U. S., at 453, 458–460. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id.*, at 459–460 (citing Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U. S., at 461–462 (Breyer, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for “aiding and abetting the Nigerian Government in committing,” among other things, “crimes against humanity.” 569 U. S., at 114; see also, e.g., *Sarei v. Rio Tinto*, 671 F. 3d 736, 761–763 (CA9 2011) (en banc) (corporate defendant allegedly used Papua New Guinea’s military to commit genocide), vacated and remanded, 569 U. S. 945 (2013).

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Anti-Terrorism Act. That Act does permit suits against corporate entities. See 18 U. S. C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Anti-Terrorism Act. But the Anti-Terrorism Act provides a cause of action only to “national[s] of the United States,” and their “estate, survivors, or heirs.” §2333(a). In contrast, the ATS is available only for claims brought by “an alien.” 28 U. S. C. §1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Anti-Terrorism Act is relevant it suggests that there should be no common-law action under the ATS for allegations like petitioners’. Otherwise, foreign plaintiffs could bypass Congress’ express limitations on liability under the Anti-Terrorism Act simply by bringing an ATS lawsuit. The Anti-Terrorism Act, as mentioned above, is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing. The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

In any event, even if the Anti-Terrorism Act were a suitable model for an ATS suit, Congress’ decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, e.g., 18 U. S. C. §1091 (criminal prohibition on genocide); §1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.
If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international law by itself forecloses petitioners’ claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA’s limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle “would imply that other nations, also applying the law of nations, could hail our [corporations] into their courts for alleged violations of the law of nations.” Kiobel, 569 U. S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby “hinder[ing] global investment in developing economies, where it is most needed.” Brief for United States as Amicus Curiae in American Isuzu Motors, Inc. v. Ntsebeza, O. T. 2007, No. 07–919, p. 20 (internal quotation marks omitted).

In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.

It is also true, of course, that natural persons can and douse corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with “the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.” Kiobel, 569 U. S., at 116 (internal quotation marks omitted). As noted further below, there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability. And, as the TVPA illustrates, Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way.

C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as Amicus Curiae 7. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank’s New York branch and a brief allegation regarding a charity funded by “hinder[ing] global investment in developing economies, where it is most needed.” Brief for United States as Amicus Curiae 7. But here, and in similar cases, the opposite is occurring.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has “caused significant diplomatic tensions” with Jordan, a critical ally in one of the world’s most sensitive regions. Brief for United States as Amicus Curiae 30. “Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria.” Id., at 31. The United States explains that Arab Bank itself is “a constructive partner with the United States in working to prevent terrorist financing.” Id., at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a “grave affront” to its sovereignty. See Brief for Hashemite Kingdom of Jordan as Amicus Curiae 3; see ibid. (“By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan’s economy and undermine its cooperation with the United States”).

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. Sosa, 542 U. S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as Amicus Curiae in Kiobel v. Royal Dutch Petroleum Co., O. T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in No. 10–1491, p. 3. These are the
very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

Like the presumption against extraterritoriality, judicial caution under Sosa “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.” Kiobel, 569 U. S., at 124. If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of Sosa would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The political branches can determine, referring to international law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation’s courts, and, conversely, that courts in other countries should be able to hold United States corporations liable. Congress might determine that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business. If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate.

It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge.

These delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would, once again, also be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law. All this underscores the important separation-of-powers concerns that require the Judiciary to refrain from making these kinds of decisions under the ATS. The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.

Finally, Congress might find that corporate liability should be limited to cases where a corporation’s management was actively complicit in the crime. Cf. ALI, Model Penal Code §2.07(1)(c) (1985) (a corporation may be held criminally liable where “the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment”). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination.

These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full because it correctly applies our precedents. I also agree with the points raised by my concurring colleagues. Courts should not be in the business of creating new causes of action under the Alien Tort Statute, see post, at 2–5 (GORSUCH, J., concurring in part and concurring in judgment), especially when it risks international strife, see post, at 3–7 (ALITO, J., concurring in part and concurring in judgment). And the Alien Tort Statute likely does not apply to suits between foreign plaintiffs and foreign defendants. See post, at 5–14 (opinion of GORSUCH, J.).

JUSTICE ALITO, concurring in part and concurring in the judgment.

Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to
prevent. As a result, I agree with the Court that we should not take that step, and I join Parts I, II–B–I, and II–C of the opinion of the Court. I write separately to elaborate on why that outcome is compelled not only by “judicial caution,” ante, at 27 (majority opinion), but also by the separation of powers.

I

The ATS is a jurisdictional statute. It provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. By its terms, the ATS does not create any causes of action.

In Sosa v. Alvarez-Machain, 542 U. S. 692 (2004), however, this Court nevertheless held that federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS. That holding takes some explaining.

According to Sosa, when the First Congress enacted the ATS in 1789, it assumed that the statute would “have practical effect the moment it became law” because the general common law “would provide a cause of action for [a] modest number of international law violations.” Id., at 724. That assumption, however, depended on the continued existence of the general common law. And in 1938—a century and a half after Congress enacted the ATS—this Court rejected the “fallacy” underlying the general common law, declaring definitively that “[t]here is no federal general common law.” Erie R. Co. v. Tompkins, 304 U. S. 64, 78, 79 (1938). That left the ATS in an awkward spot: Congress had not created any causes of action for the statute on the assumption that litigants would use those provided by the general common law, but now the general common law was no more.

In Sosa, this Court did its best to resolve that problem. “If [t]he result would be unreasonable to assume,” the Court explained, “that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the [general] common law might lose some metaphysical cachet on the road to modern realism.” 542 U. S., at 730. Although the general common law was gone, the Court concluded, federal courts could still exercise their authority to create so-called “federal common law” for those “few and restricted” areas “in which Congress has given the courts the power to develop substantive law.” Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U. S. 630, 640 (1981). Sosa interpreted the ATS as conferring such authorization.

As a result, Sosa held that federal courts, subject to certain conditions, may “recognize private causes of action [under the ATS] for certain torts in violation of the law of nations.” 542 U. S., at 724. But before doing so, Sosa stressed, courts should follow a two-step process. First, they should ensure that the contemplated cause of action reflects an international law norm that is “specific, universal and obligatory.” ” Id., at 732. Second, if a suitable norm is identified, federal courts should decide whether there is any other reason to limit “the availability of relief.” Id., at 733, n. 21.

II

For the reasons articulated by Justice Scalia in Sosa and by JUSTICE GORSUCH today, I am not certain that Sosa was correctly decided. See id., at 739–751 (Scalia, J., dissenting); post, at 2–5 (GORSUCH, J., concurring in part and concurring in judgment). But even taking that decision on its own terms, this Court should not create causes of action under the ATS against foreign corporate defendants. As part of Sosa’s second step, a court should decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife. Properly applied, that rule easily resolves the question presented by this case.51

Sosa interpreted the ATS to authorize the federal courts to create causes of action as a matter of federal common law. We have repeatedly emphasized that “in fashioning federal [common law] principles to govern areas left open by Congress, our function is to effectuate congressional policy.” United States v. Kimbell Foods, Inc., 440 U. S. 715, 738 (1979). Fidelity to congressional policy is not only prudent but necessary: Going beyond the bounds of Congress’s authorization would mean unconstitutionally usurping part of the “legislative Powers.” U. S. Const., Art. I, §1. Accordingly, the objective for courts in every case requiring the creation of federal common law must be “to find the rule that will best effectuate the federal policy.” Textile Workers v. Lincoln Mills of Ala., 353 U. S. 448, 457 (1957).

The ATS was meant to help the United States avoid diplomatic friction. The First Congress enacted the law to provide a forum for adjudicating that “narrow set of violations of the law of nations” that, if left unaddressed, “threaten[ed] serious consequences” for the United States. Sosa, 542 U. S., at 715; see also Brief for Professors of International Law et al. as Amici Curiae supra 7–12. Specifically, the First Congress was concerned about offenses like piracy, violation of safe conduct, and infringement of the rights of ambassadors, each of which “if not adequately redressed could rise to an issue of war.” Sosa, supra, at 715. That threat was existentially terrifying for the young Nation. See Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 123–124 (2013). To minimize the danger, the First Congress enacted the ATS, “ensur[ing] that the United States could provide a forum for adjudicating such incidents” and thus helping the Nation avoid further diplomatic imbroglios. Id., at 124; see ante, at 25 (majority opinion).

Putting that objective together with the rules governing federal common law generally, the following principle

1. *Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS. And since such a suit may generally be brought in federal court based on diversity jurisdiction, 28 U. S. C. §1332(a)(2), it is unclear why ATS jurisdiction would be needed in that situation.*
emerges: Federal courts should decline to create federal common law causes of action under Sosa’s second step whenever doing so would not materially advance the ATS’s objective of avoiding diplomatic strife. And applying that principle here, it is clear that federal courts should not create causes of action under the ATS against foreign corporate defendants. All parties agree that customary international law does not require corporate liability as a general matter. See Brief for Petitioners 30; Brief for Respondent 22; see also ante, at 17 (plurality opinion); post, at 3–4 (SOTOMAYOR, J., dissenting). But if customary international law does not require corporate liability, then declining to create it under the ATS cannot give other nations just cause for complaint against the United States.

To the contrary, ATS suits against foreign corporations may provoke—and, indeed, frequently have provoked—exactly the sort of diplomatic strife inimical to the fundamental purpose of the ATS. Some foreign states appear to interpret international law as foreclosing civil corporate liability for violations of the law of nations. See Brief for Government of the United Kingdom et al. as Amici Curiae in Kiobel v. Royal Dutch Petroleum Co., O. T. 2012, No. 10–1491, p. 14. Creating ATS causes of action against foreign corporate defendants would put the United States at odds with these nations. Even when states do not object to this sort of corporate liability as a legal matter, they may be concerned about ATS suits against their corporations for political reasons. For example, Jordan considers this suit “a direct affront” to its sovereignty and one that “risks destabilizing Jordan’s economy and undercutting one of the most stable and productive alliances the United States has in the Middle East.” Brief for Hashemite Kingdom of Jordan as Amicus Curiae 4. Courting these sorts of problems—which seem endemic to ATS litigation—was the opposite of what the First Congress had in mind.

In response, the dissent argues merely that any diplomatic friction “can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.” Post, at 19. Even on its own terms, that argument is problematic: Many of the “more tailored” tools offered by the dissent will still be hotly litigated by ATS plaintiffs, and it may be years before incorrect initial decisions about their applicability can be reviewed by the courts of appeals. See ante, at 11 (plurality opinion).

In any event, the dissent misunderstands the relevant standard. The question before us is whether the United States would be embroiled in fewer international controversies if we created causes of action under the ATS against foreign corporate defendants. Unless corporate liability would actively decrease diplomatic disputes, we have no authority to act. On that score, the dissent can only speculate that declining to create causes of action against foreign corporate defendants “might” lead to diplomatic friction. Post, at 30. But the dissent has no real-world examples to support its hunch, and that is not surprising; the ATS already goes further than any other statute in the world in granting aliens the right to sue civilly for violations of international law, especially in light of the many other avenues for relief available. See ante, at 23 (plurality opinion). It would be rather rich for any other nation to complain that the ATS does not go far enough. Indeed, no country has.

Finally, the dissent invokes “the considered judgment of the Executive Branch and Congress” that ATS suits against foreign corporations are “necessary ‘to help the United States avoid diplomatic friction.’” Post, at 31, n. 13. Tellingly, however, the dissent cannot muster a single source that actually supports that bold contention. Instead, the dissent immediately retreats to two far more modest assertions. First, the dissent observes that the Executive Branch and Congress have each taken steps to hold corporations liable for certain acts like terrorism. Post, at 31, n. 13. That is, of course, true, but it is also entirely irrelevant. Congress and the Executive Branch may be willing to trade off the risk of some diplomatic friction in exchange for the promotion of other objectives (such as “holding foreign corporations to account for certain egregious conduct,” ibid.). That is their prerogative as the political branches. But consistent with the separation of powers, we have neither the luxury nor the right to make such policy decisions ourselves.

Creating causes of action under the ATS against foreign corporate defendants would be a no-win proposition. Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those “serious consequences in international affairs” that the ATS was enacted to avoid. Sosa, 542 U. S., at 715. Under those circumstances, federal courts have a duty to refrain from acting. Although that may make it more difficult for aliens to hold foreign corporations liable for human rights abuses, we have repeatedly rejected the view that the ATS was meant to transform the federal courts into forums for the litigation of all human rights suits. See ante, at 8–9, 25–27 (majority opinion); Kiobel, 569 U. S., at 123–124; Sosa, supra, at 715–718. Declining to extend the ATS to foreign corporate defendants is thus not about “[i]mmunizing corporations that violate human rights,” post, at 34, but rather about furthering the purpose that the ATS was actually meant to serve—avoiding diplomatic strife.

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**Justice Gorsuch, concurring in part and concurring in the judgment.**

I am pleased to join the Court’s judgment and Parts I, II–B–1, and II–C of its opinion. Respectfully, though, I believe there are two more fundamental reasons why this lawsuit
must be dismissed. A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand. Not because the defendant happens to be a corporation instead of a human being. But because the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches. For reasons passing understanding, federal courts have sometimes treated the Alien Tort Statute as a license to overlook these foundational principles. I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability. And we should not meddle in disputes between foreign citizens over international norms. I write because I am hopeful that courts in the future might pause to consider both of these reasons for restraint before taking up cases like this one. Whatever powers courts may possess in ATS suits, they are powers judges should be doubly careful not to abuse.

I

First adopted in 1789, the current version of the ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. More than two hundred years later, the meaning of this terse provision has still “proven elusive.” Sosa v. Alvarez-Machain, 542 U. S. 692, 719 (2004). At the same time, this Court has suggested that Congress enacted the statute to afford federal courts jurisdiction to hear tort claims related to three violations of international law that were already embodied in English common law: violations of safe conducts extended to aliens, interference with ambassadors, and piracy. Id., at 715; 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (Blackstone); see also Bellia & Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445 (2011) (arguing that the ATS meant to supply jurisdiction over a slightly larger set of claims involving intentional torts by Americans against aliens).

In this case, the plaintiffs seek much more. They want the federal courts to recognize an entirely new cause of action, one that did not exist at the time of the statute’s adoption, one that Congress has never authorized. While their request might appear inconsistent with Sosa’s explanation of the ATS’s modest origin, the plaintiffs say that a caveat later in the opinion saves them. They point to a passage where the Court went on to suggest that the ATS may also afford federal judges “discretion [to] consider[ ] [creating] new cause[s] of action” if they “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [three] 18th century” torts the Court already described. 542 U. S., at 725.

I harbor serious doubts about Sosa’s suggestion. In our democracy the people’s elected representatives make the laws that govern them. Judges do not. The Constitution’s provisions insulating judges from political accountability may promote our ability to render impartial judgments in disputes between the people, but they do nothing to recommend us as policymakers for a large nation. Recognizing just this, our cases have held that when confronted with a request to fashion a new cause of action, “separation-of-powers principles are or should be central to the analysis.” Ziglar v. Abbasi, 582 U. S. ___, ___ (2017) (slip op., at 12). The first and most important question in that analysis is “is ‘who should decide’. . . . Congress or the courts?” and the right answer “most often will be Congress.” Ibid. Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts. Adopting new causes of action may have been a “proper function for common-law courts,” but it is not appropriate “for federal tribunals” mindful of the limits of their constitutional authority. Alexander v. Sandoval, 532 U. S. 275, 287 (2001) (internal quotation marks omitted).

Nor can I see any reason to make a special exception for the ATS. As Sosa initially acknowledged, the ATS was designed as “a jurisdictional statute creating no new causes of action.” 542 U. S., at 724; accord, ante, at 8 (majority opinion). And I would have thought that the end of the matter. A statute that creates no new causes of action . . . creates no new causes of action. To the extent Sosa continued on to claim for federal judges the discretionary power to create new forms of liability on their own, it invaded terrain that belongs to the people’s representatives and should be promptly returned to them. 542 U. S., at 747 (Scalia, J., concurring in part and concurring in judgment).2

But even accepting Sosa’s framework does not end the matter. As the Court acknowledges, there is a strong argument that “a proper application of Sosa would preclude courts from ever recognizing any new causes of action under the ATS.” Ante, at 19. I believe that argument is correct. For the reasons just described, separation of powers considerations ordinarily require us to defer to Congress in the creation of new forms of liability. This Court hasn’t yet used Sosa’s assertion of discretionary authority to recognize a new cause of action, and I cannot imagine a sound reason, hundreds of years after the statute’s passage, to start now. For a court inclined to claim the discretion to enter this field, it is a discretion best exercised by staying out of it.

2 The dissent claims that Congress’s decision to give federal courts “jurisdiction over claims based on ‘the law of nations,’ “ necessarily implies the authority to develop that law. Post, at 16. That does not follow. Federal courts have jurisdiction over all kinds of cases—for example, those arising under the law of torts or contracts. Yet following our decision in Erie R. Co. v. Tompkins, 304 U. S. 64 (1938), federal courts are generally no longer permitted to promulgate new federal common law causes of action in those areas. Id., at 75. I can see no reason to treat the law of nations differently. See Sosa v. Alvarez-Machain, 542 U. S. 692, 744–746 (2004) (Scalia, J., concurring in part and concurring in judgment).
The context in which any Sosa discretion would be exercised confirms the wisdom of restraint. Sosa acknowledged that any decision to create a new cause of action would “inevitably [involve] an element of judgment about the practical consequences” that might follow. Id., at 732–733. But because the point of such a claim would be to vindicate “a norm of international character,” id., at 725, those “practical consequences” would likely involve questions of foreign affairs and national security—matters that implicate neither judicial expertise nor authority. It is for Congress to “define and punish . . . Offences against the Law of Nations” and to regulate foreign commerce. U. S. Const., Art. I., §8. And it is for the President to resolve diplomatic disputes and command the armed forces. Art. II, §§2–3. Foreign policy and national security decisions are “delicate, complex, and involve large elements of prophecy” for which “the Judiciary has neither aptitude, facilities[,] nor responsibility.” Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp., 333 U. S. 103, 111 (1948) (Jackson, J.). And I find it difficult to imagine a case in which a federal court might safely conclude otherwise.

Take this very lawsuit by way of example. The Kingdom of Jordan considers it to be “a grave affront to its sovereignty,” and the State Department worries about its foreign policy implications. Ante, at 26. Whether American interests justify the “practical consequence” of offending another nation in this way (or in worse ways yet) is a question that should be addressed “only by those directly responsible to the people whose welfare” such decisions “advance or imperil.” Waterman S. S. Corp., supra, at 111. So while I have no quarrel with the dissent’s observation, post, at 15–16, that lower federal courts are not free to overrule Sosa’s framework or treat it as optional, I do know that the analysis Sosa requires should come out the same way in virtually every case. If Sosa is right—and I am sure it is—that federal courts must “inevitably” exercise “an element of judgment” about delicate questions of foreign affairs when deciding whether to create a new cause of action, then judges should exercise good judgment by declining the project before we create real trouble.

Another independent problem lurks here. This is a suit by foreigners against a foreigner over the meaning of international norms. Respectfully, I do not think the original understanding of the ATS or our precedent permits federal courts to hear cases like this. At a minimum, both those considerations and simple common sense about the limits of the judicial function should lead federal courts to require a domestic defendant before agreeing to exercise any Sosa-generated discretion to entertain an ATS suit.

Start with the statute. What we call the Alien Tort Statute began as just one clause among many in §9 of the Judiciary Act of 1789, which specified the jurisdiction of the federal courts. 1 Stat. 76–78. The ATS clause gave the district courts “cognizance, concurrent with the courts of the several States, or the circuit courts, as the case maybe, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Like today’s recodified version, 28 U. S. C. §1350, the original text of the ATS did not expressly call for a U. S. defendant. But I think it likely would have been understood to contain such a requirement when adopted.

That is because the First Congress passed the Judiciary Act in the shadow of the Constitution. The Act created the federal courts and vested them with statutory authority to entertain claims consistent with the newly ratified terms of Article III. Meanwhile, under Article III, Congress could not have extended to federal courts the power to hear just any suit between two aliens (unless, for example, one was a diplomat). Diversity of citizenship was required. So, because Article III’s diversity-of-citizenship clause calls for a U. S. party, and because the ATS clause requires an alien plaintiff, it follows that an American defendant was needed for an ATS suit to proceed.

Precedent confirms this conclusion. In Mossman v. Higginson, 4 Dall. 12, 14 (1800), this Court addressed the meaning of a neighboring provision of the Judiciary Act. Section 11 gave the circuit courts power to hear, among other things, civil cases where “an alien is a party.” 1 Stat. 78. As with §9, you might think §11’s language could be read to permit a suit between aliens. Yet this Court held §11 must instead be construed to refer only to cases “where, indeed, an alien is one party, but a citizen is the other.” Mossman, 4 Dall., at 14 (internal quotation marks omitted). That was necessary, Mossman explained, to give the statute a “construction[n] consistent” with the diversity-jurisdiction clause of Article III. Ibid. And as a matter of precedent, I cannot think of a good reason why that same analysis would not apply in this case.

3. “Sec. 9. And be it further enacted. That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.” 1 Stat. 76–77 (some emphasis added; footnotes omitted).
reason why we would now read §9 differently than Mossman read §11. Like cases are, after all, supposed to come out alike. See Sarei v. Rio Tinto, PLC, 671 F. 3d 736, 828 (CA9 2011) (Ikuta, J., dissenting) ("Mossman’s analysis of §11 is equally applicable to §9. . . . ATS does not give federal courts jurisdiction to hear international law claims between two aliens"), vacated and remanded, 569 U.S. 945 (2013).

Nor does it appear the ATS meant to rely on any other head of Article III jurisdiction. You might wonder, for example, if the First Congress considered a “violation of the law of nations” to be a violation of, and thus “arise under,” federal law. But that does not seem likely. At the founding, the law of nations was considered a distinct “system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world,” 4 Blackstone 66. While this Court has called international law “part of our law,” The Paquete Habana, 175 U.S. 677, 700 (1900), and a component of the “law of the land,” The Nereide, 9 Cranch 388, 423 (1815), that simply meant international law was no different than the law of torts or contracts—it was “part of the so-called general common law,” but not part of federal law. Sosa, 542 U. S., at 739–740 (opinion of Scalia, J.). See Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 824, 849–850 (1997); see also Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int’l L. 365, 374–375 (2002). The text of the Constitution appears to recognize just this distinction. Article I speaks of “Offences against the Law of Nations,” while both Article III and Article VI’s Supremacy Clause, which defines the scope of pre-emptive federal law, omit that phrase while referring to the “Laws of the United States.” Congress may act to bring provisions of international law into federal law, but they cannot find their way there on their own. “The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States.” Caperton v. Bowyer, 14 Wall. 216, 228 (1872).

Even so, that hardly left the ATS without important work to perform. At the time of the founding, “[i]f a nation failed to redress injuries by its citizens upon the citizens of another nation, the perpetrators’ nation violated the ‘perfect rights’ of the other nation,” which “provided the offended nation with just cause for reprisals or war.” Bellia & Clark, 78 U. Chi. L. Rev., at 476.4 This reality posed an existential threat to the new nation. Under the Articles of Confederation, States regularly refused to redress injuries their citizens caused foreigners. British creditors, for example, often found their efforts to collect debts from American debtors thwarted. Id., at 498–501. Seeking to remedy these and similar problems, the Continental Congress in 1781 passed a resolution encouraging the States, among other things, to establish tribunals for vindicating “offences against the law of nations” and to “authorise suits to be instituted for damages by the party injured.” Id., at 495–496. But the States did too little, too late. So when the framers gathered to write the Constitution they included among their chief priorities endowing the national government with sufficient power to ensure the country’s compliance with the law of nations. See 1 Records of the Federal Convention of 1787, pp. 24–25 (M. Farr and rev.1966).

Together with other provisions of the Judiciary Act, the ATS served that purpose. The law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants, whether “through criminal punishment, extradition, or a civil remedy.” Bellia & Clark, 78 U. Chi. L. Rev., at 509. Yet in 1789 this country had no comprehensive criminal code and no extradition treaty with Great Britain. Id., at 509–510. Section 11 achieved a partial solution to the problem by permitting civil diversity suits in federal court between aliens and domestic parties, but that provision required at least $500 in controversy. 1 Stat. 78; cf. 28 U. S. C. §1332(a) (today’s minimum is $75,000). But, as Professors Bellia and Clark have explained, “[i]f Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that US citizens inflicted upon aliens resulting in less than $500 in damages.” 78 U. Chi. L. Rev., at 509. So the ATS neatly filled the remaining gap by allowing aliens to sue in federal court for a tort in violation of the law of nations regardless of the amount in controversy. One obvious advantage of this solution was “that it was self-executing—it placed the burden on injured aliens to bring suit and did not require the still-forming US government immediately to marshal the resources necessary to prosecute crimes” or aid extraditions. Id., at 510.

Any attempt to decipher a cryptic old statute is sure to meet with challenges. For example, one could object that this reading of the Act does not assign to the ATS the work of addressing assaults by aliens against foreign ambassadors on our soil, even though Sosa suggested the statute was enacted partly in response to precisely such a case: the “Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia.” 542 U. S., at 716. Many thought that the States’ failure to provide a forum for relief to the foreign minister was a scandal and part of what prompted the framers of the Constitution to strengthen

4. As a leading treatise explained, a sovereign “ought not to suffer his subjects to molest the subjects of others, or to do them an injury, much less should he permit them audaciously to offend foreign powers.” E. de Vattel, 1 The Law of Nations, bk. II, §76, p. 145 (1760). Instead, the nation “ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it, to deliver him up to the offended state there to receive justice.” Ibid. A sovereign who “refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.” Id., §77, at 145; see also Bellia & Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 472–477 (2011).
the national government. Id., at 717; Bellia & Clark, supra, at 467 (“The Confederation’s inability to remedy or curtail violations like these was a significant factor precipitating the Federal Convention of 1787”).

But worries along these lines may be misplaced. The ATS was never meant to serve as a freestanding statute, only as one clause in one section of the Judiciary Act. So even if you think something in the Judiciary Act must be interpreted to address the Marbois incident, that doesn’t mean it must be the ATS clause. And, as it happens, a different provision of the Act did deal expressly with the problem of ambassadorial assaults: Section 13 conferred on this Court “original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party.” 1 Stat. 80–81. That implemented Article III’s provision empowering us to hear suits “affecting Ambassadors, other public ministers and Consuls.” §2. And given that §13 deals with the problem of “ambassadors” so directly, it is unclear why we must read §9 to address that same problem. See Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830, 855–858 (2006).

Along different but similar lines, some might be concerned that requiring a U. S. defendant in ATS suits would leave the problem of piracy inadequately addressed, given that Sosa suggested that piracy was one of the three offenses the ATS may have meant to capture, and many pirates were foreigners. See 542 U. S., at 719. But here the response is much the same. A separate clause of §9 gave the district courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.” 1 Stat. 77. That statute long has been given broad construction covering “all maritime contracts, torts and injuries,” DeLovio v. Boit, 7 F. Cas. 418, 442 (No. 3,776) (CC Mass. 1815) (Story, J.), along with “prize jurisdiction, which probably included almost all ‘piracy’ cases after 1789,” Lee, supra, at 867. So it is not clear why it’s necessary to cram the problem of piracy into the ATS. If anything, it may be necessary not to do so. Structural features of §9 make it at least questionable that both provisions were meant to address the same subject matter: Cases falling within §9’s ATS clause could also be brought in state court or in the circuit courts, 1 Stat. 77, while §9’s admiralty jurisdiction was generally exclusive, id., at 76–77. See Lee, supra, at 868. And the two provisions also called for incompatible procedures: Section 9 required jury trials “in all causes except civil causes of admiralty and maritime jurisdiction.” 1 Stat. 77 (emphasis added).

If doubt lingers on these historical questions, it is a doubt that should counsel restraint all the same. Even if the ATS might have meant to allow foreign ambassadors to sue foreign defendants, or foreign plaintiffs to sue foreign pirates, what would that prove about more mine-run cases like ours, where none of those special concerns are implicated? There are at least serious historical arguments suggesting the ATS was not meant to apply to suits like this one. And to the extent Sosa affords courts discretion to proceed, these arguments should inform any decision whether to exercise that discretion. In Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 116–117 (2013), the Court invoked Sosa discretion to refuse to hear cases involving foreign conduct. I can see no reason why courts should respond differently when it comes to cases involving foreign defendants.5

Any consideration of Sosa’s discretion must also account for proper limits on the judicial function. As discussed above, federal courts generally lack the institutional expertise and constitutional authority to oversee foreign policy and national security, and should be wary of straying where they do not belong. See supra, at 4–5. Yet there are degrees of institutional incompetence and constitutional evil. It is one thing for courts to assume the task of creating new causes of action to ensure our citizens abide by the law of nations and avoid reprisals against this country. It is altogether another thing for courts to punish foreign parties for conduct that could not be attributed to the United States and thereby risk reprisals against this country. If a foreign state or citizen violates an “international norm” in a way that offends another foreign state or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best, the political branches may choose to look the other way. But in all events, the decision to impose sanctions in disputes between foreigners over international norms is not ours to make. It is a decision that belongs to those answerable to the people and assigned by the Constitution to defend this nation. If they wish our help, they are free to enlist it, but we should not ever be in the business of elbowing our way in.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE KAGAN join, dissenting.

