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FEDERAL STATUTES — ALIEN TORT STATUTE — SECOND CIRCUIT LOOKS BEYOND COMPLAINT TO FIND STATE ACTION REQUIREMENT SATISFIED. — *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

In *Sosa v. Alvarez-Machain*,<sup>1</sup> the Supreme Court's first and only decision to interpret the Alien Tort Statute<sup>2</sup> (ATS), the Court urged the judiciary to exercise "great caution" in recognizing new causes of action under the ATS.<sup>3</sup> The *Sosa* Court thereby implied a general intent that ATS liability remain tightly constrained. One mechanism for circumscribing ATS liability is the "state action requirement," which establishes that private actors cannot be held liable under the ATS unless they have acted in close concert with a state.<sup>4</sup> Recently, in *Abdullahi v. Pfizer, Inc.*,<sup>5</sup> the Second Circuit neglected *Sosa*'s cautionary admonition by failing to show restraint in its treatment of the state action requirement. In order to reach its holding that a group of Nigerian plaintiffs adequately alleged the state action element of their ATS claim against Pfizer, the *Abdullahi* court disregarded circuit precedent by drawing upon facts that were elaborated in appellate briefs but absent from the original complaint.<sup>6</sup> Although courts — like the *Abdullahi* court in this case — may be tempted to procedurally evade the state action requirement in order to impose liability on unscrupulous private actors, such evasion effectively lowers the bar for ATS claim survival and engenders serious separation of powers concerns.

In 1996, an unprecedented epidemic of bacterial meningitis, measles, and cholera erupted in the Nigerian state of Kano.<sup>7</sup> Pfizer requested and received approval from the Nigerian government to enter the country and administer its new antibiotic Trovan to children suffering from bacterial meningitis.<sup>8</sup> Although Trovan had been tested on thousands of adult subjects, it had not yet received FDA approval.<sup>9</sup> After receiving permission from the Nigerian government, Pfizer established a treatment center at the Kano Infectious Disease Hospital,

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<sup>1</sup> 542 U.S. 692 (2004).

<sup>2</sup> 28 U.S.C. § 1350 (2006).

<sup>3</sup> *Sosa*, 542 U.S. at 728.

<sup>4</sup> See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 881, 890 (2d Cir. 1980).

<sup>5</sup> 562 F.3d 163 (2d Cir. 2009).

<sup>6</sup> *Id.* at 210 (Wesley, J., dissenting).

<sup>7</sup> *Abdullahi v. Pfizer, Inc.*, No. 01 Civ.8118(WHP), 2005 WL 1870811, at \*1 (S.D.N.Y. Aug. 9, 2005).

<sup>8</sup> *Abdullahi*, 562 F.3d at 170. The facts presented in this comment are those alleged in the complaint.

<sup>9</sup> *Id.* at 169; *Abdullahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956, at \*1-2 (S.D.N.Y. Sept. 17, 2002).

where it recruited two hundred sick children for treatment.<sup>10</sup> Pfizer gave half of the children Trovan, and half of the children a lowered dose of Ceftriaxone, a comparable FDA-approved antibiotic.<sup>11</sup> After receiving treatment, eleven of the children died: five who had received Trovan and six who had received the lowered dose of Ceftriaxone.<sup>12</sup> Others suffered paralysis, blindness, deafness, or brain damage.<sup>13</sup>

In August 2001, a group of the treated Nigerian children and their guardians (the *Abdullahi* plaintiffs) filed a class action suit under the ATS in the U.S. District Court for the Southern District of New York.<sup>14</sup> The plaintiffs alleged that Pfizer neglected to advise patients of the possible risks associated with Trovan and Ceftriaxone, and thus failed to secure informed consent for the treatment.<sup>15</sup> Pfizer also allegedly failed to inform patients that the nongovernmental organization Médecins Sans Frontières (Doctors Without Borders) was providing an alternative, conventional treatment for free in a separate area of the same hospital.<sup>16</sup> The plaintiffs further claimed that the Nigerian government was complicit in the project because it petitioned the FDA to authorize the export of Trovan, “arrang[ed] for Pfizer’s accommodation in Kano,” “assign[ed] Nigerian physicians to assist in the project,” and “acted to silence Nigerian physicians critical of” the project.<sup>17</sup> Although the plaintiffs also initially alleged that the Nigerian government backdated a letter of approval for the test from an ethics committee at the Kano Infectious Disease Hospital, the plaintiffs later asserted in the same complaint that the letter was instead forged by a “Nigerian physician whom Pfizer says was its principal investigator.”<sup>18</sup>

