Nos. 19-416 & 19-453

In the Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioner,
v.
JOHN DOE I, ET AL.,
Respondents.

CARGILL, INCORPORATED,
Petitioner,
v.
JOHN DOE I, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER CARGILL, INCORPORATED

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QUESTIONS PRESENTED

Petitioner Cargill, Incorporated purchases cocoa beans in Côte d'Ivoire. Respondents are Malian citizens who allege that, when Respondents were under the age of fourteen, Ivorian cocoa farmers subjected them to forced labor and other abuses in violation of international law.

Respondents filed this putative class action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, claiming that Cargill aided and abetted the Ivorian farmers' violations of international law by purchasing their cocoa and giving them financial assistance in Côte d'Ivoire.

The questions presented are:

1. Whether the presumption against extraterritorial application of the ATS is displaced by allegations that a U.S. company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in—and Respondents allegedly suffered their injuries in—a foreign country.

2. Whether a domestic corporation is subject to liability in a private action under the ATS.

PARTIES TO THE PROCEEDING BELOW

Cargill, Incorporated and Nestlé USA, Inc. were defendants-appellees below. Cargill West Africa, S.A., Cargill Cocoa, Nestlé, S.A., and Nestlé Ivory Coast, were also named as defendants-appellees below. Archer Daniels Midland Co. had been a defendant in the district court, but the claims against it were voluntarily dismissed.

John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, and John Doe VI were plaintiffs-appellants below.

RULE 29.6 STATEMENT

Petitioner Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly traded company owns 10% or more of its common stock.

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 28a-39a[1]) is reported at 929 F.3d 623. The order denying rehearing and rehearing *en banc* (Pet. App. 1a-27a) is also reported at 929 F.3d 623. The initial opinion of the court of appeals (Pet. App. 40a-51a) is reported at 906 F.3d 1120. The district court's opinion granting the second motion to dismiss (Pet. App. 52a-70a) is unreported but available at 2017 WL 6059134.

The district court's opinion granting the first motion to dismiss (J.A. 61-238) is reported at 748 F. Supp. 2d 1057. The opinion of the Ninth Circuit reversing and remanding that determination (J.A. 239-79) is reported at 766 F.3d 1013. The order denying rehearing *en banc* (J.A. 280-302) is reported at 788 F.3d 946. This Court's order denying certiorari with respect to that judgment is reported at 136 S. Ct. 798.

JURISDICTION

The court of appeals entered its judgment on October 23, 2018 (Pet. App. 40a), and denied a timely petition for rehearing on July 5, 2019 (*id.* at 1a). The petition for a writ of certiorari was filed on October 2, 2019, and was granted on July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort

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[1] References to "Pet. App." are to the appendix to Cargill's petition for a writ of certiorari, No. 19-453.

only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT

This Court has repeatedly recognized that Alien Tort Statute (ATS) claims—actions brought by citizens of other nations seeking damages for violations of international law—"implicate[] serious separation-of-powers and foreign-relations concerns" and therefore "must be 'subject to vigilant doorkeeping.'" *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004)). These concerns led this Court in *Jesner* to foreclose ATS suits against foreign corporations and, in *Kiobel* v. *Royal Dutch Petroleum*, 569 U.S. 108 (2013), to hold that the ATS does not apply extraterritorially.

Like many ATS cases, this case involves allegations of egregious wrongs—here, forced child labor on cocoa farms in Côte d'Ivoire. Cargill unequivocally condemns—and has made great efforts to combat—these abuses in the cocoa industry. But Plaintiffs "d[id] not bring this action against the slavers who kidnapped them, nor against the plantation owners who mistreated them." J.A. 282-83 (Bea, J., joined by seven other judges, dissenting from the denial of rehearing *en banc*). Instead, Plaintiffs sued companies "engaged in the Ivory Coast cocoa trade," alleging that their purchases of cocoa and other commercial activity "aid[ed] and abet[ted] the slavers and plantation owners." *Id.* at 283. Yet even though both the abuses and the commercial activity took place outside the United States—in Côte d'Ivoire—the Ninth Circuit allowed the case to proceed.

That decision "substituted sympathy for legal analysis" (J.A. 282 (*en banc* dissent)), and it contravenes both the letter and the spirit of this Court's ATS jurisprudence. Rather than adhere to the courts' prescribed role as vigilant doorkeepers, the decision below throws open the federal courts to ATS claims—in defiance of *Sosa*, *Kiobel*, and *Jesner*. The Ninth Circuit's judgment should be reversed.