The Court today holds that the Alien Tort Statute (ATS), 28 U. S. C. §1350, categorically forecloses foreign corporate liability. In so doing, it absolves corporations from responsibility under the ATS for conscience-shocking behavior. I disagree both with the Court’s conclusion and its analytic approach. The text, history, and purpose of the ATS, as well

5. The dissent is wrong to suggest, post, at 17, that Sosa “forecloses” the possibility of recognizing a U. S.-defendant requirement in ATS cases. Sosa said nothing about the subject. And were Sosa taken to preclude any future limits on ATS suits it did not itself anticipate, then Kiobel must have been wrong to apply the canon against extra-territorial application to that statute. But that is not so. The dissent also observes that Sosa “involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico,” and that certain amici in Sosa filed briefs arguing that the Court lacked authority over the ATS claims for that reason. See post, at 17. But Sosa did not address those arguments; questions that “merely lurk in the record are not resolved, and no resolution of them may be inferred.” Illinois Bd. of Elections v. Socialist Workers Party, 440 U. S. 173, 183 (1979) (citations and internal quotation marks omitted); accord, RJR Nabisco, Inc. v. European Community, 579 U. S. ___, ___ (2016) (slip op., at 23, n. 10) (issue present but unaddressed by the Court in a previous case was not implicitly decided).
as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS. Nothing about the corporate form in itself raises foreign-policy concerns that require the Court, as a matter of common-law discretion, to immunize all foreign corporations from liability under the ATS, regardless of the specific law-of-nations violations alleged. I respectfully dissent.

I

The plurality assumes without deciding that whether corporations can be permissible defendants under the ATS turns on the first step of the two-part inquiry set out in Sosa v. Alvarez-Machain, 542 U. S. 692 (2004). But by asking whether there is “a specific, universal, and obligatory norm of liability for corporations” in international law, ante, at 13, the plurality fundamentally misconceive show international law works and so misapplies the first step of Sosa.

A

In Sosa, the Court considered whether a Mexican citizen could recover under the ATS for a claim of arbitrary detention by a Mexican national who had been hired by the Drug Enforcement Administration to seize and transport him to the United States. See 542 U. S., at 697–698. The Court held that the ATS permits federal courts to “recognize private causes of action for certain torts in violation of the law of nations,” id., at 724, without the need for any “further congressional action,” id., at 712. The Court then articulated a two-step framework to guide that inquiry. First, a court must determine whether the particular international-law norm alleged to have been violated is “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” i.e., “violation of safe conduct[s], infringement of the rights of ambassadors, and piracy.” Id., at 724–725. Only if the norm is “‘specific, universal, and obligatory,’” may federal courts recognize a cause of action for its violation. Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 117 (2013) (quoting Sosa, 542 U. S., at 732). Second, if that threshold hurdle is satisfied, a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion. Sosa, 542 U. S., at 727–728, 732–733, 738. Applying that framework, Sosa held that the alleged arbitrary detention claim at issue failed at step one because “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” Id., at 738.

Sosa’s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors. See id., at 714–715; 1 Restatement (Third) of Foreign Relations Law of the United States, pt. II, Intro-
ductory Note, pp. 70–71 (1987) (Restatement). Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture. See 2 Restatement §702. Substantive prohibitions like these are the norms at which Sosa’s step-one inquiry is aimed and for which Sosa requires that there be sufficient international consensus.

Sosa does not, however, demand that there be sufficient international consensus with regard to the mechanisms of enforcing these norms, for enforcement is not a question with which customary international law is concerned. Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems. See, e.g., L. Henkin, Foreign Affairs and the United States Constitution 245 (2d ed.1996) (“International law itself . . . does not require any particular reaction to violations of law”); Denza, The Relationship Between International and National Law, in International Law 423 (M. Evans ed. 2006) (“[I]nternational law does not itself prescribe how it should be applied or enforced at the national level”); 1 Restatement §111, Comment h (“In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations”); Brief for International Law Scholars as Amici Curiae 9–10.

In keeping with the nature of international law, Sosa consistently used the word “norm” to refer to substantive conduct. For example, Sosa commands that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.” 542 U. S., at 732. That statement would make little sense if “norm” encompassed enforcement mechanisms like “corporate liability.” Unlike “the prohibition on genocide,” “corporate liability” cannot be violated. Moreover, “the historical paradigms familiar when §1350 was enacted” are all prohibitions on conduct, and Sosa clearly contemplated that courts should compare the charged conduct with the historical conduct. See ibid. (quoting Filartiga v. Pena-Irala, 630 F. 2d 876 (1980), where the Court of Appeals for the Second Circuit compared a “torturer” to “the pirate and slave trader before him.”) id., at 890, and Judge Edwards’ concurrence in Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774 (CADC 1984), which suggested that the “‘limits of section 1350’sreach’” be defined by “‘a handful of heinous actions—each of which violates definable, universal and obligatory norms,’” id., at 781. There is no indication in Sosa that the Court also intended for courts to undertake the apples-to-oranges comparison of the conduct proscribed under customary international law and the forms of liability available under domestic law. The text of the ATS also reflects this distinction between prohibiting conduct and determining enforcement. The stat-
ute provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. The phrase “of the law of nations” modifies “violation,” not “civil action.” The statutory text thus requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically and universally practices or endorses.

B

I

The plurality nonetheless allies itself with the view that international law supplies the rule of decision in this case based on its reading of footnote 20 in

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-Petroleum Co.

-Sosa

that, with respect to the particular conduct prohibited under “a given norm,” the type of defendant being sued can be alleged to have violated that specific norm. 542 U. S., at 732, n. 20. Because footnote 20 contemplates a norm-specific inquiry, not a categorical one, it is irrelevant to the categorical question presented here. Assuming the prohibition against financing of terrorism is sufficiently “specific, universal, and obligatory” to satisfy the first step of

-Sosa

a question on which I would remand to the Court of Appeals, nothing in international law suggests a corporation may not violate it.7

6. This distinction is similar to the state-action doctrine in domestic law. The prohibitions in the Bill of Rights, for instance, apply only to state actors, whereas the Thirteenth Amendment’s prohibition on slavery applies to all actors, state and private. See

-United States v. Kozinski

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The plurality briefly acknowledges this critique of its reading of footnote 20, but nonetheless assumes the correctness of its approach because of its view that there exists a "distinction in international law between corporations and natural persons." *Ante*, at 17. The plurality attempts to substantiate this proposition by pointing to the charters of certain international criminal tribunals and noting that none was given jurisdiction over corporate defendants. That argument, however, confuses the substance of international law with how it has been enforced in particular contexts.

Again, the question of who must undertake the prohibited conduct for there to be a violation of an international-law norm is one of international law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states. Sometimes, states act collectively and establish international tribunals to punish certain international-law violations. Each such tribunal is individually negotiated, and the limitations placed on its jurisdiction are typically driven by strategic considerations and resource constraints.

For example, the Allies elected not to prosecute corporations at Nuremberg because of pragmatic factors. Those factors included scarce judicial resources, a preference of the occupation governments to swiftly dismantle the most culpable German companies without destroying Germany’s postwar economy, and a desire to focus on establishing the principle of nonstate criminal responsibility for human-rights violations. See Brief for Nuremberg Scholars as *Amici Curiae* 4, 11–13.

More recently, the delegations that negotiated the Rome Statute of the International Criminal Court in the 1990’s elected not to extend that tribunal’s jurisdiction to corporations in part because states had varying domestic practices as to whether and how to impose criminal liability on corporations. See Frulli, Jurisdiction *Rattoni Personae*, in 1 Rome Statute of the International Criminal Court 527, 532–533 (A. Cassese et al. eds. 2002); Brief for Ambassador David J. Scheffer as *Amicus Curiae* 8–10.

Taken to its natural conclusion, the plurality’s focus on the practice of international criminal tribunals would prove too much. No international tribunal has been created and endowed with the jurisdiction to hold natural persons civilly (as opposed to criminally) liable, yet the majority and respondent accept that natural persons can be held liable under the ATS. See *ante*, at 26; Tr. of Oral Arg. 62. It cannot be persuasive evidence for purposes of ascertaining the availability of corporate civil liability under the ATS, then, that the jurisdiction of the handful of international criminal tribunals that states have seen fit to create in the last 75 years has not extended to corporate defendants.

Ultimately, the evidence on which the plurality relies does not prove that international law distinguishes between corporations and natural persons as a categorical matter. To the contrary, it proves only that states’ collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants.

In fact, careful review of states’ collective and individual enforcement efforts makes clear that corporations are subject to certain obligations under international law. For instance, the United States Military Tribunal that prosecuted several corporate executives of IG Farben declared that corporations could violate international law. See 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Council Control Law No. 10, p. 1132(1952) ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law"). Similarly, the International Criminal Tribunal for Rwanda found that three nonnatural entities—a private radio station, newspaper, and political party—were responsible for genocide. See *Prosecutor v. Nahimana*, Case No. ICTR–99–52–T, Judgment and Sentence ¶953 (Dec. 3, 2003). Most recently, the appeals panel of the Special Tribunal for Lebanon held that corporations may be prosecuted for contempt. See *Prosecutor v. New TV S. A. L.*., Case No. STL–14–05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings ¶74 (Oct. 2, 2014).

In addition, various international agreements require signatory states to impose liability on corporations for certain conduct. Of particular relevance here, the International Convention for the Suppression of the Financing of Terrorism provides: “Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” an act of terrorism. Dec. 9, 1999, Art. 2, S. Treaty Doc. No. 106–49, 2178 U. N. T. S. 230. It then requires each signatory state, “in accordance with its domestic legal principles,” to “take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity,” violated the Convention. *Id.*, Art. 5(1). The Convention provides that

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8. The Nuremberg Tribunal also was empowered to adjudicate a form of criminal organizational liability, pursuant to which an individual member of a convicted organization would face a rebuttable presumption of guilt in a subsequent proceeding. Brief for Nuremberg Scholars as *Amici Curiae* 4, 20–21 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Arts. 9–10, 59 Stat. 1544, E. A. S. No. 472; see also Brief for Nuremberg Scholars 21–22 (citing *United States v. Goering*, 22 Trial of the Major War Criminals Before the International Military Tribunal 171, 505, 511, 516–517 (Int’l Mil. Trib. 1946) (declaring three organizations criminal)).

answer international law furnishes is that it takes no position on the question"). Nor does domestic law. The text, history, and purpose of the ATS plainly support the conclusion that corporations may be held liable.

Beginning “with the language of the statute itself,” United States v. Ron Pair Enterprises, Inc., 489 U. S. 235, 241 (1989), two aspects of the text of the ATS make clear that the statute allows corporate liability. First, the text confines jurisdiction on federal district courts to hear “civil action[s]” for “tort[s].” 28 U. S. C. §1350. Where Congress uses a term of art like tort, “it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” Morissette v. United States, 342 U. S. 246, 263 (1952).

Corporations have long been held liable in tort under the federal common law. See Philadelphia, W., & B. R. Co. v. Quigley, 21 How. 202, 210 (1859) (“At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety”); Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawle 6, 17 (Pa. 1818) (“[F]rom the earliest times to the present, corporations have been held liable for torts”). This Court “has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules.” Meyer v. Holley, 537 U. S. 280, 285 (2003). The presumption, then, is that, in providing for “tort” liability, the ATS provides for corporate liability.

Second, whereas the ATS expressly limits the class of permissible plaintiffs to “alien[s],” §1350, it “does not distinguish among classes of defendants,” Argentine Republic v. Amerada Hess Shipping Corp., 488 U. S. 428, 438 (1989). That silence as to defendants cannot be presumed to be inadvertent. That is because in the same section of the Judiciary Act of 1789 as what is now the ATS, Congress provided the federal district courts with jurisdiction over “all suits against consuls or vice-consuls.” §9, 1 Stat.76–77. Where Congress wanted to limit the range of permissible defendants, then, it clearly knew how to do so. Russello v. United States, 464 U. S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (internal quotation marks omitted)).

Nothing about the historical background against which the ATS was enacted rebuts the presumption that the statute incorporated the accepted principle of corporate liability for tortious conduct. Under the Articles of Confederation, the Continental Congress was unable to provide redress to foreign citizens for violations of treaties or the law of nations, which threatened to undermine the United States’ relation-

“[s]uch liability may be criminal, civil, or administrative,” ibid., so long as the penalties, which can include monetary sanctions, are “effective, proportionate and dissuasive.” Id., Art. 5(3). The United States is a party to the Convention, along with 131 other states.10

The plurality dismisses the relevance of this Convention because it does not require states parties to hold corporations liable in common-law tort actions, but rather permits them to “fulfill their obligations . . . by adopting detailed regulatory regimes governing financial institutions.” Ante, at 16. That critique misses the point. The significance of the Convention is that the international community agreed that financing terrorism is unacceptable conduct and that such conduct violates the Convention when undertaken by corporations. That the Convention leaves up to each state party how to impose liability on corporations, e.g., via erecting a regulatory regime, providing for tort actions, or imposing criminal sanctions, is unremarkable,11 and simply reflects that international law sets out standards of conduct and leaves it to individual states to determine how best to enforce those standards.

Finally, a number of states, acting individually, have imposed criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems. See, e.g., New TV S. A. L., Case No. STL–14– 05/PT/AP/ AR126.1, ¶¶52–55 (listing more than 40 countries that provide for corporate criminal liability); A. Ramasastry & R. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law 22–24 (2006), available athttps://www.biicl.org/files/4364_536.pdf (noting that 15 of 16 countries surveyed permit civil claims against corporations for human rights violations); Brief for Comparative Law Scholars and Practitioners as Amici Curiae 15–19 (detailing provisions creating corporate civil liability for international-law violations in England, France, the Netherlands, and Canada).

C

Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. As explained above, international law provides no such reason. See Kioebel, 621 F. 3d, at 175 (Leval, J., concurring in judgment) (“[T]he


11. The Genocide Convention also does not specifically require that states parties recognize tort claims for genocide, but federal courts have long permitted such actions under the ATS as a matter of federal common law. See, e.g., Kadic, 70 F. 3d, at 236. The same is true of the Torture Convention. See, e.g., Filartiga v. Pena-Irala, 630 F. 2d 876, 885 (CA2 1980).
ships with other nations. See Kiobel, 569 U. S., at 123. The First Congress responded with, inter alia, the ATS. Although the two incidents that highlighted the need to provide foreign citizens with a federal forum in which to pursue their grievances involved conflicts between natural persons, see ante, at 7 (majority opinion) (describing the assault by a French adventurer on the Secretary of the French Legation and the arrest of one of the Dutch Ambassador’s servants by a New York constable), there is “no reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so,” Doe v. Exxon Mobil Corp., 654 F. 3d 11, 47 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7(CADC 2013); see also Brief for United States as Amicus Curiae 6 (“The ATS was enacted to ensure a private damages remedy for incidents with the potential for serious diplomatic consequences, and Congress had no good reason to limit the set of possible defendants in such actions to potentially judgment-proof individuals”). Indeed, foreclosing corporations from liability under the ATS would have been at odds with the contemporaneous practice of imposing liability for piracy on ships, juridical entities. See, e.g., Skinner v. East India Co., 6 State Trials 710, 711 (1666); The Marianna Flora, 11 Wheat. 1, 40–41 (1826); Harmony v. United States, 2 How. 210, 233 (1844).

Finally, the conclusion that corporations may be held liable under the ATS for violations of the law of nations is not of recent vintage. More than a century ago, the Attorney General acknowledged that corporations could be held liable under the ATS. See 26 Op. Atty. Gen. 250, 252(1907) (stating that citizens of Mexico could bring a claim under the ATS against a corporation, the American Rio Grande Land and Irrigation Company, for violating provisions of a treaty between the United States and Mexico).

D

In his concurrence, JUSTICE GORSUCH urges courts to exercise restraint in recognizing causes of action under the ATS. But whether the ATS provides a cause of action for violations of the norms against genocide, crimes against humanity, and financing of terrorism is not the question the parties have asked the Court to decide. I therefore see no reason why it is necessary to delve into the propriety of creating new causes of action. Nevertheless, because I disagree with the premises on which the concurrence relies, I offer two brief observations.

First, JUSTICE GORSUCH says it “pass[es] understanding” why federal courts have exercised jurisdiction over ATS claims raised by foreign plaintiffs against foreign defendants for breaches of international norms. See ante, at 1 (opinion concurring in part and concurring in judgment). Modern ATS cases, however, are not being litigated against a blank slate. The Court held in Sosa that Congress authorized the federal courts to “recognize private causes of action for certain torts in violation of the law of nations.” 542 U. S., at 724, so long as the underlying norm had no “less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted,” id., at 732. That holding was no mere “suggestion,” ante, at 2 (opinion of GORSUCH, J.), as this Court has made clear. See Kiobel, 569 U. S., at 116–117.

Given that the First Congress authorized suit for violations based on “the law of nations” and “treat[ies] of the United States,” 28 U. S. C. §1350, it is natural to conclude that Congress intended the district courts to consider new claims under the law of nations as that law and our Nation’s treaty obligations continued to develop. If Congress intended to limit such cases to violations of safe conduct, assaults against ambassadors, piracy, and—as JUSTICE GORSUCH suggests may have been the case—“personal injuries that US citizens inflicted upon aliens resulting in less than $500 in damages,” ante, at 10 (quoting Bellia &Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 509 (2011)), it easily could have said so. Instead, it granted the federal courts jurisdiction over claims based on “the law of nations,” a body of law that Congress did not understand to be static. See United States v. The La Jeune Eugenie, 26 F. Cas. 832, 846 (No. 15,551) (CC Mass. 1822) (Story, J.) (“What, therefore, the law of nations is . . . may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations”).

The question for courts considering new ATS claims is, “Who are today’s pirates?” Kiobel, 569 U. S., at 129 (BREYER, J., concurring in judgment). Torturers and those who commit genocide are now fairly viewed, like pirates, as “common enemies of all mankind.” Id., at 131 (internal quotation marks omitted). On remand, the Court of Appeals would decide whether the financiers of terrorism are the same. The fact that few norms have overcome Sosa’s high hurdle is strong evidence that the carefully considered standard set forth in that case is generating exactly the kind of “judicial caution” the Court stressed as necessary. See 542 U. S., at 725.

Second, the concurrence suggests that federal courts may lack jurisdiction to entertain suits between aliens based solely on a violation of the law of nations. It contends that ATS suits between aliens fall under neither the federal courts’ diversity jurisdiction nor our federal question jurisdiction. The Court was not unaware of this argument when it decided Sosa. As noted, that case involved an ATS suit brought by a citizen of Mexico against a citizen of Mexico, and various amici argued that the Court lacked Article III jurisdiction over such suits. See Brief for National Foreign Trade Counsel et al. as Amici Curiae in Sosa v. Alvarez-Machain, O. T. 2003, No. 03– 339,
pp. 24–25; see also Brief for Washington Legal Foundation et al. as Amici Curiae in No. 03–339, pp. 14–21. The Court nonetheless proceeded to decide the case, which it could not have done had it been concerned about its Article III power to do so. See Arbaugh v. Y & H Corp., 546 U. S. 500, 514 (2006). That decision forecloses the argument the confluence now makes, as Sosa authorized courts to “recognize private claims under federal common law for violations of ” certain international law norms. 542 U. S., at 732 (emphasis added); see also id., at 729–730 (explaining that, post-Erie R. Co. v. Tompkins, 304 U. S. 64 (1938), there are “limited enclaves in which federal courts may derive from substantive law in a common law way,” including the law of nations, and that “it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism”); Sarei v. Rio Tinto, 671 F. 3d 736, 749–754 (CA9 2011) (en banc) (discussing Sosa and concluding that federal courts have Article III jurisdiction to hear ATS cases between aliens), vacated and remanded, 569 U. S. 945 (2013) (remanding for further consideration in light of Kiobel).

Sosa was correct as a legal matter. Moreover, our Nation has an interest not only in providing a remedy when our own citizens commit law of nations violations, but also in preventing our Nation from serving as a safe harbor for today’s pirates. See Kiobel, 569 U. S., at 133–134 (Breyer, J., concurring in judgment). To that end, Congress has ratiﬁed treaties requiring the United States “to punish or extra- dite offenders, even when the offense was not committed . . . by a national.” 1 Restatement §404, Reporters’ Note 1, at 255–257; see Torture Convention, Arts. 5, 7; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Art. 3, Dec. 14, 1973, 28 U. S. T. 1975, T. I. A. S. No. 8532; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U. S. T. 565, T. I. A. S. No.7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Art. 4, Dec. 16, 1970, 22 U. S. T. 1641, T. I. A. S. No. 7192; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 6 U. S. T. 3316, T. I. A. S. No. 3364. To the extent suits against foreign defendants may lead to international friction, that concern is better addressed under the presumption the Court established in Kiobel against extraterritorial application of the ATS, see 569 U. S., at 124–125, than it is by litigating settled precedent.

II

At its second step, Sosa cautions that courts should consider whether permitting a case to proceed is an appropriate exercise of judicial discretion in light of potential foreign-policy implications. See 542 U. S., at 727–728, 732–733, 738. The plurality only assumes without deciding that interna- tional law does not impose liability on corporations, so it necessarily proceeds to Sosa’s second step. Here, too, its analysis is flawed.

A

Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions. Each source of diplomatic friction that respondent Arab Bank and the plurality identify can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.

Arab Bank contends that foreign citizens should not be able “to sue a Jordanian corporation in New York for events taking place in the Middle East.” Brief for Respondent 42. The heart of that qualm was already addressed in Kiobel, which held that the presumption against extraterritoriality applies to the ATS. 569 U. S., at 124. Only where the claims “touch and concern the territory of the United States . . . with sufficient force” can the presumption be displaced. Id., at 124–125. “[M]ere corporate presence” does not sufﬁce. Id., at 125. Thus, contrary to the majority’s contention, “the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States” does not “well illustrat[e] the perils of extending the scope of ATS liability to foreign multinational corporations,” ante, at 25, but merely illustrates the risks of extending the scope of ATS liability extraterritorially absent sufﬁcient connection to the United States.

Arab Bank also bemoans the unfairness of being sued when others—namely, the individuals and organizations that carried out the terrorist attacks—were “the direct cause” of the harm petitioners here suffered. Brief for Respondent 41. That complaint, though, is a critique of the imposition of li- ability for ﬁnancing terrorism, not an argument that ATS suits against corporations generally necessarily cause diplomatic tensions.

Arab Bank further expresses concern that ATS suits are being ﬁled against corporations in an effort to recover for the bad acts of foreign governments or ofﬁcials. See id., at 40. But the Bank’s explanation of this problem reveals that the true source of its grievance is the availability of aiding and abetting liability. See ibid. (“[N]umerous ATS suits have alleged that a corporation has aided or abetted bad acts committed by a foreign government and its ofﬁcials” (emphasis in original)); id., at 41 (“[A]iding and abetting suits under the ATS have given plaintiffs ‘a clear means for effectively circumventing’ critical limits on foreign sovereign immunity” (quoting Brief for United States as Amicus Curiae in American Isuzu Motors, Inc. v. Ntsebeza, O. T. 2007, No. 07–919, p. 15)). The plurality too points to an aiding and abetting case to support its contention that plaintiffs “use corporations as surrogate defendants to challenge the conduct of foreign gov- ernments.” Ante, at 21 (discussing Kiobel, in which plaintiffs sought to hold a corporate defendant liable for “‘aiding and abetting the Nigerian Government in committing’” law-of-
nations violations (quoting 569 U. S., at 114)). Yet not all law-of-nations violations asserted against corporations are premised on aiding and abetting liability; it is possible for a corporation to violate international-law norms independent of a foreign state or foreign state officials. In this respect, too, the Court’s rule is ill fitted to the problem identified.

Notably, even the Hashemite Kingdom of Jordan does not argue that there are foreign-policy tensions inherent in suing a corporation generally. Instead, Jordan contends that this particular suit is an affront to its sovereignty because of its extraterritorial character and because of the role that Arab Bank specifically plays in the Jordanian economy. See Brief for Hashemite Kingdom of Jordan as Amicus Curiae 6–12.12

The majority also cites to instances in which other foreign sovereigns have “appeared in this Court to note[their] objections to ATS litigation,” ante, at 26, but none of those objections was about the availability of corporate liability as a general matter. See Sosa, 542 U. S., at 733, n. 21 (noting argument of the European Commission that “basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals”); ibid. (noting objections by South Africa to “several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid” on the basis that the cases “interfer[e]d with the policy embodied by its Truth and Reconciliation Commission”); Brief for Federal Republic of Germany as Amicus Curiae in Kiobel v. Royal Dutch Petroleum Co., O. T. 2012, No. 10–1491, p. 1 (“The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens’ claims against foreign defendants for alleged foreign activities that caused injury on foreign soil”); Brief for Government of the United Kingdom of Great Britain and Northern Ireland et al. as Amici Curiae in No. 10–1491, p. 3 (“The Governments remain deeply concerned about . . . suits by foreign plaintiffs against foreign defendants for conduct that entirely took place in the territory of a foreign sovereign”).

As the United States urged at oral argument, when international friction arises, a court should respond with the doctrine that speaks directly to the friction’s source. See Tr. of Oral. Arg. 28 (acknowledging that “ATS litigation in recent decades has raised international friction” and explaining that “the way to deal with that friction is with a doctrine that speaks directly to the international entanglement . . . as those questions arise”). In addition to the presumption against extraterritoriality, federal courts have at their disposal a number of tools to address any foreign-relations concerns that an ATS case may raise. This Court has held that a federal court may exercise personal jurisdiction over a foreign corporate defendant only if the corporation is incorporated in the United States, has its principal place of business or is otherwise at home here, or if the activities giving rise to the lawsuit occurred or had their impact here. See Daimler AG v. Bauman, 571 U. S. 117 (2014). Courts also can dismiss ATS suits for a plaintiff’s failure to exhaust the remedies available in her domestic forum, on forum non conveniens grounds, for reasons of international comity, or when asked to do so by the State Department. See Kiobel, 569 U. S., at 133 (BREYER, J., concurring in judgment); Sosa, 542 U. S., at 733, n. 21.

Several of these doctrines might be implicated in this case, and I would remand for the Second Circuit to address them in the first instance.13 The majority, however, prefers to use a sledgehammer to crack a nut. I see no need for such an ill-fitting and disproportionate response. Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.14

B

I

The Court urges that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” Ante, at 19. I agree that the political branches are well poised to assess the foreign-policy concerns attending ATS litigation, which is why I give significant weight to the fact that the Executive Branch, in briefs signed by the Solicitor General and State Department Legal Advisor, has twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority. See Brief for United States as Amicus Curiae 5 (“This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation”); Brief for United States as Amicus Curiae in Kiobel v. Royal Dutch Petroleum Co., O. T. 2012, No. 10–1491, p. 7 (“Courts may recognize corporate liability inactions under the ATS as a matter of federal common law. . . . Sosa’s cautionary admonitions provide no reason to depart from the common law on

12. Jordan does argue that corporate liability is unavailable under the ATS, but that argument is based on its view that there is no universally recognized international-law norm of corporate liability, see Brief for Hashemite Kingdom of Jordan as Amicus Curiae 12–15, not a contention that corporate status alone presents foreign-policy concerns justifying immunity for all corporations in all ATS suits irrespective of circumstance.

13. For instance, the alleged conduct might not sufficiently touch and concern the United States to displace the presumption against extraterritoriality; the prohibition on terrorism financing might not be specific, universal, and obligatory norm warranting recognition under the ATS; and petitioners might not be able to prove the requisite mens rea. In addition, petitioners have asserted direct, rather than vicarious, liability against respondent. A suit based on only vicarious liability may raise different questions not presented here.

14. The majority’s overly blunt rule is also unlikely to resolve any foreign-relations concerns at play in this case. Arab Bank is still being sued under the Antiterrorism Act of 1990 for the exact same conduct as alleged here. It is also hard to imagine that Jordan would have been perfectly content to see the CEO of Arab Bank and high-level officials at the New York branch sued under the ATS.
this issue”). At oral argument in this case, the United States told the Court that it saw no “sound reason to categorically exclude corporate liability.” Tr. of Oral Arg. 29. It explained that another country would hold the United States accountable for not providing a remedy against a corporate defendant in a “classic” ATS case, such as one involving a “foreign official[1] injured in the United States,” id., at 32–33, and suggested that foreclosing the ability to recover from a corporation actually would raise “the possibility of friction,” id., at 33. Notably, the Government’s position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.

Likewise, when Members of Congress have weighed in on the question whether corporations can be proper defendants in an ATS suit, it has been to advise the Court against the rule it now adopts. See Brief for Sen. Sheldon Whitehouse et al. as Amici Curiae 7–11; Brief for Former Sen. Arlen Specter et al. as Amici Curiae in Kiobel v. Royal Dutch Petroleum Co., O. T. 2012, No. 10–1491, pp. 17–18. Congress has also never seen it necessary to immunize corporations from ATS liability even though corporations have been named as defendants in ATS suits for years. See Monessen Southwestern R. Co. v. Morgan, 486 U. S. 330, 338 (1988) (“Congress’ failure to disturb a consistent judicial interpretation of a statute may provide some indication that ‘Congress at least acquiesces in, and apparently affirms, that [interpretation]’” (quoting Cannon v. University of Chicago, 441 U. S. 677, 703 (1979))).