In September 2002, the district court granted Pfizer’s motion to dismiss on forum non conveniens grounds, on the condition that Pfizer consent to litigate the claims in Nigeria.<sup>19</sup> In the meantime, a second set of Nigerian parents (“the Adamu plaintiffs”) filed suit in Nigeria, but the case was dismissed after two successive judges declined to hear it.<sup>20</sup> In light of the failed Adamu effort in Nigerian courts, the *Abdullahi* plaintiffs appealed the forum non conveniens dismissal. The

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<sup>10</sup> *Abdullahi*, 562 F.3d at 169.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 170.

<sup>15</sup> *Id.* at 169.

<sup>16</sup> *Id.* at 170.

<sup>17</sup> *Id.* at 210 (Wesley, J., dissenting) (alterations in original) (internal quotation marks omitted).

<sup>18</sup> *Id.* at 210 n.18 (internal quotation marks omitted); see *id.* at 170 & n.3 (majority opinion).

<sup>19</sup> *Id.* at 170.

<sup>20</sup> *Id.* at 170–71; *Abdullahi v. Pfizer, Inc.*, No. 01 Civ.8118(WHP), 2005 WL 1870811, at \*5 (S.D.N.Y. Aug. 9, 2005).

Second Circuit vacated the district court's dismissal and remanded for further factfinding on the forum non conveniens issue.<sup>21</sup>

Meanwhile, the Adamu plaintiffs brought a new suit in the U.S. District Court for the District of Connecticut, *Adamu v. Pfizer, Inc.*<sup>22</sup> The court transferred the Adamu action to the Southern District of New York, where it was consolidated with the Abdullahi action.<sup>23</sup> Pfizer moved to dismiss both cases for failure to state a claim under the ATS and, alternatively, on forum non conveniens grounds.<sup>24</sup> The district court granted the motions, holding that a "cause of action for Pfizer's failure to get any consent . . . would expand customary international law far beyond that contemplated by the ATS"<sup>25</sup> and that "a decision to create [such] a private right of action is one better left to legislative judgment."<sup>26</sup> The court further noted that the forum non conveniens dismissals were appropriate because Nigeria remained an "adequate alternative forum."<sup>27</sup>

The plaintiffs appealed, seeking to augment their complaints by developing their factual allegations more fully in their joint appellate brief.<sup>28</sup> For the first time in the litigation, the plaintiffs alleged that the project occurred in a Nigerian government facility with the assistance of Nigerian government doctors.<sup>29</sup> The plaintiffs also newly argued that the American and Nigerian doctors administered the treatment in tandem.<sup>30</sup>

A divided panel of the Second Circuit reversed. Writing for the panel, Judge Parker<sup>31</sup> held that (1) nonconsensual drug trials violate customary international law; and (2) the plaintiffs' allegations of Nigerian government involvement were sufficient to satisfy the ATS state action requirement.<sup>32</sup> On the question of customary international law, Judge Parker referenced several sources of international law articulating a norm against nonconsensual drug trials that was "sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm" under the ATS.<sup>33</sup> However, the opinion devoted only three paragraphs to the question of state action.

<sup>21</sup> *Abdullahi*, 562 F.3d at 171.

<sup>22</sup> 399 F. Supp. 2d 495, 497 (S.D.N.Y. 2005).

<sup>23</sup> *Abdullahi*, 562 F.3d at 171.

<sup>24</sup> *Id.*

<sup>25</sup> *Abdullahi*, 2005 WL 1870811, at \*13 (internal quotation mark omitted) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723-27 (2004)).

<sup>26</sup> *Id.* at \*14 (quoting *Sosa*, 542 U.S. at 727) (internal quotation mark omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Abdullahi*, 562 F.3d at 210 (Wesley, J., dissenting).

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 188 (majority opinion).

<sup>31</sup> Judge Parker was joined by Judge Pooler.

<sup>32</sup> *Abdullahi*, 562 F.3d at 166-67.

<sup>33</sup> *Id.* at 187; *see id.* at 175-88.