First, the claims here are extraterritorial, and therefore impermissible. The relevant conduct all took place in Côte d'Ivoire: That is where unnamed Ivorian farmers committed the alleged labor abuses, that is where Plaintiffs were injured, and that is where Cargill bought cocoa and engaged in other commercial activities that Plaintiffs allege constituted aiding and abetting. The court below nevertheless ruled that the claims here are not extraterritorial based entirely on the complaint's general allegations that Cargill makes "major operational decision[s]" and conducts corporate oversight activities at its headquarters in the United States. That reasoning is contrary to *Kiobel*'s admonition that "mere corporate presence" in the United States cannot turn an otherwise extraterritorial claim into a domestic one. 569 U.S. at 125.

Moreover, the Court has explained that the key question in determining whether a claim is extraterritorial is whether the conduct relevant to the statute's "focus" occurs within the United States. *RJR Nabisco, Inc.* v. *European Cmty*, 136 S. Ct. 2090, 2101 (2016). The ATS's "focus" is the principal violation of international law that injures the plaintiffs: here, the forced labor that Plaintiffs allege took place in Côte d'Ivoire.

Second, the Ninth Circuit's holding that domestic corporations are susceptible to suit under the ATS is

indefensible after *Jesner*. The Court's reasoning in that decision precludes a distinction between foreign and domestic corporations. Congress could enact corporate liability, but it has not done so—not even on the lone occasion that it has expressly created a cause of action for closely-analogous wrongs. Proper deference to Congress's role in the constitutional scheme weighs decisively against corporate liability under the ATS.

A. Plaintiffs' Allegations.

This action was commenced in the Central District of California in 2005. Plaintiffs have filed multiple amended complaints; this discussion is based on the allegations in the operative second amended complaint. J.A. 303-44.

Plaintiffs are six Malians who allege that as children they were trafficked from Mali into Côte d'Ivoire, beaten, and forced to work on unspecified cocoa "plantation[s]," "farm[s] and/or farmer cooperative[s]." J.A. 306-07, 332-36 (¶¶ 6-11, 70-75). Plaintiffs allege that they had escaped by 2001. See *id.* at 332-36 (¶¶ 70-75).

Plaintiffs allege that these wrongs were committed by unidentified "guards" and "overseer[s]," on "farm[s] and/or farmer cooperative[s]," but none of those individuals was named as a defendant or employed by a defendant. J.A. 306-07, 332-36 (¶¶ 6-11, 70-75).

Instead, the named Defendants are "Nestle, S.A., Nestle U.S.A., Nestle Ivory Coast, Archer Daniels Midland Co., Cargill Incorporated Company, Cargill Cocoa, and Cargill West Africa S.A." J.A. 303. The complaint asserts federal common law claims under the ATS, alleging that Defendants aided and abetted

forced labor in violation of international law. *Id.* at 338-43 (¶¶ 78-99).

The complaint for the most part alleges conduct by "Defendants" without specifying which defendant engaged in which conduct. The allegations fall into several general categories:

- Cocoa purchases from, and provision of financial support, farming supplies, and training to, unspecified Ivorian cocoa farms. J.A. 319-20 (¶ 50).
- Operation of cocoa purchasing and processing facilities in Côte d'Ivoire and visits to unspecified cocoa farms by Defendants' employees or representatives. J.A. 314-15, 316-17 (¶¶ 34, 39-40).
- Failure to exercise purported "economic leverage" to "control and/or limit the use of forced child labor" by Ivorian farms, some of which are alleged to have "exclusive" business relationships with particular Defendants. J.A. 320 (¶ 51).[2]
- Statements by Defendants to U.S. consumers in 2005-2006 (four years or more after the last of the Plaintiffs escaped his cocoa farm in 2001) explaining that Defendants work with Ivorian farmers to enhance crop yields and prevent the exploitation of children. J.A. 320-29 (¶¶ 52-61).
- Lobbying by Defendants' employees of Congress and other officials beginning in 2001, leading to

[2] The complaint does not allege that Cargill purchased cocoa from or provided assistance to any farm or plantation at which any of the Plaintiffs worked. Although Plaintiffs allege that Cargill had "supplier/buyer relationships" with six identified Ivorian cocoa farms (J.A. 316 (¶ 39)), Plaintiffs do not allege that they worked at any of those farms.

> the Harkin-Engel Protocol, a voluntary agreement under which cocoa industry companies work to combat child labor abuses. J.A. 330 (¶¶ 63-65).

With respect to Cargill, the complaint also alleges that

> Cargill [is] headquartered in and [has its] management operations in the U.S., and every major operational decision by [the company] is made or approved in the U.S. * * * Cargill * * * regularly had employees from [its] U.S. headquarters inspecting [its] operations in Côte d'Ivoire and reporting back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground.