Given the deference to the political branches that Sosa encourages, I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.

2

The plurality instead purports to defer to Congress by relying heavily on the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. §1350, to support its categorical bar. See ante, at 20. The TVPA makes available to all individuals, not just foreign citizens, a civil cause of action for torture and extrajudicial killing that may be brought against natural persons. See Mohamad v. Palestinian Authority, 556 U. S. 449, 451–452, 454 (2012). The plurality extrapolates from Congress’ decision regarding the scope of liability under the TVPA a rule that it contends should govern all ATS suits. See ante, at 20. But there is no reason to think that because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations. The plurality’s contrary conclusion ignores the critical textual differences between the ATS and TVPA, as well as the TVPA’s legislative history, which emphasizes Congress’ intent to leave the ATS undisturbed.

On its face, the TVPA is different from the ATS in several significant ways: It is focused on only two law-of-nations violations, torture and extrajudicial killing; it makes a cause of action available to all individuals, not just foreign citizens; and it uses the word “individual” to delinate who may be liable. See 28 U. S. C. §1350 note. The ATS, by contrast, is concerned with all law-of-nations violations generally, makes a cause of action available only to foreign citizens, and is silent as to who may be liable. Because of the textual differences between the two statutes, the Court unanimously concluded in Mohamad that the ATS “offers no comparative value” in ascertaining the scope of liability under the TVPA. 566 U. S., at 458. It makes little sense, then, to conclude that the TVPA has dispositive comparative value in discerning the scope of liability under the ATS.

Furthermore, Congress repeatedly emphasized in the House and Senate Reports on the TVPA that the statute was meant to supplement the ATS, not replace or cabin it. See H. R. Rep. No. 102–367, pt. 1, p. 3 (1991) (“Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing”); id., at 4 (“The TVPA . . . would also enhance the remedy already available under section 1350 in an important respect: While the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U. S. citizens who may have been tortured abroad”); ibid. (“[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by] section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”); S. Rep. No. 102–249, pp. 4–5 (1991); see also Sosa, 542 U. S., at 731 (explaining that the TVPA “supplement[ed] the judicial determination” in Filartiga).

Lacking any affirmative evidence that Congress’ decision to limit liability under the TVPA to natural persons indicates a legislative judgment about the proper scope of liability in all ATS suits, the plurality focuses its efforts on dismissing petitioners’ argument that Congress limited TVPA liability to natural persons to harmonize the statute with the Foreign Sovereign Immunities Act of 1976 (FSIA), which generally immunizes foreign states from suit. See ante, at 21.15 Contrary to the plurality’s contention, however, this Court did not reject petitioners’ account of the TVPA’s legislative history in Mohamad. In fact, that decision agreed that the legislative history “clarifi[es] that the Act does not encompass liability against foreign states.” 566 U. S., at 459. What Mohamad rejected was the argument that because the TVPA forecloses liability against foreign states, it necessarily permits liability against corporations. In concluding that the TVPA encom-

15. The TVPA requires state action to trigger liability. See 28 U. S. C. §1350 note (imposing liability on “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation” subjects an individual to torture or extrajudicial killing). Absent a limitation on suits against states and state entities, the TVPA arguably would have been in conflict with the FSIA.
passes only natural persons, *Mohamad* took no position on why Congress excluded organizations from its reach.  

To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law. For instance, the Antiterrorism Act of 1990 (ATA) created a civil cause of action for U. S. nationals injured by an act of international terrorism and expressly provides for corporate liability. 18 U. S. C. §2333. That Congress foreclosed corporate liability for torture and extrajudicial killing claims under the TVPA but permitted corporate liability for terrorism-related claims under the ATA is strong evidence that Congress exercises its judgment as to the appropriateness of corporate liability on a norm-by-norm basis, and that courts should do the same when considering whether to permit causes of action against corporations for law-of-nations violations under the ATS.

The plurality dismisses the ATA as “an inapt analogy” because the ATA “provides a cause of action only to ‘national[s] of the United States,’” whereas the ATS “provides a remedy for foreign nationals only.” *Ante*, at 22 (quoting 18 U. S. C. §2333(a)). But if encompassing different groups of plaintiffs is what makes two statutes poor comparators for each other, the TVPA, too, is an inapt analogy, for it permits suits by all individuals, U. S. and foreign nationals alike.

The plurality also posits that the ATA “suggests that there should be no common-law action under the ATS for allegations like petitioners’,” *ante*, at 22, because permitting such suits would allow foreign plaintiffs to “bypass Congress’ express limitations on liability under the [ATA] simply by bringing an ATS lawsuit,” *ibid*. Yet an ATS suit alleging terrorism-related conduct does not “bypass” or “displace” any “statutory and regulatory structure,” *ibid.*, any more than an ATA suit does. As this case demonstrates, U. S. nationals and foreign citizens may bring ATA and ATS suits in the same court, at the same time, for the same underlying conduct. To the extent the plurality is suggesting that Congress, in enacting the ATA, meant to foreclose ATS suits based on terrorism financing, the plurality offers no evidence to support that hypothesis, and the legislative history suggests that Congress enacted the ATA to provide U. S. citizens with the same remedy already available to foreign citizens under the ATS. See Hearing on S. 2465 before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 101st Cong., 1st Sess., 90 (1990) (testimony of Joseph A. Morris) (noting that ATS actions for terrorism “would be preserved”).

At bottom, the ATS and TVPA are related but distinct statutes that coexist independently. There is no basis to conclude that the considered judgment Congress made about who should be liable under the TVPA for torture and extrajudicial killing should restrict who can be held liable under the ATS for other law-of-nations violations, particularly where Congress made a different judgment about the scope of liability under the ATA for terrorism.

C

Finally, the plurality offers a set of “[o]ther considerations relevant to the exercise of judicial discretion” that it concludes “counsel against allowing liability under the ATS for foreign corporations.” *Ante*, at 23. None is persuasive.

First, the plurality asserts that “[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute” because “the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable,” and because “plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.” *Ibid*. This Court has never previously required that, to maintain an ATS action, a plaintiff must show that the ATS is the exclusive means by which to hold the alleged perpetrator liable and that no relief can be had from other parties. Such requirements extend far beyond the inquiry *Sosa* contemplated and are without any basis in the statutory text.

Moreover, even if there are other grounds on which a suit alleging conduct constituting a law-of-nations violation can be brought, such as a state-law tort claim, the First Congress created the ATS because it wanted foreign plaintiffs to be able to bring their claims in federal court and sue for law-of-nations violations. A suit for state-law battery, even if based on the same alleged conduct, is not the equivalent of a federal suit for torture; the latter contributes to the uptake of international human rights norms, and the former does not.

Furthermore, holding corporations accountable for violating the human rights of foreign citizens when those violations touch and concern the United States may well be necessary to avoid the international tension with which the First Congress was concerned. Consider again the assault on the Secretary of the French Legation in Philadelphia by a French adventurer. See *supra*, at 14; *ante*, at 7 (majority opinion). Would the diplomatic strife that followed really have been any less charged if a corporation had sent its agent to accost the Secretary? Or, consider piracy. If a corporation owned a fleet of vessels and directed them to seize other ships in U. S. waters, there no doubt would be calls to hold the corporation to account. See *Kiobel*, 621 F. 3d, at 156, and n. 10 (observing that “Somali pirates essentially operate as limited part-

16. Petitioners may be right that Congress limited liability under the TVPA to natural persons to harmonize the statute with the FSIA. That Congress thought it necessary to achieve that goal by foreclosing liability against all organizational defendants, not just those operating under the authority of a foreign government, might indicate that Congress thought such line drawing would be difficult, or that an expansive approach was the clearest way to avoid the statute becoming a backdoor to suits against foreign governments.

17. Counsel for Arab Bank acknowledged the symbolic force of ATS liability at oral argument. See Tr. of Oral Arg. 60 (“[T]he idea of the ATS is . . . not just that you violated a statute, but that you have violated some specific universal obligatory norm so you are essentially an enemy of mankind. So, as much as my clients would not like to be an ATA defendant, they would really, really, really not like to be . . . labeled an enemy of mankind.”).
nerships”). Finally, take, for example, a corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees of that business less likely to be able fully to compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will persist unremedied. Immunizing the corporation from suit under the ATS merely because it is a corporation, even though the violations stemmed directly from corporate policy and practice, might cause serious diplomatic friction.

Second, the plurality expresses concern that if foreign corporations are subject to liability under the ATS, other nations could hale American corporations into court and subject them “to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world,” a prospect that will deter American corporations from investing in developing economies. Ante, at 24. The plurality offers no empirical evidence to support these alarmist conjectures, which is especially telling given that plaintiffs have been filing ATS suits against foreign corporations in United States courts for years. It does cite to an amicus brief for the United States in American Isuzu Motors, Inc. v. Ntsebeza, see ante, at 24, but that case was concerned with the availability of civil aiding and abetting liability, not corporate liability generally, and the United States never contended that permitting corporate liability under the ATS would undermine global investment. Instead, it argued that permitting extraterritorial aiding and abetting cases would interfere with foreign relations and deter “the free flow of trade and investment.” See Brief for United States as Amicus Curiae, O. T. 2007, No. 07–919, pp. 12–16, 20. Driven by hypothetical worry about besieged American corporations, today’s decision needlessly goes much further, encompassing all ATS suits against all foreign corporations, not just those cases with extraterritorial dimensions premised on an aiding and abetting theory.

** * * *

In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of-nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that “foreign corporate defendants create unique problems” that necessitate a categorical rule barring all foreign corporate liability. Ante, at 26.

Absent any reason to believe that the corporate form in itself raises serious foreign-policy concerns, and given the repeated urging from the Executive Branch and Members of Congress that the Court need not and should not foreclose corporate liability, I would reverse the decision of the Court of Appeals for the Second Circuit and remand for further proceedings, including whether the allegations here sufficiently touch and concern the United States, see Kiobel, 559 U. S., at 124–125, and whether the international-law norms alleged to have been violated by Arab Bank—the prohibitions on genocide, crimes against humanity, and financing of terrorism—are of sufficiently definite content and universal acceptance to give rise to a cause of action under the ATS.

**III**

In categorically barring all suits against foreign corporations under the ATS, the Court ensures that foreign corporations—entities capable of wrongdoing under our domestic law—remain immune from liability for human rights abuses, however egregious they may be.

Corporations can be and often are a force for innovation and growth. Many of their contributions to society should

18. JUSTICE ALITO, adopting a more absolutist position than the plurality, asserts without qualification that “federal courts should not create causes of action under the ATS against foreign corporate defendants” because doing so “would precipitate . . . diplomatic strife.” Ante, at 1, 4 (opinion concurring in part and concurring in judgment). The conclusion that ATS suits against foreign corporate defendants for law-of-nations and treaty violations always will cause diplomatic friction, and that such suits will never be necessary “to help the United States avoid diplomatic friction,” ante, at 4, however, is at odds with the considered judgment of the Executive Branch and Congress regarding the importance of holding foreign corporations to account for certain egregious conduct. As noted, see Part II–B–1, supra, the Executive Branch has twice urged the Court not to foreclose the ability of foreign nationals to sue foreign corporate defendants under the ATS. The United States also has ratified several international agreements that require it to impose liability on corporations, both foreign and domestic, for certain actions, including the financing of terrorism. See supra, at 10–11. Congress, too, has expressly authorized civil suits against corporations for acts related to terrorism. See 18 U. S. C. §2333. The Executive Branch and Congress surely would not have taken these positions, entered into these obligations, or made available these causes of action if the result were intolerable diplomatic strife.

JUSTICE ALITO also faults the lack of “real-world examples” of instances in which diplomatic friction has resulted from a court’s refusal to permit an individual to bring an ATS suit against a foreign corporation solely because of the defendant’s status as a foreign juridical entity. Ante, at 6. Such refusals, though, have been rare, as no other Court of Appeals besides the Second Circuit that has considered the question has imposed a bar on corporate liability. Compare Doe v. Drummond Co., 782 F. 3d 576, 584 (CA11 2015); Doe I v. Nestle USA, Inc., 766 F. 3d 1013, 1022 (CA9 2014); Doe v. Exxon Mobil Corp., 654 F. 3d 11, 39–57 (CA3 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013); Flomo v. Firestone Nat. Rubber Co., 643 F. 3d 1013, 1017–1021 (CA7 2011), with Kiobel v. Royal Dutch Petroleum, 621 F. 3d 111, 120 (CA2 2010).
be celebrated. But the unique power that corporations wield can be used both for good and for bad. Just as corporations can increase the capacity for production, so, too, some can increase the capacity for suffering. Consider the genocide that took upwards of 800,000 lives in Rwanda in 1994, which was fueled by incendiary rhetoric delivered via a private radio station, the Radio Télévision Libre des Mille Collines (RTLM). Men spoke the hateful words, but the RTLM made their widespread influence possible.\footnote{See, e.g., Nahimana v. Prosecutor, Case No. ICTR 99–52–A, Appeals Judgment ¶176 (Nov. 28, 2007) (upholding finding that the RTLM Collines broadcasts “contributed substantially to the killing of Tutsi”); G. Prunier, The Rwanda Crisis: History of a Genocide 224 (2d ed. 1999) (detailing incitements to murder broadcast on the RTLM, including: “The graves are not yet full. Who is going to do the good work and help us fill them completely?”); Yanagizawa-Drott, Propaganda and Conflict: Evidence From the Rwandan Genocide, 129 Q. J. Econ. 1947, 1950 (2014) (analyzing village-level data from Rwanda to estimate that the RTLM’s transmissions caused 10 percent of the total participation in the genocide).}

There can be, and sometimes is, a profit motive for these types of abuses. Although the market does not price all externalities, the law does. We recognize as much when we permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake the requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human rights context.

Immunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose. It allows these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights, see, e.g., Citizens United v. Federal Election Comm’n, 558 U. S. 310 (2010); Burwell v. Hobby Lobby Stores, Inc., 573 U. S. ___ (2014), without having to shoulder attendant fundamental responsibilities.

I respectfully dissent.

\footnote{19. See, e.g., Nahimana v. Prosecutor, Case No. ICTR 99–52–A, Appeals Judgment ¶176 (Nov. 28, 2007) (upholding finding that the RTLM Collines broadcasts “contributed substantially to the killing of Tutsi”); G. Prunier, The Rwanda Crisis: History of a Genocide 224 (2d ed. 1999) (detailing incitements to murder broadcast on the RTLM, including: “The graves are not yet full. Who is going to do the good work and help us fill them completely?”); Yanagizawa-Drott, Propaganda and Conflict: Evidence From the Rwandan Genocide, 129 Q. J. Econ. 1947, 1950 (2014) (analyzing village-level data from Rwanda to estimate that the RTLM’s transmissions caused 10 percent of the total participation in the genocide).}
§§4601–4608, 113 Stat. 1501A–567 to 1501A–572. Under this procedure, any person could file a request for reexamination. 35 U. S. C. §311(a) (2006 ed.). The Director would determine if the request raised “a substantial new question of patentability affecting any claim of the patent” and, if so, commence a reexamination. §§312(a), 313 (2006 ed.). The reexamination would follow the general procedures for initial examination, but would allow the third-party requester and the patent owner to participate in a limited manner by filing responses and replies. §§314(a), (b) (2006 ed.). Inter partes reexamination was phased out when the America Invents Act went into effect in 2012. See §6, 125 Stat. 299–305.

C

The America Invents Act replaced inter partes reexamination with inter partes review, the procedure at issue here. See id., at 299. Any person other than the patent owner can file a petition for inter partes review. 35 U. S. C. §311(a) (2012 ed.). The petition can request cancellation of “1 or more claims of a patent” on the grounds that the claim fails the novelty or nonobviousness standards for patentability. §311(b). The challenges must be made “only on the basis of prior art consisting of patents or printed publications.” Ibid. If a petition is filed, the patent owner has the right to file a preliminary response explaining why inter partes review should not be instituted. §313.

Before he can institute inter partes review, the Director must determine “that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged.” §314(a). The decision whether to institute inter partes review is committed to the Director’s discretion. See Cuozzo Speed Technologies, LLC v. Lee, 579 U. S. ___, ___ (2016) (slip op., at 9). The Director’s decision is “final and nonappealable.” §314(d).1

Once inter partes review is instituted, the Patent Trial and Appeal Board—an adjudicatory body within the PTO created to conduct inter partes review—examines the patent’s validity. See 35 U. S. C. §§6, 316(c). The Board sits in three-member panels of administrative patent judges. See §6(c). During the inter partes review, the petitioner and the patent owner are entitled to certain discovery, §316(a)(5); to file affidavits, declarations, and written memoranda, §316(a)(8); and to receive an oral hearing before the Board, §316(a)(10). The petitioner has the burden of proving unpatentability by a preponderance of the evidence. §316(e). The owner can file a motion to amend the patent by voluntarily canceling a claim or by “propos[ing] a reasonable number of substitute claims.” §316(d)(1)(B). The owner can also settle with the petitioner by filing a written agreement prior to the Board’s final decision, which terminates the proceedings with respect to that petitioner. §317. If the settlement results in no petitioner remaining in the inter partes review, the Board can terminate the proceeding or issue a final written decision. §317(a).

If the proceeding does not terminate, the Board must issue a final written decision no later than a year after it notices the institution of inter partes review, but that deadline can be extended up to six months for good cause. §§316(a)(11), 318(a). If the Board’s decision becomes final, the Director must “issue and publish a certificate.” §318(b). The certificate cancels patent claims “finally determined to be unpatentable,” confirms patent claims “determined to be patentable,” and incorporates into the patent “any new or amended claim determined to be patentable.” Ibid.

A party dissatisfied with the Board’s decision can seek judicial review in the Court of Appeals for the Federal Circuit. §319. Any party to the inter partes review can be a party in the Federal Circuit. Ibid. The Director can intervene to defend the Board’s decision, even if no party does. See §143; Cuozzo, supra, at __ (slip op., at 15). When reviewing the Board’s decision, the Federal Circuit assesses “the Board’s compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence.” Randall Mfg. v. Rea, 733 F. 3d 1355, 1362 (CA Fed. 2013).

II

Petitioner Oil States Energy Services, LLC, and respondent Greene’s Energy Group, LLC, are both oilfield services companies. In 2001, Oil States obtained a patent relating to an apparatus and method for protecting well-head equipment used in hydraulic fracturing. In 2012, Oil States sued Greene’s Energy in Federal District Court for infringing that patent. Greene’s Energy responded by challenging the patent’s validity. Near the close of discovery, Greene’s Energy also petitioned the Board to institute inter partes review. It argued that two of the patent’s claims were unpatentable because they were anticipated by prior art not mentioned by Oil States in its original patent application. Oil States filed a response opposing review. The Board found that Greene’s Energy had established a reasonable likelihood that the two claims were unpatentable and, thus, instituted inter partes review.

The proceedings before the District Court and the Board progressed in parallel. In June 2014, the District Court issued a claim-construction order. The order construed the challenged claims in a way that foreclosed Greene’s Energy’s arguments about the prior art. But a few months later, the Board issued a final written decision concluding that the claims were unpatentable. The Board acknowledged the District Court’s contrary decision, but nonetheless concluded that the claims were anticipated by the prior art.

Oil States sought review in the Federal Circuit. In addition to its arguments about patentability, Oil States challenged the constitutionality of inter partes review. Specifically, it argued that actions to revoke a patent must be tried in an Article III court before a jury. While Oil States’ case was pending, the Federal Circuit issued an opinion in a different case, rejecting the same constitutional arguments. MCM Portfolio LLC v. Hewlett-Packard Co., 812 F. 3d 1284, 1288–1293 (2015).

1. The Director has delegated his authority to the Patent Trial and Appeal Board. See 37 CFR §42.108(c) (2017).

We granted certiorari to determine whether inter partes review violates Article III or the Seventh Amendment. 582 U. S. ___ (2017). We address each issue in turn.

III

Article III vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” §1. Consequently, Congress cannot “confer the Government’s ‘judicial Power’ on entities outside Article III.” Stern v. Marshall, 564 U. S. 462, 484 (2011). When determining whether a proceeding involves an exercise of Article III judicial power, this Court’s precedents have distinguished between “public rights” and “private rights.” Executive Benefits Ins. Agency v. Arkison, 573 U. S. ___ (2014) (slip op., at 6) (internal quotation marks omitted). Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts. See ibid.; Stern, supra, at 488–492.

This Court has not “definitively explained” the distinction between public and private rights, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U. S. 50, 69 (1982), and its precedents applying the public-rights doctrine have “not been entirely consistent.” Stern, 564 U. S., at 488. But this case does not require us to add to the “various formulations” of the public-rights doctrine. Ibid. Our precedents have recognized that the doctrine covers matters “which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.” Crowell v. Benson, 285 U. S. 22, 50 (1932). In other words, the public-rights doctrine applies to matters “ arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.” Ibid. (quoting Ex parte Bakelite Corp., 279 U. S. 438, 451 (1929)). Inter partes review involves such a matter: reconsideration of the Government’s decision to grant a public franchise.

A

Inter partes review falls squarely within the public-rights doctrine. This Court has recognized, and the parties do not dispute, that the decision to grant a patent is a matter involving public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO’s authority to conduct that reconsideration. Thus, the PTO can do so without violating Article III.

1

This Court has long recognized that the grant of a patent is a “ ‘matter involving public rights.’ ” United States v. Duell, 172 U. S. 576, 582–583 (1899) (quoting Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856)). It has the key features to fall within this Court’s longstanding formulation of the public-rights doctrine.

Ab initio, the grant of a patent involves a matter “arising between the government and others.” Ex parte Bakelite Corp., supra, at 451. As this Court has long recognized, the grant of a patent is a matter between “ the public, who are the grantors, and . . . the patentee.” Duell, supra, at 586 (quoting Butterworth v. United States ex rel. Hoe, 112 U. S. 50, 59 (1884)). By “issuing patents,” the PTO “take[s] from the public rights of immense value, and bestow[s] them upon the patentee.” United States v. American Bell Telephone Co., 128 U. S. 315, 370 (1888). Specifically, patents are “public franchises” that the Government grants “to the inventors of new and useful improvements.” Seymour v. Osborne, 11 Wall. 516, 533 (1871); accord, Pfaff v. Wells Electronics, Inc., 525 U. S. 55, 63–64 (1998). The franchise gives the patent owner “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.” 35 U. S. C. §154(a)(1). That right “did not exist at common law.” Gayler v. Wilder, 10 How. 477, 494 (1851). Rather, it is a “creature of statute law.” Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U. S. 24, 40 (1923).

Additionally, granting patents is one of “the constitutional functions” that can be carried out by “the executive or legislative departments” without “ judicial determination.” Crowell, supra, at 50–51 (quoting Ex parte Bakelite Corp., supra, at 452). Article I gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” §8, cl. 8. Congress can grant patents itself by statute. See, e.g., Bloomer v. McQuewan, 14 How. 539, 548–550 (1853). And, from the founding to today, Congress has authorized the Executive Branch to grant patents that meet the statutory requirements for patentability. See 35 U. S. C. §§2(a)(1), 151; see also Act of July 8, 1870, §31, 16 Stat. 202; Act of July 4, 1836, §7, 5 Stat. 119–120; Act of Apr. 10, 1790, ch. 7, §1, 1 Stat. 109–110. When the PTO “adjudicate[s] the patentability of inventions,” it is “exercising the executive power.” Freytag v. Commissioner, 501 U. S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment) (emphasis deleted).

Accordingly, the determination to grant a patent is a “matter involving public rights.” Murray’s Lessee, supra, at 284. It need not be adjudicated in Article III court.

2

Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.

Inter partes review is “a second look at an earlier administrative grant of a patent.” Cuozzo, 579 U. S., at ____ (slip op., at 16). The Board considers the same statutory requirements that the PTO considered when granting the patent. See 35 U. S. C. §311(b). Those statutory requirements prevent the “issuance of patents whose effects are to remove existent knowl-
edge from the public domain.” *Graham v. John Deere Co. of Kansas City*, 383 U. S. 1, 6 (1966). So, like the PTO’s initial review, the Board’s inter partes review protects “the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope.” *Cuozzo*, supra, at ___ (slip op., at 16) (internal quotation marks and alterations omitted). Thus, inter partes review involves the same interests as the determination to grant a patent in the first instance. See *Duell*, supra, at 586.

The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs after the patent has issued. But that distinction does not make a difference here. Patent claims are granted subject to the qualification that the PTO has “the authority to reexamine—and perhaps cancel—a patent claim” in an inter partes review. See *Cuozzo*, supra, at ___ (slip op., at 3). Patents thus remain “subject to [the Board’s] authority” to cancel outside of an Article III court. *Crowell*, 285 U. S., at 50.

This Court has recognized that franchises can be qualified in this manner. For example, Congress can grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the franchise. See, e.g., *Louisville Bridge Co. v. United States*, 242 U. S. 409, 421 (1917) (collecting cases). Even after the bridge is built, the Government can exercise its reserved authority through legislation or an administrative proceeding. See, e.g., *id.*, at 420–421; *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 205 (1911); *Bridge Co. v. United States*, 105 U. S. 470, 478–482 (1882). The same is true for franchises that permit companies to build railroads or telegraph lines. See, e.g., *United States v. Union Pacific R. Co.*, 160 U. S. 1, 24–25, 37–38 (1895).

Thus, the public-rights doctrine covers the matter resolved in inter partes review. The Constitution does not prohibit the Board from resolving it outside of an Article III court.

**B**

Oil States challenges this conclusion, citing three decisions that recognize patent rights as the “private property of the patentee.” *American Bell Telephone Co.*, 128 U. S., at 364. But those cases were decided under the Patent Act of 1870. See *id.*, at 371; *McCormick Harvesting Machine Co.*, supra, at 611. That version of the Patent Act did not include any provision for post-issuance administrative review. Those precedents, then, are best read as a description of the statutory scheme that existed at that time. They do not resolve Congress’ authority under the Constitution to establish a different scheme.\(^2\)

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2. This Court has also recognized this dynamic for state-issued franchises. For instance, States often reserve the right to alter or revoke a corporate charter either “in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted.” *Pennsylvania College Cases*, 13 Wall. 190, 214, and n. † (1872). That reservation remains effective even after the corporation comes into existence, and such alterations do not offend the Contracts Clause of Article I, §10. See *Pennsylvania College Cases*, supra, at 212–214; e.g., *Miller v. State*, 15 Wall. 478, 488–489 (1873).

3. The dissent points to *McCormick’s* statement that the Patent Office Commissioner could not invalidate the patent at issue because it would “‘deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch.’” *Post*, at 10 (quoting *McCormick Harvesting Machine Co. v. Aultman*, 169 U. S. 606, 612 (1898)). But that statement followed naturally from the Court’s determination that, under the Patent Act of 1870, the Commissioner “was functus officio” and “had no power to revoke, cancel, or annul” the patent at issue. 169 U. S., at 611–612.

Nor is it significant that the *McCormick* Court “equated invention patents with land patents.” *Post*, at 10. *McCormick* itself makes clear that the analogy between the two depended on the particulars of the Patent Act of 1870. See 169 U. S., at 609–610. Modern invention patents, by contrast, are meaningfully different from land patents. The land-patent cases invoked by the dissent involved a “transaction [in which] ‘all authority or control’ over the lands has passed from ‘the Executive Department.’” *Boesche v. Udall*, 373 U. S. 472, 477 (1963) (quoting *Moore v. Robbins*, 96 U. S. 530, 533 (1878)). Their holdings do not apply when “the Government continues to possess some measure of control over” the right in question. *Boesche*, 373 U. S., at 477; see *id.*, at 477–478 (affirming administrative cancellations of public-land leases). And that is true of modern invention patents under the current Patent Act, which gives the PTO continuing authority to...
C

Oil States and the dissent contend that inter partes review violates the “general” principle that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’ ” Stern, 554 U. S., at 484 (quoting Murray’s Lessee, supra, at 284). They argue that this is so because patent validity was often decided in English courts of law in the 18th century. For example, if a patent owner brought an infringement action, the defendant could challenge the validity of the patent as an affirmative defense. See Lemley, Why Do Juries Decide If Patents Are Valid? 99 Va. L. Rev. 1673, 1682, 1685–1686, and n. 52 (2013). Or, an individual could challenge the validity of a patent by filing a writ of scire facias in the Court of Chancery, which would sit as a law court when adjudicating the writ. See id., at 1683–1685, and n. 44; Bottomley, Patent Cases in the Court of Chancery, 1714–58, 35 J. Legal Hist. 27, 36–37, 41–43 (2014).