The majority relied heavily on the new allegations in the plaintiffs' appellate brief and determined that the plaintiffs had sufficiently alleged that "the Nigerian government was involved in all stages of the Kano test and [thus] participated in the conduct that violated international law."<sup>34</sup> Because the Nigerian government allegedly "facilitated the nonconsensual testing"<sup>35</sup> and "conspired to cover up the violations,"<sup>36</sup> the majority found that "there [was] such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself."<sup>37</sup>

In dissent, Judge Wesley voiced his concern that the majority had "create[d] a new norm out of whole cloth" by "misconstru[ing] — rather than vindicat[ing] — customary international law."<sup>38</sup> He determined that none of the sources invoked by the majority established a "universal and obligatory" norm proscribing drug trials lacking adequate consent.<sup>39</sup> Judge Wesley further concluded that, "even assuming, for argument's sake, that international law prohibits states from conducting non-consensual medical tests," the plaintiffs had failed to allege Nigerian involvement sufficient to satisfy the state action requirement.<sup>40</sup> As Judge Wesley stated, "it 'is not enough . . . for a plaintiff to plead state involvement in *some activity* of the institutions alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved with the *activity that caused the injury* giving rise to the action."<sup>41</sup> Judge Wesley noted that the complaints "did not allege that any Nigerian government officials even knew about the non-consensual tests," much less that the tests were compelled by state plan or policy.<sup>42</sup>

While the Supreme Court in *Sosa* permitted lower courts to recognize new causes of action under the ATS, it urged lower courts to serve as "vigilant doorkeep[ers]"<sup>43</sup> by exercising great restraint in doing so. The *Sosa* Court thereby indicated its general desire that ATS liability remain tightly circumscribed. The *Abdullahi* court's treatment of the state action requirement, however, exhibited extreme procedural overreach in defiance of *Sosa*'s admonition that ATS liability ought to be

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<sup>34</sup> *Id.* at 188.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)) (internal quotation marks omitted).

<sup>38</sup> *Id.* at 191 (Wesley, J., dissenting).

<sup>39</sup> *Id.* at 192; *see id.* at 193–209.

<sup>40</sup> *Id.* at 209.

<sup>41</sup> *Id.* at 211 (omission in original) (quoting *Sybalski v. Indep. Group Home Living Program, Inc.*, 546 F.3d 255, 257–58 (2d Cir. 2008)).

<sup>42</sup> *Id.*

<sup>43</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

cabined by judicial restraint. As Judge Wesley noted in his dissent, the facts as alleged in the complaint were insufficient to satisfy the state action requirement.<sup>44</sup> By relying instead on facts that were introduced for the first time on appeal, the *Abdullahi* court flouted established precedent and improperly allowed the claim to proceed. Such procedural evasion of the state action requirement lowers the bar for ATS claim survival and consequently engenders two separation of powers concerns. First, a lowered bar for ATS claim survival contradicts *Sosa*'s caution that Congress, and not courts, should generally be responsible for creating causes of action.<sup>45</sup> Second, courts that endeavor to blame foreign governments for the illicit activities of private actors may needlessly offend foreign governments in a way that threatens the executive power over foreign relations.

*Sosa* counseled lower courts to exercise "vigilant doorkeeping"<sup>46</sup> to prevent undue expansion of the "relatively modest set of [ATS] actions" intended by Congress.<sup>47</sup> The *Sosa* Court demonstrated extreme discomfort with what it perceived to be an overly aggressive use of the ATS as a means of prosecuting international wrongs.<sup>48</sup> Although the *Sosa* Court focused primarily on limiting ATS liability by restraining judicial creation of new causes of action, the state action requirement represents another crucial limit on ATS liability.<sup>49</sup>

The Supreme Court's state action jurisprudence has set a high bar that substantially circumscribes ATS liability. The Court has indicated that state assistance to a private party — whether in the form of direct financial aid, the grant of a license, tax exemptions, or even monopoly power — will not constitute state action, even if it is substantial.<sup>50</sup> Thus, the Court has repeatedly refused to find state action even when the private entity is "extensively regulated, [has] obtained governmental approval, [and has] received substantial governmental assistance."<sup>51</sup>

<sup>44</sup> *Abdullahi*, 562 F.3d at 211 (Wesley, J., dissenting).

<sup>45</sup> See *Sosa*, 542 U.S. at 727.

<sup>46</sup> *Id.* at 729.

<sup>47</sup> *Id.* at 720.

<sup>48</sup> See *id.* at 725–31 (arguing that courts ought to demonstrate "great caution in adapting the law of nations to private rights," *id.* at 728, and that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" under the ATS, *id.* at 725).