But this history does not establish that patent validity is a matter that, “from its nature,” must be decided by a court. Stern, supra, at 484 (quoting Murray’s Lessee, supra, at 284). The aforementioned proceedings were between private parties. But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent. See Lemley, supra, at 1681–1682; Hulme, Privy Council Law and Practice of Letters Patent for Invention From the Restoration to 1794, 33 L. Q. Rev. 63 (1917). The Privy Council was composed of the Crown’s advisers. Lemley, supra, at 1681. From the 17th through the 20th centuries, English patents had a standard revocation clause that permitted six or more Privy Counsellors to declare a patent void if they determined the invention was contrary to law, “prejudicial” or “inconvenient,” not new, or not invented by the patent owner. See 11 W. Holdsworth, A History of English Law 426–427, and n. 6 (1938); Davies, The Early History of the Patent Specification, 50 L. Q. Rev. 86, 102–106 (1934). Individuals could petition the Council to revoke a patent, and the petition was referred to the Attorney General. The Attorney General examined the petition, considered affidavits from the petitioner and patent owner, and heard from counsel. See, e.g., Bull v. Lydall, PC2/81, pp. 180–181 (1706). Depending on the Attorney General’s conclusion, the Council would either void the patent or dismiss the petition. See, e.g., Darby v. Betton, PC2/99, pp. 358–359 (1745–1746) (voiding the patent); Baker v. James, PC2/103, pp. 320–321, 346–347 (1752) (dismissing the petition).

The Privy Council was a prominent feature of the English system. It had exclusive authority to revoke patents until 1753, and after that, it had concurrent jurisdiction with the courts. See Hulme, 33 L. Q. Rev., at 189–191, 193–194. The Privy Council continued to consider revocation claims and to revoke patents throughout the 18th century. Its last revocation was in 1779. See id., at 192–193. It considered, but did not act on, revocation claims in 1782, 1794, and 1810. See ibid.; Board of Ordinance v. Parr, PC1/3919 (1810).

The Patent Clause in our Constitution “was written against the backdrop” of the English system. Graham, 538 U. S., at 5. Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, “[w]ithin the scope established by the Constitution, Congress may set out conditions and tests for patentability.” Id., at 6. We conclude that inter partes review is one of those conditions. 4

For similar reasons, we disagree with the dissent’s assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. See post, at 8–10. Historical practice is not decisive here because matters governed by the public-rights doctrine “from their nature” can be resolved in multiple ways: Congress can “reserve to itself the power to decide,” “delegate that power to executive officers,” or “commit it to judicial tribunals.” Ex parte Bakelite Corp., 279 U. S., at 451. That Congress chose the courts in the past does not foreclose its choice of the PTO today.

D

Finally, Oil States argues that inter partes review violates Article III because it shares “every salient characteristic associated with the exercise of the judicial power.” Brief for Petitioner 20. Oil States highlights various procedures used in inter partes review: motion practice before the Board; discovery, depositions, and cross-examination of witnesses; introduction of evidence and objections based on the Federal Rules of Evidence; and an adversarial hearing before the Board. See 35 U. S. C. §316(a); 77 Fed. Reg. 48758, 48761–48763 (2012). Similarly, Oil States cites PTO regulations that use terms typically associated with courts—calling the hearing a “trial,” id., at 48758; the Board members “judges,” review and potentially cancel patents after they are issued. See 35 U. S. C. §§261, 311–319.

4. Oil States also suggests that inter partes review could be an unconstitutional condition because it conditions the benefit of a patent on accepting the possibility of inter partes review. Cf. Koontz v. St. Johns River Water Management Dist., 550 U. S. 584, 604 (2010) (“[T]he government may not deny a benefit to a person because he exercises a constitutional right” (internal quotation marks omitted)). Even assuming a patent is a “benefit” for purposes of the unconstitutional-conditions doctrine, that doctrine does not apply here. The doctrine prevents the Government from using conditions “to produce a result which it could not command directly.” Perry v. Sindermann, 408 U. S. 593, 597 (1972) (internal quotation marks and alterations omitted). But inter partes review is consistent with Article III, see Part III–A, supra, and falls within Congress’ Article I authority, see Part III–C, supra; so it is something Congress can “command directly.” Perry, supra, at 597.
But this Court has never adopted a “looks like” test to determine if an adjudication has improperly occurred outside of an Article III court. The fact that an agency uses court-like procedures does not necessarily mean it is exercising the judicial power. See *Freytag*, 501 U. S., at 910 (opinion of Scalia, J.). This Court has rejected the notion that a tribunal exercises Article III judicial power simply because it is “called a court and its decisions called judgments.” *Williams v. United States*, 289 U. S. 553, 563 (1933). Nor does the fact that an administrative adjudication is final and binding on an individual who acquiesces in the result necessarily make it an exercise of the judicial power. See, e.g., *Murray’s Lessee*, 18 How., at 280–281 (permitting the Treasury Department to conduct “final and binding” audits outside of an Article III court). Although inter partes review includes some of the features of adversarial litigation, it does not make any binding determination regarding “the liability of [Greene’s Energy] to [Oil States] under the law as defined.” *Crowell*, 285 U. S., at 51. It remains a matter involving public rights, one “between the government and others, which from [its] nature do[es] not require judicial determination.” *Ex parte Bakelite Corp.*, 279 U. S., at 451.5

5. Oil States also points out that inter partes review “is initiated by private parties and implicates no waiver of sovereign immunity.” Brief for Petitioner 30–31. But neither of those features takes inter partes review outside of the public-rights doctrine. That much is clear from *United States v. Duell*, 172 U. S. 576 (1899), which held that the doctrine covers interference proceedings—a procedure to “determine[e] which of two claimants is entitled to a patent”—even though interference proceedings were initiated by “‘private interests compet[ing] for preference’ ” and did not involve a waiver of sovereign immunity. *Id.*, at 582, 586 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U. S. 50, 59 (1884)). Also, inter partes review is not initiated by private parties in the way that a common-law cause of action is. To be sure, a private party files the petition for review. 35 U. S. C. §311(a). But the decision to institute review is made by the Director and committed to his unreviewable discretion. See *Cuozzo Speed Technologies, LLC v. Lee*, 579 U. S. ___ (2016) (slip op., at 9).

We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. And because the Patent Act provides for judicial review by the Federal Circuit, see 35 U. S. C. §319, we need not consider whether inter partes review would be constitutional “without any sort of intervention by a court at any stage of the proceedings,” *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U. S. 442, 455, n. 13 (1977). Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause. See, e.g., *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U. S. 627, 642 (1999); *James v. Campbell*, 104 U. S. 356, 358 (1882).

**IV**

In addition to Article III, Oil States challenges inter partes review under the Seventh Amendment. The Seventh Amendment preserves the “right of trial by jury” in “Suits at common law, where the value in controversy shall exceed twenty dollars.” This Court’s precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, “the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33, 53–54 (1989); accord, *Atlas Roofing Co., supra*, at 450–455. No party challenges or attempts to distinguish those precedents. Thus, our rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge. Because inter partes review is a matter that Congress can properly assign to the PTO, a jury is not necessary in these proceedings.

**V**

Because inter partes review does not violate Article III or the Seventh Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

*JUSTICE BREYER,* with whom *JUSTICE GINSBURG* and *JUSTICE SOTOMAYOR* join, concurring.

I join the Court’s opinion in full. The conclusion that inter partes review is a matter involving public rights is sufficient to show that it violates neither Article III nor the Seventh Amendment. But the Court’s opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary. *Stern v. Marshall*, 564 U. S. 462, 494 (2011); *Commodity Futures Trading Comm’n v. Schor*, 478 U. S. 833, 853–856 (1986); see also *Stern, supra*, at 513 (BREYER, J., dissenting) (“The presence of ‘private rights’ does not automatically determine the outcome of the question but requires a more ‘searching’ examination of the relevant factors”).

*JUSTICE GORSUCH,* with whom THE CHIEF JUSTICE joins, dissenting.

After much hard work and no little investment you devise something you think truly novel. Then you endure the fur-
ther cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the wood-work, arguing that it was all a mistake and your patent should be canceled? Can a political appointee and his administrative agents, instead of an independent judge, resolve the dispute? The Court says yes. Respectfully, I disagree.

We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn’t always so. Before the Revolution, colonial judges depended on the crown for their tenure and salary and often enough their decisions followed their interests. The problem was so serious that the founders cited it in their Declaration of Independence (see §11). Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced.

Under the Constitution, judges “hold their Offices during good Behaviour” and their “Compensation . . . shall not be diminished during the[ir] Continuance in Office.” Art. III, §1. The framers knew that “a fixed provision” for judges’ financial support would help secure “the independence of the judges,” because “a power over a man’s subsistence amounts to a power over his will.” The Federalist No. 79, p. 472 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis deleted). They were convinced, too, that “[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts’] necessary independence.” The Federalist No. 78, at 471 (A. Hamilton).

Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency, the Patent Trial and Appeal Board, for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to decide patent disputes is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction—or, yes, a judicial hearing before a property interest is stripped away—the Constitution’s constraints can slow things down. But economy supplies no license for ignoring these—often vitally inefficient— protections. The Constitution “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,” and it is not our place to replace that judgment with our own. United States v. Stevens, 559 U. S. 460, 470 (2010).

Consider just how efficient the statute before us is. The Director of the Patent Office is a political appointee who serves at the pleasure of the President. 35 U. S. C. §§3(a)(1), (a)(4). He supervises and pays the Board members responsible for deciding patent disputes. §§1(a), 3(b)(6), 6(a). The Director is allowed to select which of these members, and how many of them, will hear any particular patent challenge. See §6(c). If they (somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard. See §§6(a), (c); In re Alappat, 33 F. 3d 1526, 1535 (CA Fed. 1994) (en banc); Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., Ltd., 868 F. 3d 1013, 1020 (CA Fed. 2013) (Dyk, J., concurring), cert. pending, No. 17–751. Nor has the Director proven bashful about asserting these statutory powers to secure the “police judgments” he seeks. Brief for Petitioner 46 (quoting Patent Office Solicitor); see also Brief for Shire Pharmaceuticals LLC as Amicus Curiae 22–30.

No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?

Of course, all this invites the question: how do we know which cases independent judges must hear? The Constitution’s original public meaning supplies the key, for the Constitution cannot secure the people’s liberty any less today than it did the day it was ratified. The relevant constitutional provision, Article III, explains that the federal “judicial Power” is vested in independent judges. As originally understood, the judicial power extended to “suit[s] at the common law, or in equity, or admiralty.” Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284 (1856). From this and as we’ve recently explained, it follows that, “[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with” Article III judges endowed with the protections for their independence the framers thought so important. Stern v. Marshall, 564 U. S. 462, 484 (2011) (internal quotation marks omitted). The Court does not quarrel with this test. See ante, at 12–14. We part ways only on its application.

6. Some of our concurring colleagues see it differently. See ante, at 1 (Breyer, J., concurring). They point to language in Commodity Futures Trading Comm’n v. Schor, 478 U. S. 833 (1986), promoting the notion that the political branches may “depart from the requirements of Article III” when the benefits outweigh the costs. Id., at 851. Color me skeptical. The very point of our written Constitution was to prevent the government from “depart[ing]” from its protections for the people and their liberty just because someone later happens to think the costs outweigh the benefits. See United States v. Stevens, 559 U. S. 460, 470 (2010).

This shift to courts paralleled a shift in thinking. Patents began as little more than feudal favors. *Id.*, at 1261. The crown both issued and revoked them. Lemley, *Juries* 1680–1681. And they often permitted the lucky recipient the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern. *Ibid*. But by the 18th century, inventors were busy in Britain and invention patents came to be seen in a different light. They came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist. Mossoff, *Rethinking Patents* 1288–1289. The Constitution itself reflects this new thinking, authorizing the issuance of patents precisely because of their contribution to the “Progress of Science and useful Arts.” Art. I, §8, cl. 8. “In essence, there was a change in perception—from viewing a patent as a contract between the crown and the patentee to viewing it as a ‘social contract’ between the patentee and society.” Waltersheid, *The Early Evolution of the United States Patent Law: Antecedents* (Part 3), 77 J. Pat. & T. Off. Soc. 771, 793 (1995). And as invention patents came to be seen so differently, it is no surprise courts came to treat them more solicitoriously.8

Unable to dispute that judges alone resolved virtually all patent challenges by the time of the founding, the Court points to three English cases that represent the Privy Council’s dying gasp in this area: *Board of Ordnance v. Wilkinson*, PC2/123 (1779); *Grill [Grice] v. Waters*, PC2/127 (1782); and *Board of Ordnance v. Parr*, PC1/3919 (1810).9 Filed in 1779, 1782, and 1810, each involved an effort to override a patent on munitions during wartime, no doubt in an effort to increase their supply. But even then appealing to the Privy Council was seen as a last resort. The 1779 petition (the last Privy Council revocation ever) came only after the patentee twice refused instructions to litigate the patent’s validity in a court of law. Gómez-Arostegui & Bottomley, *Privy Council and Scire Facias* 1700–1883, p. 6 (Nov. 6, 2017) https://ssrn.com/abstract=3054989 (citing *Board of Ordnance v. Wilkinson*, PC2/123 (1779), and PC1/11/150 (1779)). The Council did not act on the 1782 petition but instead referred it to the Attorney General where it appears to have been abandoned. Gómez-Arostegui & Bottomley, *Privy Council and Scire Facias*, supra, at 17–18. Meanwhile, in response to the 1810 petition the Attorney General admitted that *scire facias* was the “usual manner” of revoking a patent and so directed the petitioner to proceed at law even as he suggested the Privy Council might be available in the event of a “very pressing and imminent” danger to the public. *Id.*, at 20 (citing PC1/3919 (1810)).

In the end, these cases do very little to support the Court’s holding. At most, they suggest that the Privy Council might have possessed some residual power to revoke patents to address wartime necessities. Equally, they might serve only as

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7. See also Brief for H. Tomás Gómez-Arostegui et al. as *Amici Curiae* 6–37; Brief for Alliacense Limited LLC as *Amicus Curiae* 10–11; Gómez-Arostegui & Bottomley, *Privy Council and Scire Facias* 1700–1883, p. 2 (Nov. 6, 2017) (Addendum), https://ssrn.com/abstract=3054989 (all Internet materials as last visited Apr. 20, 2018); Observations on the Utility of Patents, and on the Sentiments of Lord Kenyon Respecting That Subject 23 (2d ed. 1791) (“If persons of the same trade find themselves aggrieved by Patents taken for any thing already in use, their remedy is at hand. It is by a writ of *Scire Facias*”); *Mancius v. Lawton*, 10 Johns. 23, 24 (NY Sup. Ct. 1813) (Kent, C. J.) (noting the “settled English course” that “[l]etters-patent . . . can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name” (emphasis deleted)).


more unfortunate evidence of the maxim that in time of war, the laws fall silent. But whatever they do, these cases do not come close to proving that patent disputes were routinely permitted to proceed outside a court of law. Any lingering doubt about English law is resolved for me by looking to our own. While the Court is correct that the Constitution’s Patent Clause “‘was written against the backdrop’ of English practice, ante, at 14 (quoting Graham v. John Deere Co. of Kansas City, 383 U. S. 1, 5 (1966))”, it’s also true that the Clause sought to reject some of early English practice. Reflecting the growing sentiment that patents shouldn’t be used for anticompetitive monopolies over “goods or businesses which had long before been enjoyed by the public”, the framers wrote the Clause to protect only procompetitive invention patents that are the product of hard work and insight and “add to the sum of useful knowledge.” Id., at 5–6. In light of the Patent Clause’s restrictions on this score, courts took the view that when the federal government “grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.” James v. Campbell, 104 U. S. 356, 358 (1882) (emphasis added). As Chief Justice Marshall explained, courts treated American invention patents as recognizing an “inchoate property” that exists “from the moment of invention.” Evans v. Jordan, 8 F. Cas. 872, 873 (No. 4,564) (CC Va. 1813). American patent holders thus were thought to “hold a property in [their] invention[s] by as good a title as the farmer holds his farm and flock.” Hovey v. Henry, 12 F. Cas. 603, 604 (No. 6,742) (CC Mass. 1846) (Woodbury, J.). And just as with farm and flock, it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.

This view held firm for most of our history. In fact, from the time it established the American patent system in 1790 until about 1880, Congress left the job of invalidating patents at the federal level to courts alone. The only apparent exception to this rule cited to us was a 4 year period when foreign patentees had to “work” or commercialize their patents or risk having them revoked. Hovenkamp, The Emergence of Classical American Patent Law, 58 Ariz. L. Rev. 263, 283–284 (2016). And the fact that for almost 200 years “earlier Congresses avoided use of [a] highly attractive”—and surely more efficient—means for extinguishing patents should serve as good “reason to believe that the power was thought not to exist” at the time of the founding. Printz v. United States, 521 U. S. 898, 905 (1997).

One more episode still underscores the point. When the Executive sought to claim the right to cancel a patent in the 1800s, this Court firmly rebuffed the effort. The Court explained:

“It has been settled by repeated decisions of this court that when a patent has [been issued by] the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. It has become the property of the patentee, and as such is entitled to the same legal protection as other property.” McCormick Harvesting Machine Co. v. Aultman, 169 U. S. 606, 608–609 (1898) (citations omitted).

As a result, the Court held, “[t]he only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent.” Id., at 609.

The Court today replies that McCormick sought only to interpret certain statutes then in force, not the Constitution. Ante, at 11, and n. 3. But this much is hard to see. Allowing the Executive to withdraw a patent, McCormick said, “would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.” 169 U. S., at 612. McCormick also pointed to “repeated decisions” in similar cases that themselves do not seem to rest merely on statutory grounds. See id., at 608–609 (citing United States v. Schurz, 102 U. S. 378 (1880), and United States v. American Bell Telephone Co., 128 U. S. 315 (1888)). And McCormick equated invention patents with land patents. 169 U. S., at 609. That is significant because, while the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a “judgment of a court.” United States v. Stone, 2 Wall. 525, 535 (1865); Wellness Int’l Network, Ltd. v. Sharif, 575 U. S. , , , (2015) (THOMAS, J., dissenting) (slip op., at 11) (“Although Congress could authorize executive agencies to dispose of public rights in lands—often by means of adjudicating a claimant’s qualifications for a land grant under a statute—the United States had to go to the courts if it wished to revoke a patent” (emphasis deleted)).

With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. Ante, at 6–10. But that doesn’t follow. Just because you give a gift doesn’t mean you forever enjoy the right to reclaim it. And, as we’ve seen, just because the Executive could issue an invention (or land) patent did not mean the Executive could revoke it. To reward those who had proved the social utility of their work (and to induce others

10. After all, the English statute of monopolies appeared to require the “force and validitie” of all patents to be determined only by “the Comon Lawes of this Realme & not otherwise.” 21 Jac. 1, c. 3, § 2 (1624). So the Privy Council cases on which the Court relies may not reflect the best understanding of the British constitution.
to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.

Still, the Court asks us to look away in yet another direction. At the founding, the Court notes, the Executive could sometimes both dispense and revoke public franchises. And because, it says, invention patents are a species of public franchises, the Court argues the Executive should be allowed to dispense and revoke them too. Ante, at 9–10. But labels aside, by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises. Many public franchises amounted to little more than favors resembling the original royal patents the framers expressly refused to protect in the Patent Clause. The Court points to a good example: the state-granted exclusive right to operate a toll bridge. Ante, at 9. By the founding, courts in this country (as in England) had come to view anticompetitive monopolies like that with disfavor, narrowly construing the rights they conferred. See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 544 (1837). By contrast, courts routinely applied to invention patents protected by the Patent Clause the “liberal common sense construction” that applies to other instruments creating private property rights, like land deeds. Davis v. Palmer, 7 F. Cas. 154, 158 (No. 3,645) (CC Va. 1827) (Marshall, C. J.); see also Mossoff, Reevaluating the Patent Privilege 990 (listing more differences in treatment). As Justice Story explained, invention patents protected by the Patent Clause were “not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored.” Ames v. Howard, 1 F. Cas. 755, 756 (No. 326) (CC Mass. 1833). For precisely these reasons and as we’ve seen, the law traditionally treated patents issued under the Patent Clause very differently than monopoly franchises when it came to governmental invasions. Patents alone required independent judges. Nor can simply invoking a mismatched label obscure that fact. The people’s historic rights to have independent judges decide their disputes with the government should not be a “constitutional Maginot Line, easily circumvented” by such “simpl[e] maneuver[s].” Bank Markazi v. Peterson, 578 U. S. ___, ___ (2016) (ROBERTS, C. J., dissenting) (slip op., at 12).

Today’s decision may not represent a rout but it at least signals a retreat from Article III’s guarantees. Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn’t about protecting judicial authority for its own sake. It’s about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It’s for that reason Hamilton warned the judiciary to take “all possible care . . . to defend itself against” intrusions by the other branches. The Federalist No. 78, at 466. It’s for that reason I respectfully dissent.

Cite as 18 C.D.O.S. 3732

SAS INSTITUTE INC., PETITIONER v. ANDREI IANCU, AS DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL.

No. 16–969

In the Supreme Court of the United States
On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit
Argued November 27, 2017
Filed April 24, 2018

JUSTICE GORSUCH delivered the opinion of the Court.

A few years ago Congress created “inter partes review.” The new procedure allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office that mimics civil litigation. Recently, the Court upheld the inter partes review statute against a constitutional challenge. Oil States Energy Services, LLC v. Greene’s Energy Group, LLC, ante, p. ___. Now we take up a question concerning the statute’s operation. When the Patent Office initiates an inter partes review, must it resolve all of the claims in the case, or may it choose to limit its review to only some of them? The statute, we find, supplies a clear answer: the Patent Office must “issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” 35 U. S. C. §318(a) (emphasis added). In this context, as in so many others, “any” means “every.” The agency cannot curate the claims at issue but must decide them all.

“To promote the Progress of Science and useful Arts,” Congress long ago created a patent system granting inventors rights over the manufacture, sale, and use of their inventions. U. S. Const., Art. I, §8, cl. 8; see 35 U. S. C. §154(a) (1). To win a patent, an applicant must (among other things) file “claims” that describe the invention and establish to the satisfaction of the Patent Office the invention’s novelty and nonobviousness. See §§102, 103, 112(b), 131; Cuozzo Speed Technologies, LLC v. Lee, 579 U. S. ___, ___–___ (2016) (slip op., at 2–3).

Sometimes, though, bad patents slip through. Maybe the invention wasn’t novel, or maybe it was obvious all along, and the patent owner shouldn’t enjoy the special privileges it has received. To remedy these sorts of problems, Congress has long permitted parties to challenge the validity of patent claims in federal court. See §§282(b)(2)–(3). More recently, Congress has supplemented litigation with various administrative remedies. The first of these was ex parte reexamination. Anyone, including the Director of the Patent Office, can
seek ex parte reexamination of a patent claim. §§302, 303(a).
Once instituted, though, an ex parte reexamination follows essentially the same inquisitorial process between patent owner and examiner as the initial Patent Office examination. §305. Later, Congress supplemented ex parte reexamination with inter partes reexamination. Inter partes reexamination (since repealed) provided a slightly more adversarial process, allowing a third party challenger to submit comments throughout the proceeding. §314(b)(2) (2006 ed.) (repealed). But otherwise it too followed a more or less inquisitorial course led by the Patent Office. §314(a). Apparently unsatisfied with this approach, in 2011 Congress repealed inter partes reexamination and replaced it with inter partes review. See 35 U. S. C. §§311–319 (2012 ed.).

The new inter partes review regime looks a good deal more like civil litigation. At its outset, a party must file a petition to institute an inter partes review of [a] patent.” §311(a). The petition “may request to cancel as unpatentable 1 or more claims of [the] patent” on the ground that the claims are obvious or not novel. §311(b); see §§102 and 103. In doing so, the petition must identify “each claim challenged,” the grounds for the challenge, and the evidence supporting the challenge. §312(a)(3). The patent owner, in turn, may respond with “a preliminary response to the petition” explaining “why no inter partes review should be instituted.” §313. With the parties’ submissions before him, the Director then decides “whether to institute an inter partes review . . . pursuant to [the] petition.”§314(b). (In practice, the agency’s Patent Trial and Appeal Board exercises this authority on behalf of the Director, see 37 CFR §42.4(a) (2017).) Before instituting review, the Director must determine, based on the parties’ papers, “that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U. S. C. §314(a).

Once the Director institutes an inter partes review, the matter proceeds before the Board with many of the usual trappings of litigation. The parties conduct discovery and join issue in briefing and at an oral hearing. §§316(a)(5), (6), (8), (10), (13). During the course of the case, the case the patent owner may seek to amend its patent or to cancel one or more of its claims. §316(d). The parties may also settle their differences and seek to end the review. §317. But “[i]f an inter partes review is instituted and not dismissed,” at the end of the litigation the Board “shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner.” §318(a).

Our case arose when SAS sought an inter partes review of Complement Soft’s software patent. In its petition, SAS alleged that all 16 of the patent’s claims were unpatentable for various reasons. The Director (in truth the Board acting on the Director’s behalf) concluded that SAS was likely to succeed with respect to at least one of the claims and that an inter partes review was therefore warranted. But instead of instituting review on all of the claims challenged in the petition, the Director instituted review on only some (claims 1 and 3–10) and denied review on the rest. The Director did all this on the strength of a Patent Office regulation that purported to recognize a power of “partial institution,” claiming that “[w]hen instituting inter partes review, the [Director] may authorize the review to proceed on all or some of the challenged claims and on all or some or the grounds of unpatentability asserted for each claim.” 37 CFR §42.108(a). At the end of litigation, the Board issued a final written decision finding claims 1, 3, and 5–10 to be unpatentable while upholding claim 4. But the Board’s decision did not address the remaining claims on which the Director had refused review.

That last fact led SAS to seek review in the Federal Circuit. There SAS argued that 35 U. S. C. §318(a) required the Board to decide the patentability of every claim SAS challenged in its petition, not just some. For its part, the Federal Circuit rejected SAS’s argument over a vigorous dissent by Judge Newman. SAS Institute, Inc. v. ComplementSoft, LLC, 825 F. 3d 1341 (2016). We granted certiorari to decide the question ourselves. 581 U. S. ___ (2017).

We find that the plain text of §318(a) supplies a ready answer. It directs that “[i]f an inter partes review is instituted and not dismissed under this chapter, the [Board] shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner . . . .” §318(a) (emphasis added). This directive is both mandatory and comprehensive. The word “shall” generally imposes a nondiscretionary duty. See Lexenon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U. S. 26, 35 (1998). And the word “any” naturally carries “an expansive meaning.” United States v. Gonzalez, 520 U. S. 1, 5 (1997). When used (as here) with a “singular noun in affirmative contexts,” the word “any” ordinarily “refer[s] to a member of a particular group or class without distinction or limitation” and in this way “impl[ies] every member of the class or group.” Oxford English Dictionary (3d ed., Mar. 2016), www.oed.com/view/Entry/8973 (OED) (emphasis added) (all Internet materials as last visited Apr. 20, 2018). So when §318(a) says the Board’s final written decision “shall” resolve the patentability of “any patent claim challenged by the petitioner,” it means the Board must address every claim the petitioner has challenged.

That would seem to make this an easy case. Where a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer. Social Security Bd. v. Nierotko, 327 U. S. 358, 369 (1946). Because SAS challenged all 16 claims of Complement Soft’s patent, the Board in its final written decision had to address the patentability of all 16 claims. Much as in the civil litigation system it mimics, in an inter partes review the petitioner is master of its complaint and normally entitled to judgment on all of the claims it raises, not just those the decisionmaker might wish to address.

The Director replies that things are not quite as simple as they seem. Maybe the Board has to decide every claim challenged by the petitioner in an inter partes review. But, he
saying that doesn’t mean every challenged claim gains admission to the review process. In the Director’s view, he retains discretion to decide which claims make it into an inter partes review and which don’t. The trouble is, nothing in the statute says anything like that. The Director’s claimed “partial institution” power appears nowhere in the text of §318, or anywhere else in the statute for that matter. And what can be found in the statutory text and context strongly counsels against the Director’s view.

Start where the statute does. In its very first provision, the statute says that a party may seek inter partes review by filing “a petition to institute an inter partes review.” §311(a). This language doesn’t authorize the Director to start proceedings on his own initiative. Nor does it contemplate a petition that asks the Director to initiate whatever kind of inter partes review he might choose. Instead, the statute envisions that a petitioner will seek an inter partes review of a particular kind—one guided by a petition describing “each claim challenged” and “the grounds on which the challenge to each claim is based.” §312(a)(3). From the outset, we see that Congress chose to structure a process in which it’s the petitioner, not the Director, who gets to define the contours of the proceeding. And “[j]ust as Congress’ choice of words is presumed to be deliberate” and deserving of judicial respect, “so too are its structural choices.” University of Tex. Southwestern Medical Center v. Nassar, 570 U. S. 338, 353 (2013).

It’s telling, too, to compare this structure with what came before. In the ex parte reexamination statute, Congress embraced an inquisitorial approach, authorizing the Director to investigate a question of patentability “[o]n his own initiative, and at any time.” §303(a). If Congress had wanted to give the Director similar authority over the institution of inter partes review, it knew exactly how to do so—it could have simply borrowed from the statute next door. But rather than create (another) agency-led, inquisitorial process for reconceiving patents, Congress opted for a party-directed, adversarial process. Congress’s choice to depart from the model of a closely related statute is a choice neither we nor the agency may disregard. See Nassar, supra, at 353–354.

More confirmation comes as we move to the point of institution. Here the statute says the Director must decide “whether to institute an inter partes review . . . pursuant to a petition.” §314(b). The Director, we see, is given only the choice “whether” to institute an inter partes review. That language indicates a binary choice—either institute review or don’t. And by using the term “pursuant to,” Congress told the Director what he must say yes or no to: an inter partes review that proceeds “[i]n accordance with” or “[i]n conformance to” the petition. OED, www.oed.com/view/Entry/155073. Nothing suggests the Director enjoys a license to depart from the petition and institute a different inter partes review of his own design.

To this the Director replies by pointing to another part of §314. Section 314(a) provides that the Director may not authorize an inter partes review unless he determines “there is a reasonable likelihood” the petitioner will prevail on “at least 1 of the claims challenged in the petition.” The Director argues that this language requires him to “evaluate claims individually” and so must allow him to institute review on a claim-by-claim basis as well. Brief for Federal Respondent 28. But this language, if anything, suggests just the opposite. Section 314(a) does not require the Director to evaluate every claim individually. Instead, it simply requires him to decide whether the petitioner is likely to succeed on “at least 1” claim. Once that single claim threshold is satisfied, it doesn’t matter whether the petitioner is likely to prevail on any additional claims; the Director need not even consider any other claim before instituting review. Rather than contemplate claim-by-claim institution, then, the language anticipates a regime where a reasonable prospect of success on a single claim justifies review of all.

Here again we know that if Congress wanted to adopt the Director’s approach it knew exactly how to do so. The ex parte reexamination statute allows the Director to assess whether a request raises “a substantial new question of patentability affecting any claim” and (if so) to institute reexamination limited to “resolution of the question.” §304 (emphasis added). In other words, that statute allows the Director to institute proceedings on a claim-by-claim and ground-by-ground basis. But Congress didn’t choose to pursue that known and readily available approach here. And its choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before. See Nassar, supra, at 353–354.

Faced with this difficulty, the Director tries another tack. He points to the fact that §314(a) doesn’t require him to institute an inter partes review even after he finds the “reasonable likelihood” threshold met with respect to one claim. Whether to institute proceedings upon such a finding, he says, remains a matter left to his discretion. See Cuozzo, 579 U. S., at ___. (slip op., at 9). But while §314(a) invests the Director with discretion on the question whether to institute review, it doesn’t follow that the statute affords him discretion regarding what claims that review will encompass. The text says only that the Director can decide “whether” to institute the requested review—not “whether and to what extent” review should proceed. §314(b).

The rest of the statute confirms, too, that the petitioner’s petition, not the Director’s discretion, is supposed to guide the life of the litigation. For example, §316(a)(8) tells the Director to adopt regulations ensuring that, “after an inter partes review has been instituted,” the patent owner will file “a response to the petition.” Surely it would have made little sense for Congress to insist on a response to the petition if, in truth, the Director enjoyed the discretion to limit the claims under review. What’s the point, after all, of answering claims that aren’t in the proceeding? If Congress had meant to afford the Director the power he asserts, we would have expected it to instruct him to adopt regulations requiring the patent owner to file a response to the Director’s institution notice.
or to the claims on which the Director instituted review. Yet we have nothing like that here. And then and again there is §318(a). At the end of the proceeding, §318(a) categorically commands the Board to address in its final written decision “any patent claim challenged by the petitioner.” In all these ways, the statute tells us that the petitioner’s contentions, not the Director’s discretion, define the scope of the litigation all the way from institution through to conclusion.

The Director says we can find at least some hint of the discretion he seeks by comparing §314(a) and §318(a). He notes that, when addressing whether to institute review at the beginning of the litigation, §314(a) says he must focus on the claims found “in the petition”; but when addressing what claims the Board must address at the end of the litigation, §318(a) says it must resolve the claims challenged “by the petitioner.” According to the Director, this (slight) linguistic discrepancy means the claims the Board must address in its final decision are not necessarily the same as those identified in the petition. And the only possible explanation for this arrangement, the Director submits, is that he must enjoy the (admittedly implicit) power to institute an inter partes review that covers fewer than all of the claims challenged in the petition.

We just don’t see it. Whatever differences they might display, §314(a) and §318(a) both focus on the petitioner’s contentions and, given that, it’s difficult to see how they might be read to give the Director power to decide what claims are at issue. Particularly when there’s a much simpler and sounder explanation for the statute’s wording. As we’ve seen, a patent owner may move to “[c]ancel any challenged patent claim” during the course of an inter partes review, effectively conceding one part of a petitioner’s challenge. §316(d)(1)(A). Naturally, then, the claims challenged “in the petition” will not always survive to the end of the case; some may drop out thanks to the patent owner’s actions. And in that light it is plain enough why Congress provided that only claims still challenged “by the petitioner” at the litigation’s end must be addressed in the Board’s final written decision. The statute’s own winnowing mechanism fully explains why Congress adopted slightly different language in §314(a) and §318(a).

We need not and will not invent an textual explanation for Congress’s drafting choices when the statute’s own terms supply an answer. See United States v. Ron Pair Enterprises, Inc., 489 U. S. 235, 240–241 (1989) (“[A]s long as the statute’s scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute”).

Moving past the statute’s text and context, the Director attempts a policy argument. He tells us that partial institution is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others. Brief for Federal Respondent 35–36; see also post, at 1 (GINSBURG, J., dissenting); post, at 7–8 (BREYER, J., dissenting). SAS responds that all patent challenges usually end up being litigated somewhere, and that partial institution creates inefficiency by requiring the parties to litigate in two places instead of one—the Board for claims the Director chooses to entertain and a federal court for claims he refuses. Indeed, SAS notes, the government itself once took the same view, arguing that partial institution “undermines[s] the Congressional efficiency goal” for this very reason. Brief for Petitioner 30. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn’t our call to make. Policy arguments are properly addressed to Congress, not this Court. It is Congress’s job to enact policy and it is this Court’s job to follow the policy Congress has prescribed. And whatever its virtues or vices, Congress’s prescribed policy here is clear: the petitioner in an inter partes review is entitled to a decision on all the claims it has challenged.61

That leaves the Director to suggest that, however this Court might read the statute, he should win anyway because of Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984). Even though the statute says nothing about his asserted “partial institution” power, the Director says the statute is at least ambiguous on the propriety of the practice and so we should leave the matter to his judgment. For its part, SAS replies that we might use this case as an opportunity to abandon Chevron and embrace the “‘impressive body’” of pre-Chevron law recognizing that “‘the meaning of a statutory term’” is properly a matter for “‘judicial [rather than] administrative judgment.’” Brief for Petitioner 41 (quoting Pittston Stevedoring Corp. v. Del- laventura, 544 F. 2d 35, 49 (CA2 1976) (Friendly, J.)).

But whether Chevron should remain is a question we may leave for another day. Even under Chevron, we owe an agency’s interpretation of the law no deference unless, after “employing traditional tools of statutory construction,” we find ourselves unable to discern Congress’s meaning. 467 U. S., at 843, n. 9. And after applying traditional tools of interpretation here, we are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands. The statute hinges inter partes review on the filing of a petition challenging specific patent claims; it makes the petition the centerpiece of the proceeding both before and after institution; and it requires the Board’s final

1. * JUSTICE GINSBURG suggests the Director might yet avoid this command by refusing to review a petition he thinks too broad while signaling his willingness to entertain one more tailored to his sympathies. Post, at 1 (dissenting opinion). We have no occasion today to consider whether this stratagem is consistent with the statute’s demands. See Cuozzo Speed Technologies, LLC v. Lee, 579 U. S. ___ (2016) (slip op., at 11) (noting that courts may invalidate “she-nanigans” by the Director that are “outside [his] statutory limits”); CAB v. Delta Air Lines, Inc., 367 U. S. 316, 328 (1961) (questioning an agency’s “power to do indirectly what it cannot do directly”). But even assuming (without granting) the law would tolerate this tactic, it would show only that a lawful means exists for the Director to achieve his policy aims—not that he “should be allowed to improvise on the powers granted by Congress” by devising an extralegal path to the same goal. Id., at 330. That an agency’s improvisation might be thought by some more expedient than what the law allows, post, at 1, does nothing to commend it either, for lawful ends do not justify unlawful means.
written decision to address every claim the petitioner presents for review. There is no room in this scheme for a wholly unmentioned “partial institution” power that lets the Director select only some challenged claims for decision. The Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear. See SEC v. Sloan, 436 U. S. 103, 116–117 (1978). Neither may we defer to an agency official’s preferences because we imagine some “hypothetical reasonable legislator” would have favored that approach. Post, at 9 (BREYER, J., dissenting). Our duty is to give effect to the text that 535 actual legislators (plus one President) enacted into law.

At this point, only one final question remains to resolve. Even if the statute forbids his partial institution practice, the Director suggests we lack the power to say so. By way of support, he points to §314(d) and our decision in Cuozzo, 579 U. S. ___. Section 314(d) says that the “determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” In Cuozzo, we held that this provision prevented courts from entertaining an argument that the Director erred in instituting an inter partes review of certain patent claims. Id., at ___ (slip op., at 7–12). The Director reads these authorities as foreclosing judicial review of any legal question bearing on the institution of inter partes review—including whether the statute permits his “partial institution” practice.

But this reading over reads both the statute and our precedent. As Cuozzo recognized, we begin with “the ‘strong presumption’ in favor of judicial review.” Id., at ___ (slip op., at 9). To overcome that presumption, Cuozzo explained, this Court’s precedents require “clear and convincing indications” that Congress meant to foreclose review. Id., at ___ (slip op., at 10) (internal quotation marks omitted). Given the strength of this presumption and the statute’s text, Cuozzo concluded that §314(d) precludes judicial review only of the Director’s “initial determination” under §314(a) that “there is a ‘reasonable likelihood’ that the claims are unpatentable on the grounds asserted” and review is therefore justified. Id., at ___ (slip op., at 9); see id., at ___ (slip op., at 12) (review unavailable “where a patent holder merely challenges the Patent Office’s ‘determination’ that the information presented in the petition . . . shows that there is a reasonable likelihood of success ‘with respect to at least 1 of the claims challenged’”); ibid. (claim that a “petition was not pleaded ‘with particularity’ under §312 is little more than a challenge to the Patent Office’s conclusion, under §314(a), that the ‘information presented in the petition’ warranted review”). In fact, Cuozzo proceeded to emphasize that §314(d) does not “enable the agency to act outside its statutory limits.” Id., at ___ (slip op., at 11). If a party believes the Patent Office has engaged in “‘shenanigans’” by exceeding its statutory bounds, judicial review remains available consistent with the Administrative Procedure Act, which directs courts to set aside agency action “not in accordance with law” or “in excess of statutory juris-

diction, authority, or limitations.” Ibid.; 5 U. S. C. §§706(2) (A), (C).

And that, of course, is exactly the sort of question we are called upon to decide today. SAS does not seek to challenge the Director’s conclusion that it showed a “reasonable likelihood” of success sufficient to warrant “institut[ing] an inter partes review.” 35 U. S. C. §§314(a), (d). No doubt SAS remains very pleased with the Director’s judgment on that score. Instead, SAS contends that the Director exceeded his statutory authority by limiting the review to fewer than all of the claims SAS challenged. And nothing in §314(d) or Cuozzo withdraws our power to ensure that an inter partes review proceeds in accordance with the law’s demands.

Because everything in the statute before us confirms that SAS is entitled to a final written decision addressing all of the claims it has challenged and nothing suggests we lack the power to say so, the judgment of the Federal Circuit is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Given the Court’s wooden reading of 35 U. S. C. §318(a), and with “no mandate to institute [inter partes] review” at all, Cuozzo Speed Technologies, LLC v. Lee, 579 U. S. ___, ___ (2016) (slip op., at 9), the Patent Trial and Appeal Board could simply deny a petition containing challenges having no “reasonable likelihood” of success, §314(a). Simultaneously, the Board might note that one or more specified claims warrant reexamination, while others challenged in the petition do not. Petitioners would then be free to file new or amended petitions shorn of challenges the Board finds unworthy of inter partes review. Why should the statute be read to preclude the Board’s more rational way to weed out insubstantial challenges? For the reasons stated by JUSTICE BREYER, the Court’s opinion offers no persuasive answer to that question, and no cause to believe Congress wanted the Board to spend its time so uselessly.

JUSTICE BREYER, with whom JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, and with whom JUSTICE KAGAN joins except as to Part III–A, dissenting.

This case requires us to engage in a typical judicial exercise, construing a statute that is technical, unclear, and constitutes a minor procedural part of a larger administrative scheme. I would follow an interpretive technique that judges often use in such cases. Initially, using “traditional tools of
statutory construction,” INS v. Cardoza-Fonseca, 480 U. S. 421, 446 (1987), I would look to see whether the relevant statutory phrase is ambiguous or leaves a gap that Congress implicitly delegated authority to the agency to fill. Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842–843 (1984). If so, I would look to see whether the agency’s interpretation is reasonable. Id., at 843. Because I believe there is such a gap and because the Patent Office’s interpretation of the ambiguous phrase is reasonable, I would conclude that the Patent Office’s interpretation is lawful.

I

The majority sets out the statutory framework that establishes “inter partes review.” See ante, at 2–3; 35 U. S. C. §§311–319. An example will help the reader keep that framework in mind. Suppose the Patent Office issues a patent containing, say, 16 different claims. A challenger, believing the patent is invalid, seeks to invoke the inter partes review procedure.

The statutory chapter entitled “Inter partes review” explains just how this is to be done. See §§311–319. First, the challenger files a petition requesting “cancellation” of one or more of the patent claims as “unpatentable” because “prior art” shows, for example, that they are not “novel.” §311(b); see §§102, 103. That petition must detail the grounds for the challenge and the supporting evidence, along with providing certain technical information. §312. Second, the patent owner may file a “preliminary response” to the petition. §313.

Third, the Director of the Patent Office will decide whether to “institute” inter partes review. §314. The statute specifies that the Director “may not authorize an inter partes review to be instituted unless the Director determines . . . that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” §314(a). Thus, in my example, if the Director determines that none of the 16 challenges in the petition has likely merit, he cannot institute an inter partes review. Even if there is one potentially meritorious challenge, we have said that the statute contains “no mandate to institute review,” so the Director still has discretion to deny a petition. Cuozzo Speed Technologies, LLC v. Lee, 579 U. S. ___ (2016) (slip op., at 9). We have also held that the Director’s decision whether to institute review is normally not reviewable. Id., at ___–___ (slip op., at 11–12).

The Director, by regulation, has delegated the power to institute review to the Patent Trial and Appeal Board. 37 CFR §42.4(a) (2017). And the Director has further provided by regulation that where a petition challenges several patent claims (say, all 16 claims in my example), “the Board may authorize the review to proceed on all or some of the challenged claims.” §42.108(a) (emphasis added). Thus, where some, but not all, of the challenges have likely merit (say, 1 of the 16 has likely merit and the others are close to frivolous), the Board is free to conduct inter partes review only as to the challenge with likely merit.

Fourth, the statute next describes the relation of a petition for review and an instituted review to other proceedings involving the challenged patent. §315. Fifth, the statute describes what happens once the Board begins its inter partes review, including how the Board is to take evidence and make its decisions, §316, and the nature and effect of settlements, §317.

Sixth, the statute sets forth the section primarily at issue here, which describes what happens at the end of the process. It says:

“Final Written Decision. If an inter partes review is instituted and not dismissed under this chapter, the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d).” §318(a) (emphasis added).

Finally, the chapter says that a “party dissatisfied with the final written decision . . . may appeal the decision” to the U. S. Court of Appeals for the Federal Circuit. §319; see §141(c).

Thus, going through this process, if a petitioner files a petition challenging 16 claims and the Board finds that the challenges to 15 of the claims are frivolous, the Board may then, as it interprets the statute, begin and proceed through the inter partes review process as to the remaining claim, number 16, but not in respect to the other 15 claims. Eventually the Board will produce a “final written decision” as to the patentability of claim number 16, which decision the challenger (or the patentee) can appeal to the Federal Circuit.

II

Now let us return to the question at hand, the meaning of the phrase “any patent claim challenged by the petitioner” in §318(a). Do those words unambiguously refer, as the majority believes, to “any patent claim challenged by the petitioner’s original petition?” No, in the petitioner’s original petition? The words “in the petitioner’s original petition” do not appear in the statute. And the words that do appear, “any patent claim challenged by the petitioner,” could be modified by using different words that similarly do not appear, for example, the words “in the inter partes review proceeding.” But without added words, the phrase “challenged by the petitioner” does not tell us whether the relevant challenge is one made in the initial petition or only one made in the inter partes review proceeding itself. And, linguistically speaking, there is as much reason to fill that gap with reference to the claims still being challenged in the proceeding itself as there is to fill it with reference to claims that were initially challenged in the petition but which the Board weeded out before the inter partes review proceedings began.

Which reading we give the statute makes a difference. The first reading, the majority’s reading, means that in my example, the Board must consider and write a final decision in respect to the challenges to all
16 claims, including the 15 frivolous challenges. The second
reading requires the Board to write a final, appealable deci-
sion only in respect to the challenge to the claim (number 16
in my example) that survived the Board’s initial screening,
namely, in my example, the one challenge in respect to which
the Board found a “reasonable likelihood that the petitioner
would prevail.” §314(a).

I cannot find much in the statutory context to support the
majority’s claim that the statutory words “claim challenged
by the petitioner” refer unambiguously to claims challenged
initially in the petition. After all, the majority agrees that they
do not refer to claims that initially were challenged in the
petition but were later settled or withdrawn. Ante, at 9–10;
see §316(d)(1)(A) (allowing the patent owner to cancel a
challenged patent claim during inter partes review); §317
(addressing settlement). The majority says that weeded-out
challenges, unlike settled matters or canceled claims, involve
claims that are still being “challenged ‘by the petitioner’ at
the litigation’s end.” Ante, at 9–10. But weeded-out challeng-
es are the same as settled matters and canceled claims in this
respect. The petitioner cannot continue to challenge a claim
once that challenge is weeded out by the Board at the institu-
tion phase. He cannot pursue it before the Board in the inter
parts review, and normally he cannot pursue it in a court
of appeals. See Cuozzo, 579 U. S., at __–__ (slip op., at
11–12). The petitioner might bring a totally separate case in
court in which he challenges the claim, but that is a different
matter that is not the subject of this statutory chapter.

Nor does the chapter’s structure help fill the statutory gap.
I concede that if we examine the “final written decision” sec-
tion, §318(a), just after reading the three initial sections of
the statute, §§311, 312, and 313, we may be tempted to be-
lieve that the words “any patent claim challenged” in §318(a)
must refer to the claims challenged in the petition, just as the
words “each claim challenged” in §312(a)(3) unmistakably
do. But once we look at the whole statute, this temptation
disappears. The first section, §311, describing the inter par-
tes review process, does not use the word “challenge.” The
next section, §312, describes the requirements for the initial
petition, which is filed before any inter partes proceeding has
been instituted. It is about the petition, so it is not surprising
that it refers to the claims challenged in the petition. The next
section, §313, concerns the preliminary response, which is
similarly filed before the inter partes review proceeding has
been instituted and is thus similarly focused on the petition,
although it does not use the word “challenged.”

The very next section, however, §314, along with part
of §315, describes preliminary screening and the institution
of the inter partes review proceeding. The remainder of §315,
and the following sections, §§316 and 317, then describe how
that proceeding, once instituted, will be conducted (and pro-
vide for settlements). Only then does §318 appear. That statu-

tory provision tells the Board that, at the conclusion of the
inter partes review proceeding, it must “issue a final written
decision with respect to the patentability of any patent claim
challenged by the petitioner.” §318(a). And in this context, a
context about the inter partes review proceeding itself, it is
more than reasonable to think that the phrase “patent claim
challenged by the petitioner” refers to challenges made in
the proceeding, not challenges made in the petition but never
made a part of the proceeding.

I am not helped by examining, as the majority examines,
what Congress might have done had it used other language.
Ante, at 6–8. The majority points out that had Congress meant
anything other than “challenged in the petition,” it might
have said so more clearly. Ibid. But similarly, if Congress
had meant “challenged in the petition,” it might have used
the words “in the petition.” After all, it used those very words
only four sections earlier. See §314(a) (referring to “claims
challenged in the petition”). This argument, like many such
arguments, is a wash.

Neither am I helped by analogizing the inter partes re-
view proceeding to civil litigation. Cf. ante, at 2–3, 5. That
is because, as this Court said in Cuozzo, inter partes review
is a “hybrid proceeding.” 579 U. S., at __ (slip op., at 16). It
has some adversarial characteristics, but “in other significant
respects, inter partes review is less like a judicial proceed-
ing and more like a specialized agency proceeding.” Id., at
__ (slip op., at 15). Its purposes are not limited to “helping
resolve concrete patent-related disputes among parties,” but
extend to “reeexamin[ing] . . . an earlier administrative grant
of a patent” and “protect[ing] the public’s ‘paramount inter-
est in seeing that patent monopolies . . . are kept within their
legitimate scope.” Ibid. (quoting Precision Instrument Mfg.
Co. v. Automotive Maintenance Machinery Co., 324 U. S.
806, 816 (1945); ellipsis in original); see also Oil States En-
(slip op., at 8–9).

Finally, I would turn to the likely purposes of the statu-
tory provision. As the majority points out, §314(a) makes
clear that the “Director” (now his delegate, the Board) is to
determine whether there is a “reasonable likelihood” of suc-
cess as to at least one of the claims the petition challenges. If
not, he cannot initiate an inter partes review proceeding. If so,
§314(a) “invests the Director with discretion on the question
whether to institute review.” Ante, at 8 (emphasis deleted);
Cuozzo, supra, at __ (slip op., at 9). As I have said, Patent
Office regulations allow the Board to proceed with inter par-
tes review of some of the claims a petitioner challenges (say,
only those where there is a reasonable likelihood of success),
but not of others. 37 CFR §42.108(a).

The majority points out that it does not follow from §314(a)
that the statute affords the Director discretion regarding what
claims that review will encompass. The text says only that
the Director can decide “whether” to institute the requested
review, not “whether and to what extent” review should pro-
cceed. Ante, at 8 (emphasis deleted). That is certainly so. But
I think that when we, as judges, face a difficult text, it is often
helpful to ask not just “whether” or “what” but also “why.”
Why, asks the Patent Office, would Congress have intended
to require the Board to proceed with an inter partes review, take evidence, and hear argument in respect to challenges to claims that the Board had previously determined had no “reasonable likelihood” of success? The statute would seem to give the Director discretion to achieve the opposite, namely, to avoid wasting the Board’s time and effort reviewing challenges that it has already decided have no “reasonable likelihood of success.” In my example, why make the Board do further work on the challenges to claims 1 through 15, which the Board has already decided are near frivolous?

More than that, to read §318(a) as requiring a “final written decision” in respect to those 15 perhaps frivolous challenges would seem to lead to judicial review of the Board’s decision about those frivolous challenges. After all, §319 of the statute says that a “party dissatisfied with the final written decision of the [Board] under section 318(a),” the provision before us, “may appeal the decision” to the Federal Circuit. And the majority’s interpretation is anomalous in that it is difficult to imagine why Congress, with one hand, would make the agency’s weeding-out decision nonreviewable, see Cuozzo, supra, at ___–___ (slip op., at 11–12), yet at the same time would make the decision reviewable via the requirement that the Board issue a “final written” appealable “decision” with respect to that weeded-out challenge.

III

I end up where I began. Section 318(a) contains a gap just after the words “challenged by the petitioner.” Considerations of context, structure, and purpose do not close the gap. And under Chevron, “where a statute leaves a ‘gap’ or is ‘ambigu[ous],’ we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.” Cuozzo, supra, at ___ (slip op., at 13) (quoting United States v. Mead Corp., 533 U. S. 218, 229 (2001); alteration in original).

A

In referring to Chevron, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision. See Mead Corp., supra, at 229–231. Rather, I understand Chevron as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have. I recognize that Congress does not always consider such matters, but if not, courts can often implement a more general, virtually omnipresent congressional purpose—namely, the creation of a well-functioning statutory scheme—by using a canon-like, judicially created construct, the hypothetical reasonable legislator, and asking what such legislators would likely have intended had Congress considered the question of delegating gap-filling authority to the agency.

B

To answer this question, we have previously held that a “statute’s complexity, the vast number of claims that it engenders, and the consequent need for agency expertise and administrative experience” normally “lead us to read [a] statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.” Barnhart v. Walton, 535 U. S. 212, 225 (2002). These considerations all favor such a reading here. Indeed, the question before us is one of agency administration in respect to detailed matters that an agency working with the statute is particularly likely to understand. In addition, the agency filled the gap here through the exercise of rulemaking authority explicitly given it by Congress to issue regulations “setting forth the standards for the showing of sufficient grounds to institute a review” and “establishing and governing inter partes review.” §§316(a)(2), (4); Cuozzo, 579 U. S., at ___–___ (slip op., at 12–13); cf. Mead Corp., supra, at 227. Thus, there is a gap, the agency possesses gap-filling authority, and it filled the gap with a regulation that, for reasons I have stated, is a reasonable exercise of that authority.

* * *

I consequently would affirm the judgment of the Federal Circuit. And, with respect, I dissent from the Court’s contrary conclusion.
Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 3740

ROBERT I. REESE, JR., Plaintiff-Appellant,
v.
COUNTY OF SACRAMENTO; DUNCAN BROWN, Sacramento County Sheriff’s Department Deputy (Badge #1220); ZACHARY ROSE, Sacramento County Sheriff’s Department Deputy (Badge #832), Defendants-Appellees.

No. 16-16195
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-cv-00559-GEB-KJN

ROBERT I. REESE, JR., Plaintiff-Appellee,
v.
COUNTY OF SACRAMENTO; ZACHARY ROSE, Sacramento County Sheriff’s Department Deputy (Badge #832), Defendants-Appellants,
and
DUNCAN BROWN, Sacramento County Sheriff’s Department Deputy (Badge #1220), Defendant.

No. 16-16230
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:13-cv-00559-GEB-KJN
Appeal from the United States District Court for the Eastern District of California
Garland E. Burrell, Jr., Senior District Judge, Presiding
Argued and Submitted December 8, 2017
San Francisco, California
Filed April 23, 2018
Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and Diane J. Humetewa,* District Judge.
Opinion by Judge Humetewa

*The Honorable Diane J. Humetewa, United States District Judge for the District of Arizona, sitting by designation.

COUNSEL

Dale K. Galipo (argued), Law Office of Dale K. Galipo, Woodland Hills, California; Eric Grant, Hicks Thomas LLP, Sacramento, California; Stewart Katz, Law Office of Stewart Katz, Sacramento, California; for Plaintiff-Appellant.
John R. Whitefleet (argued) and Thomas L. Riordan, Porter Scott, Sacramento, California, for Defendants-Appellees.

OPINION

HUMETEWA, District Judge:

Plaintiff/Appellant Robert Reese, Jr. (“Reese”) appeals the district court’s decision granting Defendants’/Appellees’ (“the Defendants”) post-verdict motion for judgment as a matter of law on the issue of qualified immunity. Reese further appeals the district court’s post-verdict decision granting “summary judgment sua sponte” for the Defendants on the California Bane Act (“Bane Act”) claim. The Defendants cross-appeal the district court’s denial of their requests for post-trial relief. Defendants also argue that Heck v. Humphrey, 512 U.S. 477 (1994) should have barred Reese’s claims because his misdemeanor criminal conviction for exhibiting a knife arose out of the same acts. We have jurisdiction under 28 U.S.C. § 1291.

BACKGROUND

Robert Reese, Jr., filed this civil rights claim against the County of Sacramento and two of its Deputy Sheriffs, Duncan Brown and Zachary Rose, following a shooting incident on March 25, 2011. In the hours leading up to the incident, Reese had consumed large quantities of alcohol, marijuana, and cocaine at a neighborhood party. The party ended when Reese and his neighbor Nathan began arguing over whether Reese had taken Nathan’s bottle of vodka. Sometime after the party, Nathan’s girlfriend went to Reese’s apartment to retrieve the vodka. Reese answered the door holding a knife and refused to hand over the bottle. Around 4:30 a.m., Reese exchanged several text messages, some containing racial epithets. Shortly thereafter, Reese heard knocking on his apartment door. He assumed it was Nathan. It was not.

Deputies Brown and Rose and several other police officers arrived at Reese’s apartment complex shortly before 5:00 a.m. They were responding to an anonymous 911 call that an African-American male had exited apartment 144 and fired an automatic gun. The caller also stated that the male was possibly crazy, under the influence of drugs, had a knife, and was back inside apartment 144.