<sup>49</sup> Although *Sosa* did not specifically address the ATS state action requirement, it 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 n.20.

<sup>50</sup> See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 314 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (citing MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 5.12, at 5-87 to -88 (4th ed. 2003)).

<sup>51</sup> SCHWARTZ, *supra* note 50, § 5.12, at 5-88 (citing *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974)).

Rather, the Court has indicated that the state action requirement is satisfied only when the state has “exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>52</sup> At a minimum, therefore, the foreign government must *know* of the specific wrongful conduct alleged to have violated international law.<sup>53</sup> Some courts have further required an express state plan or policy to commit that conduct before the state action requirement is satisfied.<sup>54</sup> And even the Second Circuit has previously recognized that the state action requirement “is not satisfied when the state ‘[m]ere[ly] approv[es] of or acquiesce[s] in the initiatives’ of the private entity.”<sup>55</sup> State action exists “only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.”<sup>56</sup>

The facts as alleged in the complaint simply did not meet this standard. The Nigerian plaintiffs alleged only that “the Nigerian government provided a letter of request to the FDA to authorize the export of Trovan, arranged for Pfizer’s accommodations in Kano, and facilitated the nonconsensual testing.”<sup>57</sup> The plaintiffs did not allege that any government official “participate[d] in, order[ed], coerce[d], or significantly encourage[d]”<sup>58</sup> testing without consent, nor “that any Nigerian government officials *even knew* about the non-consensual tests.”<sup>59</sup> In fact, the plaintiffs altogether failed to allege that the hospital was government-owned, or that the Nigerian doctors working with Pfizer were government-employed.<sup>60</sup> Perhaps most importantly, the complaint lacked any allegation that the Nigerian government or its employees played any role in the specific wrongful conduct by “either administering Trovan without consent or deciding to do so in the first instance.”<sup>61</sup>

To overcome the state action requirement, the majority instead turned to factual allegations introduced for the first time on appeal. Because the plaintiffs’ new brief suggested that the Nigerian doctors assigned to Pfizer were employed by the government, and that the American and Nigerian doctors jointly administered the treatment,<sup>62</sup> the majority determined that the plaintiffs had adequately alleged that

<sup>52</sup> *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) (quoting *Jackson*, 419 U.S. at 350).

<sup>53</sup> See *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248–49 (11th Cir. 2005).

<sup>54</sup> See, e.g., *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 735, 742 (9th Cir. 2008).

<sup>55</sup> *United States v. Stein*, 541 F.3d 130, 146 (2d Cir. 2008) (alteration in original) (quoting *S.F. Arts & Athletics*, 483 U.S. at 547).

<sup>56</sup> *Id.* at 146–47 (quoting *Blum*, 457 U.S. at 1004) (internal quotation mark omitted).

<sup>57</sup> *Abdullahi*, 562 F.3d at 188.

<sup>58</sup> SCHWARTZ, *supra* note 50, § 5.12, at 5–87.

<sup>59</sup> *Abdullahi*, 562 F.3d at 211 (Wesley, J., dissenting) (emphasis added).

<sup>60</sup> *Id.* at 210.

<sup>61</sup> *Id.* at 211.

<sup>62</sup> See *id.* at 188 (majority opinion); *id.* at 210 (Wesley, J., dissenting).

“the Nigerian government was involved in all stages of the Kano test and [thus] participated in the conduct that violated international law.”<sup>63</sup> The majority’s reliance on these new allegations, however, was procedurally barred. The Second Circuit has repeatedly held that appellate review is “generally limited to the facts as presented within the four corners of the complaint, to documents attached to the complaint, or to documents incorporated within the complaint by reference.”<sup>64</sup> Courts may not rely on new facts in appellate briefs.<sup>65</sup>

It is tempting for courts to evade established procedure in order to extend liability for nefarious private action. In ATS cases in particular, courts recognize that plaintiffs have little hope of securing compensation through litigation in their home countries.<sup>66</sup> The Adamu suit in Nigeria, for example, was delayed and dismissed after one judge was removed from the bench and another judge declined to hear the case for “personal reasons.”<sup>67</sup> And although both the Nigerian federal and state governments initiated their own suits against Pfizer in U.S. courts,<sup>68</sup> neither of these suits sought compensation for those injured by the treatment.<sup>69</sup> Moreover, apart from compensation, ATS litigation embodies notions of justice and victim empowerment: “[f]or some survivors justice is a big part of that healing process and they feel that their healing process is not complete without it.”<sup>70</sup> For these reasons, courts including the Second Circuit have exhibited a tendency to dilute the state action requirement in order to hear sympathetic cases.<sup>71</sup>

Even though courts mean well, procedural evasion to keep ATS cases alive not only ignores Supreme Court precedent, but may also

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<sup>63</sup> *Id.* at 188 (majority opinion).