Deputy Rose decided that someone should knock on the door of apartment 144 to further investigate the 911 report. The deputies decided that Deputy Brown, who had a rifle, would stand back about 15 feet to cover the doorway while Deputy Rose would knock on the apartment door. Deputy Rose, concealing himself, stood to the side of the door and other deputies lined up behind him. Deputy Rose, while holding his handgun in one hand, knocked on the door with his flashlight. Deputy Brown testified that after Deputy Rose knocked, “the door flew open. I saw a figure coming out, arm
up, extended, large knife[,]” Upon seeing the knife, which he describes as being within a foot of Deputy Rose’s neck, Deputy Brown fired his rifle at Reese. Deputy Rose, seeing Reese with the knife in his hand, simultaneously backed away from the door of the apartment. The next events occurred in what Deputy Rose describes as a “millisecond.” After the rifle shot, Deputy Rose advanced into the apartment expecting to see Reese shot and incapacitated. Instead he saw Reese standing upright in the apartment. He could not, however, see Reese’s hands. Deputy Rose immediately fired his handgun, aiming it at Reese’s chest. He was approximately three feet away from Reese. Reese fell backward toward a couch and Deputy Rose saw blood on Reese’s clothing and the carpet. At trial, Deputy Rose testified that he was uncertain whether it was his or Deputy Brown’s shot that actually hit Reese but believed that it was his. Reese survived the incident and thereafter asserted civil rights claims against the County and Deputies Brown and Rose.

After a seven-day jury trial, the jury returned a verdict in favor of Reese on his Fourth Amendment excessive force and Bane Act claims against Deputy Rose and the County. The jury also returned a verdict in favor of Deputy Brown, which Reese does not appeal. In separate interrogatories, the jury determined that Deputy Rose’s pistol round, not Deputy Brown’s rifle round, hit Reese. The jury also found that Reese had a knife in his hand in an elevated position when he opened the door. They answered “no” to the question of whether Reese brandished the knife at Deputy Rose. Question 14 asked the jury “[a]t the time Deputy Rose fired his shot, did it appear that Plaintiff posed an immediate threat of death or serious physical injury to Deputy Rose?” The jury answered “no.” The jury awarded Reese $534,340.00 in compensatory damages including $150,000.00 for non-economic loss.

After the jury returned its verdict, the Defendants moved for a judgment as a matter of law asserting that Deputy Rose was entitled to qualified immunity, or alternatively that Reese failed to prove by a preponderance of the evidence all of the elements required for a Fourth Amendment battery and Bane Act violation. The Defendants asserted that the evidence at trial insufficiently established that it was Deputy Rose’s shot that hit Reese, and thus Reese had not met his burden of showing Rose had caused Reese’s harm. Finally, the Defendants asserted that Reese’s claims were barred by Heck v. Humphrey because he pleaded no contest to a violation of California Penal Code section 417(a)(1). Defendants also moved for a new trial, arguing that the district court erred in its instruction to the jury on Reese’s Bane Act claim.

The district court determined that Deputy Rose was entitled to qualified immunity on Reese’s Fourth Amendment claim. The district court then granted “summary judgment sua sponte,” finding that Defendants were entitled to judgment as a matter of law on Reese’s Bane Act claim, concluding that Defendants’ proposed jury instruction on that claim should have been given. The district court denied Defendants’ other requests for post-trial relief, including their Heck v. Humphrey claim. Reese appealed the district court’s post-trial rulings in favor of Defendants. Defendants filed a cross-appeal reasserting their Heck v. Humphrey claim and asserting that the district court erred in several of its evidentiary rulings and its award of future non-economic loss.

**ANALYSIS**

**I. DEFENDANTS’ POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW**

The Court of Appeals “review[s] de novo the grant or denial of a renewed motion for judgment as a matter of law.” Pavao v. Pagay, 307 F.3d 915, 918 (9th Cir. 2002). “A renewed motion for judgment as a matter of law is properly granted only ‘if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict,’” Castro v. County of Los Angeles, 833 F.3d 1060, 1066 (9th Cir. 2016) (quoting Pavao, 307 F.3d at 918). Thus, although the Court does not defer to the district court’s decision on the motion, it gives “significant deference to the jury’s verdict and to the nonmoving parties . . . when deciding whether that decision was correct.” A.D. v. Cal. Highway Patrol, 712 F.3d 446, 453 (9th Cir. 2013).

**A. Qualified Immunity**

Reese first challenges the district court’s post-verdict ruling that Deputy Rose is entitled to qualified immunity on his Fourth Amendment excessive force claim.

“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’ Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). “The purpose of qualified immunity is to strike a balance between the competing ‘need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.’” Mattos v. Agarano, 661 F.3d 433, 440 (9th Cir. 2011) (quoting Pearson, 555 U.S. at 231). “In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer’s alleged misconduct.” Lal v. California, 746 F.3d 1112, 1116 (9th Cir. 2014) (citing Pearson, 555 U.S. at 232).
Here, the jury found Deputy Rose violated Reese’s right to be free from excessive force under the Fourth Amendment. “Therefore, the jury’s verdict against [Rose] is sufficient to deny him qualified immunity on this prong of the analysis.” See A.D., 712 F.3d at 456 (denying qualified immunity on a post-verdict motion for judgment as a matter of law). Rose’s entitlement to qualified immunity therefore turns on whether Reese’s right was clearly established at the time of the incident in 2011.

Joining other circuit courts from around the country, this Court recently determined that the “clearly established” prong of the qualified immunity analysis is a matter of law to be decided by a judge. Morales v. Fry, 873 F.3d 817, 824–25 (9th Cir. 2017). In Morales, we recognized that “the question of whether a particular constitutional right is ‘clearly established’ is one that the Supreme Court has increasingly emphasized is within the province of the judge.” Id. at 822. “[C]omparing a given case with existing statutory or constitutional precedent is quintessentially a question of law for the judge, not the jury.” Id. at 823. We recognized, however, that “[a] bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.” Id.

In arguing that his right to be free of excessive force under these circumstances was clearly established, Reese relies on the jury’s answer to Question 14, their finding that it did not appear that Reese posed an immediate threat of death or serious physical injury to Rose at the time Rose fired his shot. Reese contends that by making this finding, the jury determined Rose violated Reese’s clearly established right not to be subjected to deadly force when he posed no immediate threat to Rose or others. As Morales confirmed, however, the question of whether the right was clearly established is solely for the judge to decide, not the jury. See id. at 825. Thus, although the jury’s finding that Reese posed no immediate threat of death or serious physical injury to Rose addresses the first prong of the qualified immunity analysis, it does not answer the purely legal question of whether the right was clearly established in this context. Therefore, the district court was within its authority to determine, as a matter of law, whether Deputy Rose was entitled to qualified immunity, even where a jury determined that he violated Reese’s Fourth Amendment right to be free from excessive force.

Moreover, the district court appropriately analyzed the facts here to the established standard that “[a] Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” White v. Pauly, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting al-Kidd, 563 U.S. at 741). “As [the Supreme] Court explained decades ago, the clearly established law must be ‘particularized’ to the facts of the case.” Id. (citing Anderson, 483 U.S. at 640). “Such specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that ‘[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.’” Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (second alteration in original) (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)).

We agree with the district court that Reese has not identified any sufficiently analogous cases showing that under similar circumstances, a clearly established Fourth Amendment right against the use of deadly force existed at the time of the shooting. The jury determined that when Reese answered the door to his apartment, he had a knife in his hand in an elevated position. Upon seeing Reese in the doorway with the knife, which was very close to where Rose was standing, Brown immediately fired a shot from his rifle at Reese, but missed. After Brown fired the shot, he saw Reese back into the apartment and drop the knife. Rose, who saw Reese when he first opened the door, lost sight of Reese when he backed up into his apartment and after Brown fired at him. Rose then advanced toward the doorway and was surprised to see Reese standing in the apartment. Rose stated that he could not see Reese’s hands but upon seeing him, shot Reese in the chest from three to five feet away. Notably, while the jury found that Reese did not brandish the knife at Rose, they also found that at the time Rose fired his shot, he did not see Reese’s hands.

Although Reese goes to great lengths to remind this Court that we do not demand a case with “materi(ally similar)” factual circumstances or even facts closely analogous to his case, Hope v. Pelzer, 536 U.S. 730, 741 (2002), none of Reese’s cited cases demonstrate that the contours of his Fourth Amendment right were sufficiently clear such that “any reasonable official in [his] shoes would have understood that he was violating it.” City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (alteration in original) (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)). Critically, Reese points to no case that considered the relevant question whether Deputy Rose, having come within striking distance of a suspect who had held a knife a fraction of a second before, was objectively unreasonable in using deadly force before determining whether the suspect still possessed the knife. Compare Wilkinson v. Torres, 610 F.3d 546, 551 (9th Cir. 2010) (holding that officer’s shooting of plaintiff did not violate a constitutional right where plaintiff had ignored officer commands and was accelerating towards officer on foot); Smith v. City of Hemet, 394 F.3d 689, 693, 702, 704 n.7 (9th Cir. 2005) (en banc) (declining to address qualified immunity, but concluding that a rational jury could find that officers’ use of pepper spray and a police canine on a plain-
tiff was unconstitutionally excessive where the “[t]he record does not reveal any basis for believing that [plaintiff] was armed,” where his wife had informed officers that plaintiff “did not have a gun, there were no weapons in the house, and he was clad in his pajamas”); Harris v. Roderick, 126 F.3d 1189, 1203 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998) (finding officer’s shooting of plaintiff objectively unreasonable where the officer was “safely ensconced on [a] hill overlooking” the cabin that plaintiff was running toward and the plaintiff had made “[n]o threatening movement . . . with respect to [the shooting officer] or anyone else, even after [the officer] shot [plaintiff’s friend]”); Curnow By and Through Curnow v. Ridgecrest Police, 952 F.2d 321, 323, 325 (9th Cir. 1991) (affirming district court’s denial of officer’s motion for summary judgment on qualified immunity grounds where the non-moving plaintiff’s evidence showed that the plaintiff had not pointed his gun at officers, his gun was not loaded, and he was not facing the officer who opened fire).

Reese relies on additional cases that post-date March 2011, when the incident occurred, but those decisions “could not have given fair notice to [Deputy Rose] and are of no use in the clearly established inquiry.” Broussard v. Haugen, 543 U.S. 194, 200 (2004). Even to the extent that those cases reflect clearly established case law that pre-dates March 2011, their factual contexts make clear that the law was not clearly established for the circumstances Deputy Rose confronted here. See Zion v. County of Orange, 874 F.3d 1072, 1076 (9th Cir. 2017) (holding excessive force was used if defendant officer fired a second round of close range bullets at a plaintiff who was curled up on the floor and injured from a first round of fire, and then subsequently stomped on the plaintiff’s head); Longoria v. Pinal County, 873 F.3d 699, 708–09, 710 (9th Cir. 2017) (holding that officer’s use of deadly force could have violated a clearly established right if jury determined plaintiff who was surrounded by law enforcement and had not brandished a weapon during forty minutes of observation was in the process of surrendering at the time of the shooting, rather than assuming a shooting stance); Estate of Lopez by and Through Lopez v. Gelhaus, 871 F.3d 998, 1021–22 (9th Cir. 2017) (remanding for trial where the facts, viewed in the light most favorable to the non-moving plaintiff in response to defendants’ motion for summary judgment on defense of qualified immunity, could show that the force used was unreasonable because the victim never raised the perceived weapon or made a “harrowing gesture” when he turned toward the officers).

Moreover, Reese’s reliance on our decision in Hughes v. Kisela, 862 F.3d 775 (9th Cir. 2016), only confirms that the law was not clearly established here. In Hughes, we reasoned that an officer’s shooting of a plaintiff who was approaching a third party while holding a kitchen knife at her side violated the plaintiff’s clearly established rights, where the facts viewed in the plaintiff’s favor showed that she was not “angry or menacing,” officers knew only that she has been using the knife to carve a tree, and the plaintiff did not understand orders to drop the weapon. Id. at 785. After Reese’s appeal was argued, the Supreme Court summarily reversed our decision in Hughes, concluding that it was “far from an obvious case,” and that none of our precedents squarely governed the facts involved. Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018). Given that Rose had greater reason to perceive a threat here, and no luxury of time or distance to discern whether Reese still posed such a threat, the Supreme Court’s decision in Kisela v. Hughes further illustrates that Rose is entitled to qualified immunity.

None of Reese’s cases “squarely govern” the situation that Rose confronted such that they would have given Rose clear warning that his use of deadly force was objectively unreasonable. Mullenix, 136 S. Ct. at 310 (quotation marks omitted). Absent a showing by Reese that the right was clearly established at the time, Rose is entitled to qualified immunity on the Fourth Amendment excessive force claim. We therefore affirm the district court’s ruling that Deputy Rose is entitled to qualified immunity on that claim.

B. Reese’s Bane Act Claim

Reese also claims that the district court erred when it granted post-verdict summary judgment to Defendants on his claim under California Civil Code section 52.1, known as the Bane Act. Reese asserts that the district court properly rejected the Defendants’ proposed jury instruction on his Bane Act claim and therefore Defendants are not entitled to a new trial. We disagree.

The Tom Bane Civil Rights Act, 1987 Cal. Stat. 4544, was enacted in 1987 to address hate crimes. The Bane Act civilly protects individuals from conduct aimed at interfering with rights that are secured by federal or state law, where the interference is carried out “by threats, intimidation or coercion.” See Venegas v. County of Los Angeles, 63 Cal. Rptr. 3d 741, 742 (Cal. Ct. App. 2007). Section 52.1 “provides a cause of action for violations of a plaintiff’s state or federal civil rights committed by ‘threats, intimidation, or coercion.’” Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1105 (9th Cir. 2014) (quoting Cal. Civ. Code § 52.1). Claims under section 52.1 may be brought against public officials who are alleged to interfere with protected rights, and qualified immunity is not available for those claims. See Venegas, 63 Cal. Rptr. 3d at

1. We also agree with the district court that the jury’s negative answer to Question 14 (“At the time Deputy Rose fired his shot, did it appear that Plaintiff posed an immediate threat of death or serious physical injury to Deputy Rose?”) was unhelpful to the judge’s legal question of whether any “reasonable” officer would have understood that the use of deadly force was at that time proscribed by clearly established Fourth Amendment excessive force law. As the district court noted, the question does “not specify from whose perspective it did appear that Reese posed an immediate threat of death or serious physical injury to Rose.” (Doc. 216 at 11).

2. Chaudhry relied on Cameron v. Craig, 713 F.3d 1012, 1022 (9th Cir. 2013) for the proposition that “the elements of [an] excessive force claim under § 52.1 are the same as under § 1983.” Id.
753. Reese alleged a Bane Act violation based upon the same facts as his Fourth Amendment excessive force claim.

Before trial, Defendants moved for summary judgment, arguing that a Bane Act claim required a showing of threats, intimidation or coercion in addition to the elements required to establish a violation of the Fourth Amendment. The district judge who ruled on the motion (who was not the trial judge) denied the motion based on Chaudhry, which held that section 52.1 “does not require proof of discriminatory intent” and “that a successful claim for excessive force under the Fourth Amendment provides the basis for a successful claim under § 52.1.” 751 F.3d at 1105.

Likewise, at the conclusion of trial, the district court rejected Defendants’ proposed alternative California Civil Jury Instruction [CACI] 3066 on the Bane Act. In re-urging their position, Defendants argued that Reese’s proposed instruction eviscerates the requirement in CACI 3066 that additional elements are necessary to prove a Bane Act claim because his instruction is “essentially amounting to a passthrough where there’s a Fourth Amendment violation saying that if there’s a Fourth Amendment violation, there’s also a Bane Act violation.” The district court summarily explained that Defendants’ argument had previously been rejected on summary judgment and “I’m going to reject it too.” Therefore, the district court instructed the jury as follows: “If you determine that Plaintiff prevails on his Fourth Amendment excessive force claim against Defendant Brown and/or Defendant Rose, then Plaintiff also prevails on his Bane Act claim against that Defendant or Defendants.” The jury found for Reese and against Deputy Rose and the County on the Bane Act claim.

In their request for a new trial, Defendants claimed that the trial court erred when it declined to give their CACI 3066 instruction. In addition to reasserting the arguments made in their summary judgment motion, Defendants also attempted to distinguish Chaudhry from this case stating “contrary to Defendants in this case ‘[t]he City defendants [in Chaudhry] conceded in their brief . . . that a successful claim for excessive force under the Fourth Amendment provides the basis for a successful claim under § 52.1.’” The Defendants bolstered their position with several district court cases that held that the Bane Act does not apply to an allegation of excessive force without a showing that the act was done to interfere with a separate state or federal constitutional right.

3. The applicable 3066 instruction reads:
[Plaintiff] claims that [defendant] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [plaintiff] must prove all of the following:
1. That [defendant] acted violently against [plaintiff]/ [and][plaintiff’s property] [to prevent [him/her] from exercising [his/her] right [insert right] to retaliate against [plaintiff] for having exercised [his/her] right [insert right]);
2. That [plaintiff] was harmed; and
3. That [defendant]’s conduct was a substantial factor in causing [plaintiff]’s harm.

Thus, Defendants asserted that Chaudhry “does not equate to a correct application of § 52.1” and a new trial with a CACI 3066 instruction was required.

Convinced by the Defendants’ arguments, the district court changed its mind. The court concluded that the Defendants were correct in their argument that their proposed instruction should have been given. The court pronounced that because the evidentiary record is complete on the Bane Act claim, rather than granting a new trial, the court would issue an amended judgment in favor of Defendants on the Bane Act claim.

In explaining its ruling the district court stated that “California Appellate Court authority reveals: The Bane Act ‘requires a showing of coercion independent from the coercion inherent in [constitutional violation] itself.’” The district court found that the evidence in this case did not, therefore, support this Bane Act element. The court relied on Shoyoye v. County of Los Angeles, which held that “where coercion is inherent in the constitutional violation alleged, i.e., an overdetention in County jail, the [Bane Act] statutory requirement of ‘threats, intimidation, or coercion’ is not met” and that “[t] he statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.” 137 Cal. Rptr. 3d 839, 849 (Cal. Ct. App. 2012).

We find that the district court erred in granting summary judgment to the Defendants. We note that at the time that the district court issued its sua sponte summary judgment order, it observed that “no California Appellate Court decision addressed whether excessive force alone - ‘the use of excessive force during an otherwise lawful arrest,’ - is sufficient to sustain a Bane Act violation[,]” (Doc. 216 at 27). Thus, the district court relied on what it determined were persuasive decisions, including Shoyoye, that explain that more is required. The district court’s reliance on Shoyoye is misplaced, however. First, Shoyoye is distinguishable from Reese’s excessive force claim because it involved a claim of wrongful detention. Chaudhry, upon which the prior court relied when it initially denied Defendants’ summary judgment motion, is an excessive force case. Moreover, Chaudhry was decided two years after Shoyoye and since the Chaudhry decision, district courts have largely interpreted it to mean that section 52.1 does not require a showing of “threats, intimidation and coercion” separate from an underlying constitutional violation. See, e.g., Rodriguez v. County of Los Angeles, 96 F. Supp. 3d 990, 999 (C.D. Cal. 2014) (distinguishing Shoyoye by interpreting it to apply only when the constitutional violation is unintentional); Boarman v. County of Sacramento, 55 F. Supp. 3d 1271, 1287 (E.D. Cal. 2014) (applying Chaudhry and holding that the plaintiff’s Bane Act claim based on excessive force survived summary judgment because the elements of such a claim under section 52.1 are the same as under § 1983); Barragan v. City of Eureka, No. 15-cv-02070-WHO, 2016 WL 4549130, at *8 (N.D. Cal. Sept. 1, 2016) (agreeing with Chaudhry that the elements of an excessive
force claim under § 1983 establish the elements of a Bane Act claim and that no additional elements are required).

Although there are ample federal district court cases that interpret Chaudhry in a way that is contrary to the district court’s decision here, to be sure, the district court is not bound by those decisions. However, where “there is relevant precedent from the state’s intermediate appellate court, the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state’s supreme court likely would not follow it.” Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007) (emphasis omitted). Until recently, California’s appellate court guidance had not squarely addressed whether in an excessive force case the Bane Act requires a separate showing of coercion independent of the coercion inherent in the use of force. Reese’s supplemental authority however, provides us with that guidance which we are now bound to apply.

In Cornell v. City and County of San Francisco, the California Court of Appeal recognized that Bane Act claims are routinely alleged in Section 1983 claims under federal pendent jurisdiction and that “[t]he Bane Act’s requirement that interference with rights must be accomplished by threats[,] intimidation or coercion ‘has been the source of much debate and confusion.’” 225 Cal. Rptr. 3d 356, 384 (Cal. Ct. App. 2017) (citations omitted). Thus, the court announced its endeavor to provide clarity. In so doing, the court examined Shoyoye’s conclusion that the section 52.1 claim required a showing of coercion independent of the coercion inherent in the wrongful detention at issue in that case. Concluding that Shoyoye was limited to cases involving mere negligence, the court in Cornell ruled that “[n]othing in the text of the statute requires that the offending ‘threat, intimidation or coercion’ be ‘independent’ from the constitutional violation alleged.” Cornell, 225 Cal. Rptr. 3d at 383. The court agreed “that the use of excessive force can be enough to assert the ‘threat, intimidation or coercion’ element of Section 52.1.” Id. at 382.

Cornell also makes clear, however, that the Bane Act imposes an additional requirement beyond a finding of a constitutional violation. Cornell explained that “[p]roperly read, the statutory phrase ‘threat, intimidation or coercion’ serves as an aggravator justifying the conclusion that the underlying violation of rights is sufficiently egregious to warrant enhanced statutory remedies, beyond tort relief.” Id. at 383. Accordingly, Cornell held that “the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee’s right to freedom from unreasonable seizure.” Id. at 384.

In so holding, Cornell adopted the specific intent standard established in Screws v. United States, 325 U.S. 91 (1945), for assessing criminal violations of federal civil rights. 4 225 Cal. Rptr. 3d at 384–85.

Thus, based on the weight of this new state authority, and our obligation to consider the California Court of Appeal’s thorough analysis of its own law, we draw two conclusions as to the necessary showing for an excessive force claim under the Bane Act. First, the Bane Act does not require the “threat, intimidation or coercion” element of the claim to be transactionally independent from the constitutional violation alleged. Cornell, 225 Cal. Rptr. 3d at 382–83. Second, the Bane Act requires a “a specific intent to violate the arrestee’s right to freedom from unreasonable seizure.” Id. at 384.

We see no “convincing evidence that the state’s supreme court likely would not follow” Cornell in reaching these two conclusions. Ryman, 505 F.3d at 994. As to the requirement of coercion independent from the constitutional violation, Cornell correctly notes that the plain language of Section 52.1 gives no indication that the “threat, intimidation, or coercion” must be independent from the constitutional violation. See Cornell, 225 Cal. Rptr. 3d at 383. Moreover, in the two California Supreme Court cases to apply Section 52.1 in the Fourth Amendment context, neither gave any indication of an independent coercion requirement. In Venegas v. County of Los Angeles, the California Supreme Court, in holding that a Section 52.1 plaintiff need not be a member of a protected class, found that plaintiffs had “adequately stated a cause of action under section 52.1” where they alleged warrantless, unconsented searches and unlawful detention. 87 P.3d 1, 3–4, 14 (Cal. 2004). In Jones v. Kmart Corp., the court held that the plaintiff could not bring a Fourth Amendment excessive force claim against a private security guard because the lack of a state actor meant there was no constitutional violation, but did not suggest that some coercion independent of the alleged excessive force was required. 949 P.2d 941, 942, 944 (Cal 2004). 5

Similarly, the specific intent requirement articulated in Cornell is consistent with the language of Section 52.1, which requires interference with rights by “threat, intimidation or coercion,” words which connote an element of intent. This is also reflected in California’s model jury instruction, CACI 3066, which characterizes a Bane Act claim as one by the plaintiff that the defendant “intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion.” CACI 3066 (emphasis added); see also Cornell, 225 Cal. Rptr. 3d at 387 (approving

4. Cornell acknowledged that Section 52.1 is civil, while the federal laws to which Screws applies, 18 U.S.C. §§ 241 and 242, are criminal. 225 Cal. Rptr. 3d at 385. But given their structural similarities, Cornell concluded that, though “the burden of proof is fundamentally different in these two arenas . . . we see no reason why the applicable mens rea element ought to differ.” Id.

5. To the extent that we previously followed Shoyoye in concluding that “a plaintiff in a search-and-seizure case must allege threats or coercion beyond the coercion inherent in a detention or search,” Lyall v. City of Los Angeles, 807 F.3d 1178, 1196 (9th Cir. 2015), we are now guided by Cornell to interpret Shoyoye’s holding as limited to cases involving mere negligence, see Cornell, 225 Cal. Rptr. 3d at 381–82.
use of CACI 3066 because it “properly focused the jury on intentional violation of Cornell’s right to be free from unreasonable seizure”). As above, we observe that the Fourth Amendment claims asserted in Venegas and Jones are not inconsistent with Cornell’s approach.

Though we have previously stated that “the elements of the excessive force claim under § 52.1 are the same as under § 1983,” Chaudhry, 751 F.3d at 1105 (quoting Cameron, 713 F.3d at 1022), we do not read those cases as contradicting the intent requirement articulated in Cornell. In Cameron, we noted that the plaintiff “assert[ed] no California right different from the rights guaranteed under the Fourth Amendment,” 713 F.3d at 1022, and so concluded that the elements of the excessive force claim were the same, citing our prior observation in Reynolds v. County of San Diego that “[s]ection 52.1 does not provide any substantive protections; instead, it enables individuals to sue for damages as a result of constitutional violations.” Cameron, 713 F.3d at 1022 (quoting Reynolds, 84 F.3d 1162, 1170 (9th Cir. 1996), overruled on other grounds, Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997)). Thus, Cameron was concerned with the nature of the elements of the predicate constitutional violation asserted under § 1983 and the Bane Act, but did not address whether the Bane Act required some showing of intent in addition to showing the constitutional violation. Chaudhry had no occasion to address the issue either, as the defendants there conceded that the elements were the same.

Applying these principles here, we conclude that the district court’s jury instructions were erroneous. The district court instructed the jury that if Reese prevailed on his Fourth Amendment claim, then he also prevailed on his Bane Act claim. But the jury did not consider Deputy Rose’s intent in its finding that he violated Reese’s Fourth Amendment rights. See Graham v. Connor, 490 U.S. 386, 397 (1989) (“[T]he ‘reasonableness’ inquiry in an excessive force case is . . . whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”)). As we have explained in applying the Screws specific intent standard to an excessive force violation of 18 U.S.C. § 242, 6 “a mere intention to use force that the jury ultimately finds unreasonable—that is, general criminal intent—is insufficient.” United States v. Reese, 2 F.3d 870, 885 (9th Cir. 1993). Rather, the jury must find that the defendants “intended not only the force, but its unreasonableness, its character as ‘more than necessary under the circumstances.’” Id. But it is not necessary for the defendants to have been “thinking in constitutional or legal terms at the time of the incidents, because a reckless disregard for a person’s constitutional rights is evidence of a specific intent to deprive that person of those rights.” Id.

Because the district court’s Bane Act jury instruction did not require this inquiry into Deputy Rose’s intent, it was incorrect. The district court’s post-trial order correctly recognized that Defendants’ proposed jury instruction, CACI 3066, should have been given, see Cornell, 225 Cal. Rptr. at 386–87.

In addition to giving an incorrect jury instruction, the district court erred when it issued its post-trial grant of summary judgment to Defendants on the Bane Act claim. The district court’s decision was based on an erroneous conclusion that the Bane Act required coercion independent from the constitutional violation. Although there was no evidence of coercion independent from Deputy Rose’s use of objectively unreasonable force, we cannot conclude from the record that, taking the evidence in the light most favorable to Reese, no reasonable jury could find that Deputy Rose had a specific intent to violate Reese’s Fourth Amendment rights. See Nozzi v. Housing Auth. of City of L.A., 806 F.3d 1178, 1199–200 (9th Cir. 2015). The decision is therefore reversed and Reese’s Bane Act claim is remanded for a new trial.7

II. DEFENDANTS’ CROSS-APPEALS


Prior to trial, Reese entered a “no contest” plea to a misdemeanor charge that he violated California Penal Code § 417(a)(1) for drawing or exhibiting a deadly weapon, other than a firearm, “in a rude, angry, or threatening manner,” thus disposing of his original charge of Assault with a Deadly Weapon.8 Under Heck v. Humphrey, 512 U.S. 477, 487 (1994), “[w]hen a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, ‘the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’” Hooper v. County of San Diego, 629 F.3d 1127, 1130 (9th Cir. 2011) (quoting Heck, 512 U.S. at 487). If it would, the civil action is barred. Id.; see also Yount v. City of Sacramento, 183 P.3d 471, 484 (Cal 2008) (extending Heck to California state law claims). Defendants argue that Reese’s misdemeanor conviction bars his claims because the claims necessarily imply the invalidity of his conviction.

Reese counters that Defendants did not produce evidence at trial to show the factual basis for Reese’s no contest plea. Defendants rely upon Reese’s trial testimony, which they characterize as stating that he “displayed/brandished the

6. In relevant part, 18 U.S.C. § 242 applies to “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States…”

7. The jury also found the deputy and County liable for battery under state law, and the damages award was therefore unaffected by the district court’s decision to grant summary judgment on the Bane Act claim, other than a reduction of $21,175.00 for past medical expenses that had already been paid on Reese’s behalf under the County Indigent Program. Because we do not reinstate the jury verdict on Reese’s Bane Act claim, we do not reconsider the district court’s denial of his motion for attorney’s fees and costs.

knife when he opened the door, but denied it was angry or threatening, and could not say whether the manner of display was ‘not polite.’” Reese points out, however, that there are other instances of conduct that could have formed the factual basis for his misdemeanor conviction including evidence that he exhibited a knife to Brittany Shurtleff in an angry or threatening manner before the Deputies arrived. The district court found that even if Reese’s misdemeanor conviction was based on a finding of “rudeness,” his trial testimony did not invalidate that conviction finding. In addition, the district court found that Defendants failed to show that the victim or victims of the conviction were any of the officers involved in Reese’s action.

We agree. Defendants have not demonstrated that Reese’s claims in this action are barred by Heck. Defendants have identified nothing in the record that shows the specific factual basis for Reese’s misdemeanor conviction. Without such information, this Court cannot determine that Reese’s claim of excessive force in this case would call into question the validity of his misdemeanor weapon conviction. See Smith, 394 F.3d at 698–99. The district court’s ruling is affirmed.

B. The jury’s award of $150,000.00 for future non-economic loss was supported by substantial evidence.

Defendants challenge the district court’s ruling that upheld the jury’s award of $150,000.00 to Reese for future non-economic loss. They contend there was no evidence at trial of future non-economic losses. They argue that “[a]lmost most, the jury was shown a visible physical scar, but there was no testimony that future care was needed, no testimony that the scar caused any sort of anxiety, mental disturbance or other non-economic loss.”

The district court cited two district court cases and a California Supreme Court case in determining that “[a]wards for non-economic damages, which included pain and suffering, can be supported by a finding of permanent scarring.” The district court then found that “[i]n light of Reese’s scarring, an inference can reasonably be drawn that he will continue to endure suffering” and that Defendants failed to show this portion of the judgment should be amended.

“A jury’s verdict, including a damages award, must be upheld if supported by ‘substantial evidence.’” Freitag v. Ayers, 468 F.3d 528, 537 (9th Cir. 2006), cert. denied, 549 U.S. 1323 (2007). “Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.” Landes Const. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987). Substantial deference is afforded to a jury’s finding of the appropriate amount of damages. United States v. CB & I Constructors, Inc., 685 F.3d 827, 839 (9th Cir. 2012).

9. Contrary to Defendants’ assertions, that Reese denied raising the knife to Shurtleff in his civil trial testimony does not necessarily mean that this was not the basis for his criminal conviction.
As to the argument that the hypothetical was incomplete in that it referred to Reese being unarmed after he backed up into the apartment, the jury was not required to accept the described scenario as true and, in fact, made a finding that Deputy Rose did not see Reese’s hands when he shot him. As to the argument that the expert’s answer invaded the province of the jury in that it addressed the ultimate issue, Defendants have not shown prejudicial error. As a general rule, “[a]n opinion is not objectionable just because it embraces an ultimate issue.” Fed. R. Evid. 704(a). The district court’s ruling on this issue is therefore affirmed.

Defendants also challenge the district judge’s failure to sustain objections to questions asked of Defendants’ expert by Reese’s counsel. The questions addressed scenarios pertaining to whether Deputy Rose saw Reese’s hands when he shot him. Again, given the jury’s finding on this issue, Defendants have failed to show prejudicial error, as the district court determined. The district court’s ruling is affirmed.

E. The district court did not err in excluding the deposition testimony of a defense witness who did not appear in court to testify.

Next, Defendants argue the district court erred in excluding from the trial deposition testimony of Brittany Shurtleff, a witness who Defendants claim was “unavailable” under the Federal Rules of Evidence. Defendants contend they successfully served a subpoena on the witness and made reasonable, good faith efforts to procure her presence.

The district court determined that defense counsel, despite being aware the witness did not intend to appear in court, failed to make additional reasonable efforts in the time leading up to trial to ensure the witness’s appearance in court. The district court therefore concluded there was no basis “to justify finding her unavailable under Federal Rule of Evidence 804(a)(5).”

Likewise, Defendants here simply assert that counsel made reasonable, good faith efforts to procure the witness’s presence but they fail to explain what those efforts were. Absent any evidence of actual reasonable, good faith efforts to ensure the witness’s appearance, Defendants have not demonstrated that the district court abused its discretion. The district court’s ruling is therefore affirmed.

AFFIRMED IN PART, and REVERSED AND REMANDED IN PART. Each party shall pay its own costs on appeal.
California Courts of Appeal

Cite as 18 C.D.O.S. 3749

THE PEOPLE, Plaintiff and Respondent, v. COLLEEN ANN HARRIS, Defendant and Appellant.

No. C079470
In The Court of Appeal of the State of California Third Appellate District
(El Dorado)
(Super. Ct. Nos. P13CRF0031, P13CRF0343)
Motion to recall the remittitur. Denied.
Filed April 23, 2018

COUNSEL
Charles R. Khoury Jr., for Defendant and Appellant.
Xavier Becerra, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez, Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

In People v. Woods (2018) 19 Cal.App.5th 1080, we held that Senate Bill No. 620 and the associated amendment to Penal Code1 section 12022.53 (effective January 1, 2018) apply retroactively to nonfinal2 cases. (Woods, at pp. 1090-1091.) We reached this conclusion by following our Supreme Court’s directive in In re Estrada (1965) 63 Cal.2d 740 that “‘when a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature.’ ” (Woods, at p. 1090.)

In this case, defendant Colleen Ann Harris filed a motion to recall the remittitur to either permit briefing on the application of Senate Bill No. 620 and the recent amendment to section 12022.53 to her case, which was final almost a year before the statute’s effective date, or remand the case to the trial court to exercise its discretion as to whether to strike the firearm enhancement under the amendment. Noting that recalling a remittitur is an extraordinary remedy generally available in a limited number of instances, defendant relies on a narrow exception espoused by our Supreme Court in People v. Mutch (1971) 4 Cal.3d 389. As explained, however, the narrow exception does not apply here.

We deny the motion and hold a motion to recall the remittitur is not the appropriate procedural vehicle through which to seek the requested relief in cases that are final for purposes of Estrada and do not involve Mutch-type circumstances.

FACTUAL AND PROCEDURAL BACKGROUND

A jury found defendant guilty of the first degree murder of Robert Harris, her husband. The jury also found true an allegation that defendant discharged a firearm causing death under section 12022.53, subdivision (d) and she was sentenced to 50 years to life. Defendant appealed and we affirmed. (See People v. Harris (Aug. 22, 2016, C079470) [nonpub. opn.].) We issued the remittitur on November 29, 2016, and her case was final in early 2017.

In October 2017, the California Legislature amended section 12022.53 via Senate Bill No. 620. (Stats. 2017, ch. 682, § 2.) The amendment to subdivision (h) of that section was effective January 1, 2018, and provides trial courts with the discretion “in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (§ 12022.53, subd. (h).) In Woods, we held that the amendment applies retroactively to nonfinal cases. (People v. Woods, supra, 19 Cal.App.5th at pp. 1090-1091.)

Defendant now seeks an order recalling the remittitur in her final case so that she may have an opportunity to take advantage of the amendment and potentially have her sentence reduced.

DISCUSSION

A remittitur may only be recalled for “good cause.” (Cal. Rules of Court, rule 8.272(c)(2).) Other than to correct clerical errors, “good cause” generally exists only when a judgment was secured by fraud, mistake or inadvertence. (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 165.) “‘This remedy [recalling the remittitur], though described in procedural terms, is actually an exercise of an extraordinary substantive power . . . ; its significant function is to permit the court to set aside an erroneous judgment on appeal obtained by improper means.’ ” (In re Richardson (2011) 196 Cal.App.4th 647, 663.)

Defendant makes no claim of fraud, mistake or inadvertence. She further makes no claim of clerical error or that the judgment was obtained by improper means. She instead solely relies on the principle espoused by our Supreme Court in Mutch that, while error of law generally does not authorize the recalling of a remittitur, an exception exists when “the error is of such dimensions as to entitle the defendant to a writ of habeas corpus.” (People v. Mutch, supra, 4 Cal.3d at p.

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1. All further section references are to the Penal Code unless otherwise stated.
2. A case is final when the time for petitioning the United States Supreme Court for a writ of certiorari expires, which is 90 days after the remittitur is issued. (See People v. Vieira (2005) 35 Cal.4th 264, 306; see also Bowles v. Russell (2007) 551 U.S. 205, 212 [168 L.Ed.2d 96, 103].)
396.) This exception is known as the “excess of jurisdiction” exception. (People v. Boyd (1979) 24 Cal.3d 285, 291; In re Miller (2017) 14 Cal.App.5th 960, 979.) Defendant’s reliance on Mutch is misplaced.

In Mutch, the court considered the retroactive effect of its prior decision in People v. Daniels (1969) 71 Cal.2d 1119, in which it overruled established precedent regarding the scope of the offense of aggravated kidnaping. (People v. Mutch, supra, 4 Cal.3d at p. 392.) The court gave the Daniels decision full retroactive effect to convictions that were final on appeal because the interpretation was not a change in the law but a declaration of “what the intent of the Legislature ha[d] been” since enacting the amendment to the statute and “confirmed a substantive definition of crime duly promulgated by the Legislature.” (Mutch, at pp. 394, 395.) The court then observed that “a defendant is entitled to habeas corpus if there is no material dispute as to the facts relating to his conviction and if it appears that the statute under which he was convicted did not prohibit his conduct.” (Id. at p. 396.) The court concluded, based on the undisputed facts and applying Daniels retroactively, the defendant was convicted of kidnaping under a statute that did not prohibit his conduct and he was, thus, “entitled to relief by habeas corpus, and, to implement that right, [wa]s further entitled to a recall of the remittitur in his appeal and an order vacating the judgment on the kidnaping counts.” (Mutch, at p. 399.) The recall of the remittitur was “deemed an adjunct to the writ.” (Id. at p. 396.)

Our Supreme Court has repeatedly cited Mutch as an example of a case not involving application of new law. (See People v. Guerra (1984) 37 Cal.3d 385, 399, fn. 13; Woolsley v. State of California (1992) 3 Cal.4th 758, 794.) Our Supreme Court has also “emphasize[d] the narrowness of [the excess of jurisdiction] exception,” limiting it to cases involving application of law to undisputed facts. (In re Harris (1993) 5 Cal.4th 813, 840.) The excess of jurisdiction exception applied in Mutch only applies when legal error occurred in the trial court, and the appellate court determines, based on the undisputed facts, the defendant suffered a conviction for conduct that did not amount to a crime under the relevant penal statute. (See In re Walker (1974) 10 Cal.3d 764, 787; In re Brown (1973) 9 Cal.3d 612, 624-625.) The exception does not apply here. Defendant does not claim the court erred when it imposed her sentence because the amendment took effect only after her case was final.

We further note that, if the Legislature wanted to provide a specific procedure via petition or motion to reopen final cases for resentencing, it could have done so. (See, e.g., §§ 1170.126, 1170.18.) It did not. Should defendant believe she is entitled to habeas corpus relief, as she asserts, she may file a petition in the sentencing court. Petitions for writ of habeas corpus should be filed in the superior court in the first instance. (In re Steele (2004) 32 Cal.4th 682, 692; In re Hillery (1962) 202 Cal.App.2d 293, 294.) We express no opinion on the merits of such a petition, should one be filed.

**DISPOSITION**

The motion to recall the remittitur is denied.

Robie, Acting P. J.

We concur: Duarte, J., Renner, J.
IIG WIRELESS, INC., Plaintiff, Cross-defendant and Appellant,

v.

JOHN YI, Defendant, Cross-complainant and Appellant;

LAUREN KIM, Defendant and Respondent.

No. G053393
In The Court of Appeal of the State of California
Fourth Appellate District
Division Three
(Super. Ct. No. 30-2013-00690040)
Appeal from a judgment of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Affirmed.
Filed March 27, 2018
Certified for Publication April 23, 2018

COUNSEL
Eanet, Matthew L. Eanet and Laine Mervis for Plaintiff, Cross-defendant and Appellant.
The Hall Law Corporation and Laurence C. Hall for Defendant, Cross-complainant and Appellant John Yi, and for Defendant and Respondent Lauren Kim.

ORDER GRANTING REQUEST FOR PUBLICATION

Attorney Matthew L. Eanet, counsel for IIG Wireless, Inc., has requested that our opinion filed on March 27, 2018, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is GRANTED.

The opinion is ordered published in the Official Reports.

MOORE, J.
WE CONCUR: O’LEARY, P. J., GOETHALS, J.

OPINION

The parties appeal and cross-appeal a judgment after a jury trial in this business dispute. Plaintiff and cross-defendant IIG Wireless, Inc. (IIG) obtained a judgment of $401,860 against defendant and cross-complainant John Yi. IIG also sued Lauren Kim, Yi’s fiancée, who moved for and was granted a nonsuit during trial. Yi obtained a judgment on his cross-complaint for $122,000, resulting in a final judgment of $279,860 in IIG’s favor.

Yi appeals the judgment and the court’s denial of his motion for judgment notwithstanding the verdict (JNOV). In sum, he argues there was no substantial evidence to support the verdict, the court made numerous errors with respect to the introduction of evidence and its conduct of the trial, and the damage award of $122,000 on his cross-complaint was inadequate.

IIG argues there was substantial evidence to support the verdict, the JNOV was properly denied, and the damage award on the cross-complaint should be reduced. In its cross-appeal, IIG argues the court should not have granted nonsuit as to Kim. Further, IIG contends the trial court erred by denying its motion to amend the complaint and to admit certain expert testimony.

We conclude that neither the appeal nor the cross-appeal have any merit, and we therefore affirm the judgment in its entirety.

I

FACTS

A. Underlying Facts

IIG was formed in June 2007, and known under its name at the time, Unlimited PCS, Inc. 1 It is a distributor and retailer for cellular phones, equipment and plans for MetroPCS, a national carrier. The company has over 96 stores in southern California and in several other states, and operates stores both directly and under a dealer program with MetroPCS.

Before IIG’s official formation, Yi had been doing business with MetroPCS and was the owner of several out-of-state dealers. Yi, Jimmy Hu, and Seung Lee founded IIG to become another dealer for MetroPCS with stores in southern California. Neither Hu nor Lee had experience in the industry.

Yi, Hu, and Lee were IIG’s three founding shareholders. Lee provided $400,000 in investment capital, Hu was general manager of IIG, and Yi was chief executive officer (CEO) and chairman of the board.

Between June 2007, when IIG was formed, and the end of 2008, the company opened 30 stores. Yi signed personal guarantees with MetroPCS for product to sell, as well as the leases for the retail locations, while Hu and Lee did not.

The distribution of stock shares in the company is a major point of dispute. IIG claims that it initially issued 100,000 common shares of stock, with 20,000 going to Yi, and 40,000 each to Hu and Lee. A stock ledger and unsigned stock certificates dated June 14, 2007, show this distribution, as does an IRS form signed by each shareholder and attested to by Yi. Hu and Lee also testified to this at trial.

Yi testified that initial discussions had set forth a 40/40/20 allocation of shares, as IIG asserts, but because Yi was required to personally guarantee all leases, Yi requested and an agreement was reached that the share distribution would be 30,000 each to Hu and Lee and 40,000 to Yi. A September 27, 2007 document entitled “Shareholder Agreement of Unlimited PCS, Inc.” (the 2007 agreement), is part of the record.

1. The company changed its name in 2014, but for ease of reading and to avoid confusion with MetroPCS, we refer to it as IIG throughout.
The first paragraph states the agreement “dated September 27, 2007, is among John Yi, Jimmy Hu, and Seung Lee each holding 40%, 30%, and 30% shares of stock . . . .” Each page includes three sets of initials, and what appears to be the signature of each individual.

Hu testified that he and Yi met with MetroPCS in November 2007, at which point the company had opened three stores. Hu was concerned about expanding quickly, and specifically, about where the funding would come from. Lee was initially opposed to any expansion. Yi and Hu discussed bringing in an additional investor. Hu and Lee testified that Yi told them that MetroPCS wanted Yi to be a majority shareholder in order to expand and launch new stores. Yi denied making such a statement, testifying that nobody at MetroPCS ever told him that.

Hu and Lee testified that based on the representation that MetroPCS required him to be majority shareholder, they agreed to each contribute 5,000 shares to Yi, and another 5,000 shares to IIG. Thus, the split among the shareholders would be 30% each, with 10% held by IIG as treasury shares.2 Hu and Lee testified, however, that due to MetroPCS’s purported requirement that Yi was to be the majority shareholder, they agreed to put the 10,000 shares of treasury stock in his possession. Hu testified that Yi said he would return the treasury stock when he stepped down as CEO; that he would return the stock when other shareholders requested he do so; and that he would return the stock to future key employees. Lee testified similarly. Hu also testified that Yi understood any dividends on the 10,000 treasury shares would also be held in treasury.

The record includes another shareholder agreement, this one dated January 1, 2008 (the 2008 agreement). It names Yi, Hu, and Lee, as well as an additional individual, new investor Ho Hyun Chung. The agreement and the signature page state the percentage of interest held by each shareholder: 41 percent to Yi, 10 percent to Hu, 25 percent to Lee, and 24 percent to Chung, who made a $400,000 investment. Prior to the execution of this agreement, Yi, Hu, and Lee had various conversations about where Chung’s shares should come from. Hu eventually offered 20,000 shares to Chung, but was concerned about his financial benefit if the company was successful. Hu testified Yi told him he would compensate Hu for the shares. In addition to Hu’s shares, 4,000 of Lee’s shares went to Chung. Hu and Lee also transferred 500 shares each to Yi.

IIG’s controller, Luke Cheon, also testified that Yi told him that he held 10,000 treasury stock shares that Yi could transfer to key employees. A 2010 e-mail from Chung, the new investor, to Cheon, Yi, Hu, and Lee was about proposed language for a written recap of a video meeting. One of the items addressed was the “10% reserved shares,” and stated in part that Yi “stated and it was fully acknowledged by the shareholders that [Yi] has every right of the reserved shares distribution for the company when necessary under his discretion.”

For his part, Yi testified that no treasury stock existed, and he replied to Chung’s e-mail saying so. He testified the changes to the allocation of shares were in light of the personal guarantees he had to execute.

In 2009, an amendment (the 2009 amendment) to the shareholder agreement was executed, bringing in another new investor, Seung Hee Ko. Ko invested $400,000 in return for 21,951 shares, which came from Yi, Hu, and Lee. After the amendment, Yi owned 33.6 percent of the shares; Hu 8.2 percent; Lee 20.5 percent; Chung 19.7 percent; and Ko 18 percent. There was no mention of treasury shares or reserved shares in the 2009 amendment.

In February 2010, Chung, the 2008 investor, sent an e-mail to Yi which addressed several issues. This e-mail was copied to numerous others. One of the issues addressed was the alleged treasury shares. Chung stated, under the heading “10% share contribution to [IIG]” as follows: “This was a promise from CEO [Yi] and we would like to ask you to make the contribution in Q1 2010. This is because we believe it is fair for the company to take & accumulate the dividend for future use. We do not believe it was a misheard or misunderstanding, and accepted it as a promise of CEO. Please let us remind you that the investments and personal loans were made based on your promises and this was one of them. In addition as an investor I questioned about how the shares were divided and two reasons were heard. One was that it is better for the company that you have majority share for the relationship with Metro PCS – as CEO of UPCS – to bring in better, favorable deals and the other was that you would contribute 10% to the company In a few years and you would not really care about the %.”

According to IIG, Yi did not respond, but eventually transferred 4,166 of what IIG claimed was treasury stock to Cheon, the controller. Yi continued to hold, IIG alleged, 5,834 shares of treasury stock.

Shortly thereafter, in the first quarter of 2010, Chung sold his shares to IIG in return for his $400,000 investment. There was a disagreement about the disposition of the shares between Lee, Hu, and Yi. Eventually they agreed to transfer sufficient shares to Hu so that he would once again own 20,000 shares, as he had before the 2009 amendment. At a shareholder meeting in December of that year, a lengthy discussion was held about the status of the stock. An agreement was eventually reached that made no mention of treasury shares. Subsequent board actions, meetings, and tax returns also make no mention of treasury shares.

IIG claims Yi committed numerous other misdeeds during his time as CEO, including directing IIG to issue payments of $48,000 to Kim, who was his girlfriend at the time (and his fiancée at the time of briefing). IIG claimed Kim did not perform any work for IIG and was not an employee, but stated that Yi directed Cheon, the controller, to direct

2. According to testimony at trial, “treasury shares” are shares held by the company, usually for future use as compensation or bonuses to employees.
IIG’s payroll company to “convert” Yi’s dividend payments to Kim’s name. According to IIG, it had to pay withholding taxes on behalf of Kim in excess of $5,000. IIG also claimed Yi caused IIG to pay rent on an apartment after IIG had specifically terminated such authorization. Further, IIG contends Yi caused IIG to enter into agreements guaranteeing the debt of other businesses.

Yi contends he was “effectively terminated” in May 2013, when he was not reelected as CEO, president, or chairman. He remained on the board as a director. Yi continued holding his shares until he transferred all remaining shares (including what IIG contends were 5,834 treasury shares) to his ex-wife in connection with their divorce agreement in January 2014. IIG repurchased the shares in 2014 at a price of $41.10 per share, for a total of $1,285,000.

IIG contends that in October 2013, while Yi was still a shareholder, he and Kim formed a competing company in Colorado in contravention of the 2008 Agreement. Yi claims that IIG owed him unpaid dividends from 2010-2013.

B. Procedural History

IIG filed the initial complaint in this action in November 2013. In June 2014, it filed a second amended complaint (the complaint) against Yi and Kim. The complaint pleaded causes of action for breach of fiduciary duty, fraud, promissory fraud, conversion, interference with prospective economic advantage, unjust enrichment, unfair competition (Bus. & Prof. Code, § 17200), and civil conspiracy. The gravamen of the claims was Yi’s purported failure to return the alleged treasury shares and dividends to IIG upon his departure. IIG also alleged breach of fiduciary duty for forming the competing Colorado company; it also claimed various other sums, including $22,000 it had paid for Yi’s corporate apartment and a $50,000 consulting fee; damages for a 2008 cross-guarantee signed by Yi; and for payroll taxes regarding the funds paid to Kim.

Kim was named only in the causes of action for conversion, unjust enrichment, unfair competition, and conspiracy. The conversion claim alleged $400,000 in damages for Yi and Kim’s causing IIG “to pay each of them certain sums of monies to which they were not entitled.”

Yi cross-complained, alleging a common count for money and unjust enrichment (seeking the remedy of an accounting).

In due course, the matter proceeded to trial. IIG pursued its claims for breach of fiduciary duty, fraud, promissory fraud, and conversion against Yi and Kim, basing its claims primarily on the treasury shares and dividends on them; the formation of the allegedly competing Colorado corporation; the apartment; the consulting fee; the payroll taxes with respect to Kim; the 2008 cross-guarantee; and conspiracy. Yi sought recovery of dividends and other distributions from 2010 to 2013.

At the close of evidence, Kim sought, and the court granted, her motion for nonsuit. The court found there was insufficient evidence to proceed on any theory.

IIG dropped its claims regarding the cross-guarantee and consulting fee. IIG alleged damages involved primarily the unretruned treasury shares ($239,778) and dividends on them ($139,135); $22,947 for the apartment; $5,288 in payroll taxes; and $1.62 million for the creation of the Colorado corporation. Yi sought $334,418 for unpaid dividends and distributions.

The jury returned a special verdict. They concluded Yi owed IIG $401,860 on its claims for fraud, promissory fraud, breach of fiduciary duty, and conversion. This comprises the amount sought by IIG for the treasury shares and dividends on them, plus the corporate apartment. It did not include damages sought for the creation of the Colorado corporation or the $5,288 in payroll taxes. As to the cross-complaint, the jury found IIG owed Yi $122,000, which comprised $45,000 in withheld dividend checks in 2013, and $77,000 for a withheld shareholder tax payment. Judgment was entered.

Both parties filed various posttrial motions. Yi filed a motion for new trial and for JNOV on the complaint, and for motion for new trial on the cross-complaint as to damages. IIG filed a motion for new trial, or in the alternative, remittitur, on its complaint against Yi, and for new trial regarding Kim. The trial court denied all posttrial motions.

II

DISCUSSION

A. Yi’s Appeal

1. Standard of Review

Most of Yi’s arguments on appeal appear to be based on the trial court’s denial of his motion for JNOV, which is essentially the same as appealing the judgment itself for a lack of substantial evidence. “A fundamental principle of appellate practice is that an appellant __must affirmatively show error by an adequate record. . . . Error is never presumed. . . . ‘A judgment or order of the lower court is presumed correct. All intentions and presumptions are indulged to support it on matters as to which the record is silent . . . .’ [Citation.]” [Citation.]” (Null v. City of Los Angeles (1988) 206 Cal. App.3d 1528, 1532-1533; see State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal.App.4th 600, 610.)

The purpose of a motion for JNOV “is not to afford a review of the jury’s deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without foundation.” [Citation.” (Sukoff v. Lemkin (1988) 202 Cal. App.3d 740, 743.)

When reviewing a JNOV, the appellate court will ordinarily use the same standard the trial court uses in ruling on the motion and determine “whether it appears from the record, viewed most favorably to the party securing the verdict, that any substantial evidence supports the verdict.” (Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280, 284.) The trial court properly denies the motion if there is any substantial evidence, or reasonable inferences to be drawn from the evidence, to support the verdict. (Ibid.) Our determina-
tion with respect to the presence of the requisite substantial evidence is de novo. (Hirst v. City of Oceanside (2015) 236 Cal.App.4th 774, 782.)

Substantial evidence may be contradicted or uncontradicted. (Hauter v. Zogarts (1975) 14 Cal.3d 104, 110.) “ ‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.” (Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651.) But we do not weigh the evidence or judge the credibility of witnesses. (Hauter v. Zogarts, supra, 14 Cal.3d at p. 110.)

2. Parol Evidence

Yi’s primary argument is that evidence of what he told Hu and Lee with respect to the treasury shares was inadmissible parol evidence, because all of the shareholder agreements were integrated contracts, and the oral statements Yi allegedly made contradicted the written terms of those agreements.

The parol evidence rule is a rule of substantive law that prevents the introduction of extrinsic evidence to vary, alter, or contradict the terms of a written agreement. (Code Civ. Proc., § 1856, subd. (a); Gerdlund v. Electronic Dispensers International (1987) 190 Cal.App.3d 263, 270.) The operation of the parol evidence rule is a question of law when no evidentiary conflict exists. (Consolidated World Investments, Inc. v. Lido Preferred Ltd. (1992) 9 Cal.App.4th 373, 378-379.)

Generally, the parol evidence rule states that evidence of an oral agreement inconsistent with a written contract is inadmissible even where the contract is not integrated. This rule is based on sound logic and policy; when a contract is reduced to writing, it is presumed to contain all of the material terms, and it cannot reasonably be presumed that the parties would intend two contradictory terms to be part of the same agreement. (Gerdlund v. Electronic Dispensers International, supra, 190 Cal.App.3d at p. 271.) Therefore, the parol evidence rule “is not merely a rule of evidence excluding precontractual discussions for lack of credibility or reliability. It is a rule of substantive law making the integrated written agreement of the parties their exclusive and binding agreement no matter how persuasive the evidence of additional oral understandings. Such evidence is legally irrelevant and cannot support a judgment.” (Marani v. Jackson (1986) 183 Cal.App.3d 695, 701.)

We must first determine whether the shareholder agreements were integrated. A merger clause, such as the one present in each iteration of the shareholder agreement, is generally conclusive on the issue of integration. (Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal.App.3d 973, 1001.) The 2007 agreement, for example, states: “This instrument constitutes the entire Shareholder Agreement . . . and correctly sets forth the rights, duties, and obligations of each Shareholder . . . . Any prior agreements, promises, negotiations, or representations concerning the Agreement’s subject matter not expressly set forth in this Agreement are of no force or effect.” The 2008 agreement includes a substantively similar clause, as does the 2009 amendment.

As to whether the documents vary, alter, or contradict the terms of a written agreement, the statements Yi made to Hu and Lee, and the existence of the treasury shares themselves, are contradicted by the written agreements in several ways. The agreements each specify the percentage of shares owned by each investor; there is no mention of IIG owned treasury shares. The 2007 agreement states that written approval of all shareholders is needed to approve the issuance of “shares of any class or other rights relating to the issuance of shares of the Corporation.” The 2008 agreement, and the 2009 amendment, specifically states the shares listed by percentage to each shareholder “constitute all of the issued and outstanding capital stock of the corporation.”

IIG does not contest the existence of integrated agreements. It argues instead that an exception to the parol evidence rule permits the introduction of extrinsic evidence to establish fraud. The fraud exception to the parol evidence rule is codified at section 1856, subdivision (g): “This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.”