<sup>64</sup> *Taylor v. Vt. Dep’t of Educ.*, 313 F.3d 768, 776 (2d Cir. 2002).

<sup>65</sup> *See, e.g., id.*; *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 91 (2d Cir. 2000) (“We cannot read into [plaintiffs’] complaint the missing allegations crucial to [their] claim because a Rule 12(b)(6) motion tests the adequacy of the complaint, not the briefs.” (citation omitted) (citing *Dangler v. N.Y. City Off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir. 1999)); *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998); *cf. Peabody v. Weider Publ’ns, Inc.*, 260 F. App’x 380, 384 (2d Cir. 2008) (refusing to entertain new factual allegations on appeal because “the proper means of [alleging new facts] is in a motion to amend [the] complaint under Federal Rule of Civil Procedure 15(a), not in [a] brief on appeal”).

<sup>66</sup> *See* JEFFREY DAVIS, *JUSTICE ACROSS BORDERS* 284 (2008).

<sup>67</sup> *Abdullahi*, 562 F.3d at 171.

<sup>68</sup> In May 2007, the Nigerian “state of Kano brought [its own] criminal charges and civil claims against Pfizer, seeking over \$2 billion in damages,” and in June 2007, “the federal government of Nigeria sued Pfizer and several of its employees, seeking \$7 billion in damages.” *Id.* at 172.

<sup>69</sup> *Id.* Subsequent to the *Abdullahi* decision, however, the Nigerian state of Kano settled its case against Pfizer for \$75 million, of which \$35 million would go to victims. *See* Joe Stephens, *Pfizer To Pay \$75 Million To Settle Trovan-Testing Suit*, WASH. POST, July 31, 2009, at A15.

<sup>70</sup> DAVIS, *supra* note 66, at 282–83 (quoting Interview by Jeffrey Davis with Moira Feeney, Counsel, Ctr. for Justice & Accountability (July 17, 2006)) (internal quotation marks omitted).

<sup>71</sup> *See, e.g., Kadic v. Karadžić*, 70 F.3d 232, 239–40 (2d Cir. 1995) (carving out exceptions to the state action requirement for the particularly heinous crimes of genocide, war crimes, and slavery).

impinge upon Congress's basic power to create causes of action. As *Sosa* noted, the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases" because such a decision "raises issues beyond the mere consideration whether [the] underlying primary conduct should be allowed or not."<sup>72</sup> Although the ATS was enacted as an exception to this congressional prerogative, it is only a *limited* exception. In ATS cases, therefore, courts should be particularly loath to overlook procedural requirements because they are already acting at the outer limits of their judicial power. Allowing plaintiffs to supplement their complaints with additional facts after a district court has correctly rejected their claim will make it much easier for an ATS plaintiff to survive the pleadings stage through clever use of the appeals process. But courts should not be looking for ways to keep ATS cases alive. It is properly left to Congress, not the judiciary, to make American courts more accessible to foreign plaintiffs.

Furthermore, evasion of the state action requirement endangers the executive's power to conduct foreign affairs. When courts depart from procedure to find that the state action requirement is satisfied, they risk blaming the foreign government even when the foreign government had little role at all. *Sosa* cautioned that it is one thing for American courts to enforce American law domestically, "but quite another to . . . claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."<sup>73</sup> This concern rings especially true when plaintiffs fail to demonstrate wrongdoing on the part of the foreign government. Although this threat may be less worrisome at the motion to dismiss stage, where the court is concerned more with the adequacy of allegations than with actual blame, the threat is especially potent once the court reaches the merits of the case. Passing judgment on foreign governments in such cases — by declaring them complicit when their involvement was minimal — defies *Sosa*'s admonition that courts ought to be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."<sup>74</sup>

By impermissibly disregarding both circuit and Supreme Court precedent, the *Abdullahi* court triggered serious separation of powers concerns. To avoid such concerns, courts seized of ATS cases should not endeavor to keep them alive through procedural evasion. Courts should follow *Sosa*'s prescribed judicial caution — not flout it.

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<sup>72</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*