Not long ago, in Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (2013) 55 Cal.4th 1169 (Riverisland), the California Supreme Court overruled Bank of America etc. Assn. v. Pendergrass (1935) 4 Cal.2d 258 (Pendergrass). Pendergrass had limited the fraud exception to the parol evidence rule by requiring that evidence offered to prove fraud “must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.” (Id. at p. 263.) Thus, under Pendergrass, external evidence of promises inconsistent with the express terms of a written contract were not admissible, even to establish fraud.

In Riverisland, the plaintiffs appealed after a grant of summary judgment. The plaintiffs alleged they negotiated an agreement to restructure their debt to a production credit association. They alleged the credit association’s representative told them that their loan would be extended for two years in exchange for additional collateral consisting of two ranches. These assurances were repeated when they signed the restructuring agreement, which they signed without reading. The agreement, however, provided only three months of forbearance and identified eight parcels as additional collateral. (Riverisland, supra, 55 Cal.4th at p. 1173.)

The plaintiffs sued for fraud, negligent misrepresentation, rescission and reformation of the agreement. The trial court granted summary judgment on the ground the fraud exception to the parol evidence rule did not allow admission of

3. Subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.
promises at odds with the terms of a written agreement. (Riverisland, supra, 55 Cal.4th at p. 1173.) The essential basis of the plaintiffs’ claims was that the written agreement did not reflect the actual agreement between the parties. (Ibid.)

The California Supreme Court disagreed with the trial court’s ruling. “Despite the unqualified language of section 1856, which broadly permits evidence relevant to the validity of an agreement and specifically allows evidence of fraud, the Pendergrass court decided to impose a limitation on the fraud exception. The facts of Pendergrass are similar in certain respects to those here. Borrowers fell behind on their payments. They and the bank executed a new promissory note, which was secured by additional collateral and payable on demand. Soon after it was signed, the bank seized the encumbered property and sued to enforce the note. In defense, the borrowers claimed the bank had promised not to interfere with their farming operations for the remainder of the year, and to take the proceeds of those operations in payment. They alleged that the bank had no intention of performing these promises, but made them for the fraudulent purpose of obtaining the new note and additional collateral. [Citation.]” (Riverisland, supra, 55 Cal.4th at p. 1175.)

The court, after extensively reviewing the holding of Pendergrass and the reactions to it over the years, reasoned: “There are multiple reasons to question whether Pendergrass has stood the test of time. It has been criticized as bad policy. Its limitation on the fraud exception is inconsistent with the governing statute, and the Legislature did not adopt that limitation when it revised section 1856 based on a survey of California case law construing the parol evidence rule. Pendergrass’s divergence from the path followed by the Restatements, the majority of other states, and most commentators is cause for concern, and leads us to doubt whether restricting fraud claims is necessary to serve the purposes of the parol evidence rule.” (Riverisland, supra, 55 Cal.4th at pp. 1179-1180.) In addition to other issues with Pendergrass, the court noted that cases predating it had routinely stated that parol evidence was admissible to prove fraud. One such case, Ferguson v. Koch (1928) 204 Cal. 342, 347, stated: “[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.” (Riverisland, supra, 55 Cal.4th at p. 1182.)

Yi argues that Riverisland applies only where the validity of the agreement is at issue, which would limit it to breach of contract cases seeking to rescind the agreement. Yi cites two cases interpreting Riverisland to support his contention: Julius Castle Restaurant, Inc. v. Payne (2013) 216 Cal.App.4th 1423 (Julius Castle), and Thrifty Payless, Inc. v. The Americana at Brand, LLC (2013) 218 Cal.App.4th 1230 (Thrifty Payless). Both of these cases were landlord/tenant disputes involving integrated lease agreements. In Julius Castle, the plaintiffs signed a lease to operate a restaurant in San Francisco. They inspected the property and carefully considered and negotiated the terms of the lease, but the Court of Appeal nonetheless ruled that evidence that the lessors made oral representations contrary to the terms of the lease were admissible under the fraud exception to the parol evidence rule. (Julius Castle, supra, 216 Cal.App.4th at pp. 1439-1440.) “Defendants also argue that Riverisland and the authorities it cites ‘require that the circumstances of each case and the bargaining power of [each party] be considered.’ Defendants also claim that ‘inquiry into the relative sophistication of the parties is simple.’ Perhaps. In our view, however, our high court sought the opposite result, namely, to create certainty and consistency by eliminating altogether the judicially created exception to section 1856, subdivision (g).” (Id. at p. 1441.) The court suggested that after Riverisland, the parties in a fraud action would be better served by focusing on addressing other elements of that tort, including the heightened pleading requirements and the element of justifiable reliance. (Id. at pp. 1441-1442.)

In Thrifty Payless, the landlord provided estimates to the tenant regarding its likely share of common area expenses during lease negotiations, but the estimates were not included in the lease. The tenant’s share turned out to be higher, and the tenant sued for fraud, alleging the landlord knew the common area expenses were material to the tenant and intentionally and negligently misrepresented them. (Thrifty Payless, supra, 218 Cal.App.4th at pp. 1234-1236.) The landlord’s demurrer, in part, argued that the parol evidence rule prohibited evidence of its “‘estimates.’” (Id. at p. 1237.)

Reversing the trial court’s decision, the Court of Appeal concluded: “Here, under Riverisland . . . extrinsic evidence is admissible to establish fraud or negligent misrepresentation in the face of the lease’s integration clause. Thus, Thrifty can allege both intentional and negligent misrepresentations based upon Americana’s grossly inaccurate estimates.” (Thrifty Payless, supra, 218 Cal.App.4th at pp. 1241-1242, fn. omitted.)
Neither of these cases support Yi’s assertion that evidence of fraud is only admissible in cases where the validity of the agreement is at issue. The plaintiffs in *Julius Castle* did not seek to rescind the contract for invalidity; they sued for breach of contract (and lost) and for fraud (intentional and negligent misrepresentation), and won. (*Julius Castle*, supra, 216 Cal.App.4th at p. 1441.) The plaintiff in *Thifty Payless* sought damages and rescission of the lease in its complaint, but the court said nothing about limiting the use of the parol evidence to the rescission claim.

Indeed, such an argument seems to us to contradict *Riverisland* itself. It simply seems to partly restate the *Pendergrass* rule that evidence of fraud “must establish . . . some fraud in the procurement of the instrument . . . and not a promise directly at variance with the promise of the writing.” (*Pendergrass*, supra, 4 Cal.2d at p. 263, italics added.) While the court noted in *Riverisland* that if “fraud is proven, it cannot be maintained that the parties freely entered into an agreement reflecting a meeting of the minds” (*Riverisland*, supra, 55 Cal.4th at p. 1182), the court said nothing about limiting its holding to cases where rescission or voiding the contract was the only remedy sought. What it did say was that “*Pendergrass* was an aberration. . . . [I]ts restriction on the fraud exception was inconsistent with the terms of the statute, and with settled case law as well.” (*Ibid.*) “The fraud exception has been part of the parol evidence rule since the earliest days of our jurisprudence, and the *Pendergrass* opinion did not justify the abridgment it imposed.” (*Ibid.*)

Accordingly, we find the overriding concern expressed by the court was that the *Pendergrass* rule, “while intended to prevent fraud, . . . may actually provide a shield for fraudulent conduct.” (*Riverisland*, supra, 55 Cal.4th at p. 1172.) The court’s intention in *Riverisland* was to bring its case law into line with section 1856, subdivision (g), which states: “this section does not exclude other evidence . . . to establish . . . fraud.” As the court noted, in *Riverisland* “[c]onspicuously omitted was any mention of *Pendergrass* and its nonstatutory limitation on the fraud exception.” (*Id.* at p. 1179.)

Therefore, we decline to give *Riverisland* the narrow reading Yi advances. Although IIG was not attempting to rescind the shareholder agreements, it set out to prove that Lee and Hu had entirely different understandings about the meaning of those agreements based on Yi’s allegedly fraudulent misrepresentations. We conclude the statements were admissible to prove fraud, and the jury apparently found the testimony of Lee and Hu credible. Accordingly, we find the court did not err by denying Yi’s motion for JNOV on this basis.4 We also need not consider Yi’s argument that the jury’s verdict cannot stand in the absence of the parol evidence.

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4. For the same reason, we also reject Yi’s assertion that the extrinsic evidence of fraud is not “relevant,” which is essentially the parol evidence argument wearing a different sweater.

### 3. Other Issues Relating to Substantial Evidence

Yi next raises a potpourri of issues regarding the purported lack of substantial evidence. He first claims that his stock certificate, if restricted, was required to so state under Corporations Code section 418. The certificate he points us to is dated June 2012. The testimony he cites from Hu and Lee relates to events far earlier. This certificate alone is insufficient to call into doubt the existence of substantial evidence on all causes of action. The jury was free to give the stock certificate the weight it deemed appropriate.

Next, Yi asserts that IIG introduced evidence that contradicted its discovery admissions and pleading. IIG alleged in its complaint that Yi’s fraudulent misrepresentations and promises relating to the 10,000 treasury shares occurred in December 2010, and gave the same date in an interrogatory response. December 2010 was the date that Hu and Lee asked Yi to return the treasury stock and he refused, not the date of the initial misrepresentations, which occurred in 2007. Yi therefore claims this inconsistency somehow utterly defeats IIG’s fraud claim. Yi is mistaken, and the cases he cites, which are mostly in the summary judgment context, do not say otherwise. Yi was well aware of IIG’s contention regarding the misrepresentations, and this blatant attempt at a “gotcha!” is beneath the dignity of further analysis.

Yi also offers analysis as to each cause of action that was purportedly lacking in substantial evidence. Because the damages were the same as to IIG’s causes of action for breach of fiduciary duty, fraud, and false promise, we need only find there was substantial evidence of one of IIG’s claims to conclude the motion for JNOV was properly denied. The most straightforward road is that of breach of fiduciary duty. “The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]” (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044.)

Yi does not argue there was no substantial evidence of breach of fiduciary duty as to either the apartment or the payroll taxes, leaving us with the issue of the treasury shares. It is undisputed that Yi was a corporate director and officer of IIG, and therefore had a fiduciary duty to the corporation. (Corp. Code, § 309; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037.) There was substantial evidence at trial that Yi misrepresented to his fellow shareholders that MetroPCS required him to be majority shareholder, thereby persuading them to give him additional shares. While Hu and Lee understood these shares would be treasury shares, owned by the corporation, Yi subsequently acted as if the shares were his personally, and refused to return them. These actions caused the corporation harm by forcing IIG to eventually buy the shares back, to its financial detriment.

As we noted above, it does not matter that there was evidence that contradicts the version of events set forth above. The evidence presented at trial was solid, reasonable, and
creditable, and therefore met the legal definition of substantial evidence to support the judgment. The court did not err by denying Yi’s motion for JNOV.

4. Purported Trial Errors

Yi next raises numerous issues he claims cumulatively prejudiced him, requiring a new trial. We review these for abuse of discretion. “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (Shamblin v. Brattain (1988) 44 Cal.3d 474, 478-479.)

First, Yi contends that IIG’s counsel committed misconduct during closing argument. “In conducting closing argument, attorneys for both sides have wide latitude to discuss the case.” “The right of counsel to discuss the merits of a case, both as to the law and facts, is very wide, and he has the right to state fully his views as to what the evidence shows, and as to the conclusions to be fairly drawn therefrom. The adverse party cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.” [Citations.] “Counsel may vigorously argue his case and is not limited to ‘Chesterfieldian politeness.’” [Citations.] “An attorney is permitted to argue all reasonable inferences from the evidence, . . .” [Citation.] “Only the most persuasive reasons justify handcuffing attorneys in the exercise of their advocacy within the bounds of propriety.” [Citation.]” (Cassim v. Allstate Ins. Co. (2004) 33 Cal.4th 780, 795-796 (Cassim.).)

Yi claims counsel committed misconduct by arguing, as Yi puts it, that “Yi was hiding money from his wife by giving it to his girlfriend.” This mischaracterizes counsel’s statement: “Now, what else is happening at the company while all of this is going on? Because there are other things happening at the company. And one of the things that’s happening . . . is Mr. Yi’s going through a divorce. And as part of that divorce, his . . . soon-to-be ex-wife Ms. Yun Sun Yi is trying to find out about his assets; she’s trying to find out how much money he has, and she’s trying to find out what his companies are worth.” This statement was also supported by evidence in the record. We find no error.

Yi did not object to any further statements during this portion of counsel’s argument, and despite his assertion to the contrary, we see no reason why he could not make further objections or request admonitions he deemed appropriate. (See Cassim, supra, 33 Cal.4th at pp. 794-795.)

Yi states that counsel, later in his argument, improperly said the jury “should disregard IIG’s evidentiary and discovery admissions that Yi made his misrepresentation and promises in 2010 that contradicted the testimony from Hu and Lee because the admissions were based on his mistake – his ‘typo.’” Essentially, Yi asserts counsel was attempting to take responsibility for any error with respect to an inconsistent date in IIG’s discovery responses. The court sustained Yi’s objection, telling counsel he was not entitled to testify. The court had already instructed the jury on the importance of discovery responses, emphasizing they were given under oath and had the same import as if the answers were given in court. Yi did not request any further admonition or instruction, and there is nothing in the record he had no opportunity to make such a request. Accordingly, any error is waived. (Cassim, supra, 33 Cal.4th at pp. 794-795.)

Yi’s next claim of error is a one-paragraph argument that the court improperly admitted Hu’s statement that Yi’s ex-wife “knew all about the treasury shares.” His entire argument is: “If the jury had any issue with the credibility between the parties, IIG was allowed to tell the jury that a non-party knew all about the treasury shares, so why should they believe Yi’s testimony that none existed.” He claims this “irreparably prejudiced” his case (without authority or analysis). IIG responds that the statement, as the trial court concluded, was not admitted for its truth, but for the effect it had on Hu. This was a proper use of the statement, and therefore we find no error.

Yi also complains the court, over an Evidence Code section 352 objection, allowed IIG to ask him whether he was over $100,000 in arrears in child support. The court overruled the objection, asked Yi whether he was in arrears without stating the amount, and instructed counsel to move on. This evidence was offered in response to Yi’s statement during direct examination, in response to a question about why he stopped attending shareholder and board meetings, that the “only thing that mattered to me the most was . . . [to] provide for . . . my other two children from my previous marriage.” Thus, the question was offered to rebut Yi’s assertion about what was important to him, thereby calling into doubt the credibility of his testimony about why he stopped attending IIG meetings. While undoubtedly prejudicial, it was not unduly prejudicial, and therefore it was within the court’s discretion to admit this statement.

Finally, Yi asserts misconduct by the trial judge by offering a laundry list of purportedly biased statements and “examining” Yi. We need not list the statements here; we have reviewed them, and taken together or separately, they reflect no bias or other improper conduct. Although at some points the court’s statements reflect frustration with Yi’s conduct, such as admonishing him for answering before the court could rule on an objection by opposing counsel, there is no support in the record that anything the court said “fatafly tainted Yi,” as he asserts. Moreover, there is nothing in the record to suggest that Yi was treated differently than any other key witness; the court was equally pointed toward both Hu and Lee. The court’s conduct was well within the scope of proper administration during a complicated trial.

Given that we find no error here, we need not address Yi’s claims regarding cumulative error.
5. Adequacy of Damages on Yi’s Cross-Complaint

Yi also appeals the amount of damages awarded on his cross-complaint, asserting the $122,000 the jury found appropriate is “insufficient as a matter of law.” “The question as to the amount of damages is a question of fact. In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. Whether the contention is that the damages fixed by the jury are too high or too low, the determination of that question rests largely in the discretion of the trial judge. The appellate court has not seen or heard the witnesses, and has no power to pass upon their creditability. Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law. In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered. [Citations.]” (Gersick v. Shilling (1950) 97 Cal.App.2d 641, 645.)

As was explained at trial, the damages Yi sought can essentially be broken into three categories: 1) Unpaid, declared dividends from September through December 2013, totaling $45,000; 2) Tax liability for 2013 of $77,000; and 3) Dividends that IIG did not declare for 2010-2013, but should have. The $122,000 awarded by the jury reflects $45,000 from the first category and $77,000 from the second category. The parties appear to agree this is what the jury awarded, while refusing to award any damages from the third category of undeclared dividends.

As noted above, damages are only insufficient if the “uncontradicted evidence demonstrates that the award is insufficient as a matter of law.” (Gerlick v. Shilling, supra, 97 Cal. App.2d at p. 645.) The evidence here was disputed. Yi’s expert and IIG’s expert gave conflicting testimony as to whether IIG’s practice prior to 2013 had been to issue dividends. Yi’s expert conceded there was no standard accounting practice or guideline regarding how much a corporation had to pay its shareholders in a given year, or whether the amount paid was required to match the amount listed on the IRS K-1 schedule. She testified as to what was “common in the industry,” as to what was a “business practice,” IIG’s expert testified that no such business practice existed with respect to the majority of businesses he had worked with. But Yi’s expert did not testify as to what IIG actually did. She testified she was basing her testimony on historical evidence that IIG had agreed to pay dividends.

The jury was instructed, and the law is that “directors of a corporation alone have the power to determine, within their sound discretion, if, when, and how much of a dividend will be paid. [¶] ... A declaration or authorization for a dividend must be for a specified amount . . . .” There was an obvious conflict of evidence, as to whether IIG had authorized such dividends, and in what amounts, for the years prior to 2013. Yi argues that because the jury accepted his argument with respect to unpaid dividends for 2013, it automatically followed that the jury must accept the same argument as to the prior years. The difference is that the 2013 dividends were expressly reflected in an April 2013 board resolution. This makes those dividends fundamentally different from alleged dividends from previous years, which were not reflected in board minutes offered at trial.

Accordingly, given the disputed evidence, we conclude Yi has not met the high standard to demonstrate inadequate damages, and we find no error.

B. IIG’s Cross-Appeal

IIG’s cross-appeal pertains primarily to Kim’s eventual dismissal of the case. It also contends that the testimony of Yi’s accounting expert should not have been admitted to establish that IIG owed Yi $45,000 in tax liability for the year 2013. We address each contention in turn.

1. Nonsuit as to Conversion

A defendant is entitled to a nonsuit if the trial court determines the evidence presented by plaintiff is insufficient to permit a jury to find in his or her favor as a matter of law. (Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291.) “In determining whether plaintiff’s evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded.” (Campbell v. General Motors Corp. (1982) 32 Cal.3d 112, 118.) The plaintiff’s evidence, however, must have substance upon which reasonable minds can differ; evidence that raises mere conjecture or speculation is insufficient. (Abreu v. Svenhard's Swedish Bakery (1989) 208 Cal.App.3d 1446, 1457.) The same standard applies on appeal. (Castaneda v. Olsher (2007) 41 Cal.4th 1205, 1214-1215.)

“...Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages. ...” (Welco Electronics, Inc. v. Mora (2014) 223 Cal.App.4th 202, 208.)
IIG makes the mistake of relying nearly entirely on acts by Yi to support its claim that Kim committed conversion. IIG argues: “At trial, IIG presented evidence that Yi caused IIG to put Kim (at that time, Yi’s girlfriend) on payroll even though Kim was not an employee and did not perform any work for IIG. The payments were classified as ‘payroll’ or ‘bonus.’ Yi did so without the knowledge of IIG’s other Directors or shareholders, by directing IIG’s Controller, Cheon, to contact the payroll processing company to ‘convert’ Yi’s dividend payments to Kim’s name. As a result, IIG had to pay W-2 wages to Kim, plus state and federal payroll taxes which it would not otherwise have been required to make. [¶] IIG contends that the money paid to Kim did not rightly belong to Kim, and instead belonged to IIG. IIG further contended that the money did not belong to Yi because he was not entitled to it as, during the period, he was in breach of his fiduciary duties to IIG. The money was not otherwise payable to Yi as wages or ‘regular’ compensation, but rather as a ‘bonus.’ Accordingly, Yi was not entitled to this money and IIG was entitled to it.”

In sum, IIG wants to hold Kim liable for conversion because Yi told Cheon (who was indisputably a shareholder as well as a controller, belying the claim that no other shareholders were aware of this) to “convert” Yi’s dividends to payroll payments to Kim. IIG claims that Yi was not entitled to this money because he was in breach of his fiduciary obligations at the time, citing cases where, it claims, an employer was able to recover salary or bonuses from a faithless employee as damages or restitution. The applicability of some of these authorities here is questionable. But the ability to recover later does not establish conversion at the time the money was paid, and IIG’s authorities do not state otherwise. Further, the trial court rejected IIG’s request for restitution at trial, and the jury was never instructed on this theory – a ruling from which IIG does not appeal. We conclude, therefore, that at the time the sums were paid to Kim, there was no substantial evidence from which a jury could conclude those funds did not belong to Yi. If Yi did not wrongfully instruct Cheon to redirect the funds, there can be no conversion on Kim’s part.7

2. Nonsuit as to Civil Conspiracy

IIG next contends the court should not have granted a nonsuit on IIG’s claim of civil conspiracy as to Kim, and the jury should have determined whether she conspired with Yi to commit conversion or fraud.

Conspiracy is not a separate tort, but a form of vicarious liability by which one defendant can be held liable for the acts of another. (De Vries v. Brumback (1960) 53 Cal.2d 643, 650; Kidron v. Movie Acquistion Corp. (1995) 40 Cal. App.4th 1571, 1581.) To establish conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. (Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 47.) A conspiracy requires evidence “that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it.” (Choate v. County of Orange (2000) 86 Cal.App.4th 312, 333.) Thus, conspiracy provides a remedial measure for affixing liability to all who have “agreed to a common design to commit a wrong” when damage to the plaintiff results. (Agnew v. Parkes (1959) 172 Cal.App.2d 756, 762.) The defendant in a conspiracy claim must be capable of committing the target tort. (Casey v. U.S. Bank Nat. Assn. (2005) 127 Cal. App.4th 1138, 1145, fn. 2.)

As it did with respect to the conversion claim, IIG again focuses on what Yi did and said to establish that Kim committed a tort against it. Here, IIG argues: “Yi was a member of IIG’s Board of Directors and knew that IIG was interested in expanding to other markets, including Colorado and that IIG was financially capable of doing so. Yi learned of the business opportunity in the Colorado market but did not present the opportunity to IIG. Instead, Yi brought the opportunity to Kim, who formed a Colorado corporation and began operations as a MetroPCS® authorized retailer, i.e. the same business as IIG. The business was also called Unlimited PCS, Inc., which at the time was the name IIG was still using. The new company was formed in Kim’s name, and Yi was kept off corporate filings. In fact, however, Yi was a member of the Board of Directors, Chairman of the Board, President, and CEO, and Yi remained President and CEO from the time of the inception of the corporation onwards. Yi’s testimony was that he did not own shares in the Colorado corporation and worked without pay.”

Assuming all of these facts are true, as we must for purposes of reviewing a grant of a nonsuit, IIG still fails to present any evidence that Kim had knowledge of and agreed to both the objective and the course of action that resulted in the injury. (Quelimane Co. v. Stewart Title Guaranty Co., supra, 19 Cal.4th at p. 47.) This means that Kim must have known more than that Yi was forming a new company with her; it must be proved that she did so with knowledge of both the conversion and fraud that Yi purportedly engaged in. (See Choate v. County of Orange, supra, 86 Cal.App.4th at p. 333 [conspiracy requires mutual understanding to accomplish an unlawful plan].) The record is bereft of any facts from which the court could have drawn the inference that Kim, who ap-

7. As to the withheld taxes, IIG argues in its reply that these were recoverable from Kim under a conversion theory as reasonably foreseeable “special damages.” It is inappropriate to raise this argument for the first time in a reply brief, something IIG does more than once in its cross-appeal. We decline to consider it further. (See Schubert v. Reynolds, supra, 95 Cal.App.4th at pp. 108-109.)

8. Because Kim was not capable of committing a breach of fiduciary duty against a company she was not in a fiduciary relationship with, IIG does not contest that Kim could not be liable for conspiring to commit a breach of fiduciary duty.
3. Leave to Amend to Allege Aiding and Abetting as to Kim

Toward the close of trial, and after Kim had moved for nonsuit, IIG requested leave to amend its complaint to include an aiding and abetting breach of fiduciary duty claim as to Kim to “conform to proof.” The court denied the motion. We review for abuse of discretion. (Branick v. Downey Savings & Loan Assn. (2006) 39 Cal.4th 235, 242.)

Motions for leave to amend are left to the sound discretion of the trial judge: “The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading . . . .” (§ 473, subd. (a)(1)). While the court’s discretion on this matter is generally exercised broadly, “‘[t]he exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse.’” (Branick v. Downey Savings & Loan Assn., supra, 39 Cal.4th at p. 242.)

Amendments are permitted even after trial begins. (§ 576.) “The cases on amending pleadings during trial suggest trial courts should be guided by two general principles: (1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment. Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory . . . no prejudice can result.” (City of Stanton v. Cox (1989) 207 Cal.App.3d 1557, 1563.) Leave to amend is properly denied, however, “where the facts are not in dispute, and the nature of the plaintiff’s claim is clear, but under substantive law, no liability exists and no amendment would change the result.” (Edwards v. Superior Court (2001) 93 Cal.App.4th 172, 180.)

California’s law on subjecting a defendant to liability for aiding and abetting a tort arises from common law. “‘Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortuous result and the person’s own conduct, separately considered, constitutes a breach of duty to the third person.’” [Citations.] (Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1325-1326.)

As we have already discussed, there is insufficient evidence to hold Kim liable for civil conspiracy. “Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no over laid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] ‘Aiding-abetting focuses on whether a defendant knowingly gave ‘substantial assistance’ to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.’” [¶] . . . While aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.” (Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc. (2005) 131 Cal. App.4th 802, 823, fn. 10.)

“California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted.” (Casey v. U.S. Bank Nat. Assn., supra, 127 Cal.App.4th at pp. 1145-1146, italics added.) In this case, that would be actual knowledge of Yi’s breach of fiduciary duty by starting the new business with Kim in Colorado in 2013. IIG does not point to anywhere in the record where it identified the specific facts to the court upon which it would rest a claim of aiding and abetting. And in its briefs here, the facts IIG sets forth do not support an argument that Kim knew or reached a conscious decision that she was assisting Yi to breach his fiduciary duty, nor do the facts IIG offers support such an inference. Again, IIG focuses on Yi’s acts, not Kim’s. Indeed, IIG does not anywhere assert that Kim had any knowledge of Yi’s wrongdoing or intent to engage in wrongdoing herself. The closest IIG comes is an assertion that “IIG contended that the clear inference [from the testimony regarding Yi’s acts] was that Kim’s involvement was a smokescreen meant to shield Yi’s involvement from scrutiny.” But this comes nowhere close to establishing Kim’s wrongful intent – it could just as easily mean that she was never informed by Yi of the full facts surrounding the Colorado corporation. Accordingly, IIG has not provided sufficient evidence that any liability on Kim’s part exists here, and therefore the court did not err by denying IIG leave to amend. (Edwards v. Superior Court, supra, 93 Cal.App.4th at p. 180.)

4. Expert Testimony on Tax Liability

One of Yi’s claims in his cross-complaint was that IIG was required to pay Yi, as a shareholder, $77,000 to cover a tax liability in 2013. Yi offered the testimony of an expert witness, who testified this was a common business practice. IIG asserts the court incorrectly admitted this testimony.

The trial court rejected IIG’s argument below, stating that it would admit the testimony of both Yi’s and IIG’s experts on this point, and instruct the jury accordingly that the experts’ opinions were only as good as their assumptions. The jury could consider those assumptions, the court decided, as a question of fact. “Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. [Citations.]” (Panmu v. Land Rover North America, Inc. (2011) 191 Cal.App.4th 1298, 1317.)
On appeal, however, IIG offers no argument that the erroneous admission of this evidence was so prejudicial that reversal is required.9 “A judgment of the trial court may not be reversed on the basis of the erroneous admission of evidence, unless that error was prejudicial. (Code Civ. Proc., § 475.)” (Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc. (2014) 225 Cal.App.4th 786, 799.) “The record must show that the appellant ‘sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown.’ [Citation.] Additionally, article VI, section 13, of the California Constitution provides that a judgment may not be set aside based on the erroneous admission of evidence ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ Evidence Code section 353 reinforces that provision: we may not reverse a judgment by reason of the erroneous admission of evidence unless . . . [¶] . . . [¶] . . . the error or errors complained of resulted in a miscarriage of justice.’ [Citation.]” (Ibid.)

IIG comes nowhere close to clearing this exceedingly high bar. Other than a bare assertion of prejudice in its reply brief, IIG offers no mention at all as to why or how this testimony was so prejudicial that a reversal is necessary. It fails to support, with evidence, that this testimony was so damaging that in its absence, a different result was probable. Accordingly, even if we agreed with IIG that this evidence should not have been admitted, IIG has failed to demonstrate the requisite prejudice to justify reversal and a new trial solely on this basis.

III

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.

MOORE, J.

WE CONCUR: O'LEARY, P. J., GOETHALS, J.

9. For the first time in its cross-reply brief, IIG introduces several new arguments beyond the admissibility of this evidence itself, including claiming that if the expert’s testimony meant what Yi claimed, it did not support any award in Yi’s favor and that Yi was never owed a debt for the funds to cover a tax liability in any event. See footnote seven for the reasons we will not be addressing these issues.