J.A. 314-15 (¶ 34).

B. The District Court's First Dismissal.

The district court (Wilson, J.) in 2010 dismissed the first amended complaint (J.A. 25-60), which contained allegations substantially similar to those in the now-operative second amended complaint. *Id.* at 61-238 (opinion granting motion to dismiss).

The district court held: (1) corporations cannot be sued under the ATS; (2) Plaintiffs did not plead facts sufficient to establish the *mens rea* element of aiding and abetting—*i.e.*, that Defendants "act[ed] with the specific intent (*i.e.*, for the purpose) of substantially assisting the * * * crime"; and (3) Plaintiffs did not plead facts sufficient to establish the *actus reus* element of aiding and abetting—*i.e.*, that Defendants committed acts "specifically directed" to perpetrating a "certain specific crime" under international law and had "a substantial effect on the perpetration of [that] crime." J.A. 95-96, 99, 115, 163, 204.

C. The Initial Appeal.

1. Plaintiffs appealed, and a divided Ninth Circuit panel vacated and remanded for further proceedings. J.A. 239-79.

The majority (D. Nelson and Wardlaw, JJ.) held (1) corporate liability is available under the ATS (J.A. 248-53); and (2) Plaintiffs' allegations supported the "inference" that Cargill acted with the requisite *mens rea*—"the purpose to facilitate child slavery"—because Cargill had a profit motive to "fail[] to stop or limit" it. *Id.* at 256-58.

While the appeal was pending, this Court decided *Kiobel*. In assessing whether Plaintiffs' ATS claims were impermissibly extraterritorial, the panel majority held that *Kiobel* "did not incorporate [the] focus test" set forth in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), but had instead "articulate[d] a new 'touch and concern' test for determining when it is permissible for an ATS claim to seek the extraterritorial application of federal law." J.A. 263 (quoting *Kiobel*, 569 U.S. at 124). The panel majority declined, however, to determine whether Plaintiffs' claims were impermissibly extraterritorial, and instead remanded so that the district court could address this issue based on an amended complaint. *Id.* at 263-65.

With respect to corporate liability, the panel majority relied on circuit precedent to hold that "corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations," but on whether the substantive claim is based on a "universal and absolute" norm. J.A. 251. The court thus ruled that De-

fendants here could be held liable for aiding and abetting alleged violations of the "universal" prohibition against slavery. *Ibid.*

In dissent, Judge Rawlinson "strongly disagree[d]" with the panel's inference of *mens rea* from the mere allegation that Cargill had "acted with the intent to reduce their cost[s]." J.A. 271. Moreover, she expressed deep skepticism that Plaintiffs' ATS claims were not extraterritorial, given "the admittedly extraterritorial child slave labor that is the basis of this case." *Id.* at 276-77.

2. Over the dissent of nine judges, the Ninth Circuit denied rehearing *en banc*. J.A. 281-82. Judge Bea's dissent was joined by judges O'Scannlain, Gould, Tallman, Bybee, Callahan, M. Smith, and N.R. Smith. J.A. 282-302.[3] The dissenters would have granted rehearing with respect to the panel's *mens rea*, extraterritoriality, and corporate liability holdings.

This Court denied certiorari. 136 S. Ct. 798 (2016).

D. The District Court's Second Dismissal.

On remand, Plaintiffs filed the operative second amended complaint. Defendants again moved to dismiss on the grounds that the ATS claims are impermissibly extraterritorial and that Plaintiffs' allegations fail to satisfy the *actus reus* element of aiding-and-abetting liability.[4]

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[3] Judge Rawlinson voted to grant rehearing but did not join Judge Bea's opinion. J.A. 282.

[4] Archer Daniels Midland Co. was voluntarily dismissed from the case before this motion to dismiss was decided. J.A. 6.

The district court dismissed the action on extra-territoriality grounds and denied leave to amend the complaint. Pet. App. 52a-70a.

Relying on this Court's decision in *RJR Nabisco,* which was issued after the court of appeals' remand, the district court held that *Kiobel* did incorporate *Morrison*'s "focus" test into the ATS extraterritoriality analysis. Pet. App. 54a-56a (discussing *RJR Nabisco*, 136 S. Ct. at 2100-01).

The district court held that "the 'focus' in this case is the conduct of Defendants that aided and abetted forced child labor in Côte d'Ivoire." Pet. App. 58a. The court then concluded that none of Plaintiffs' allegations satisfied the "focus" test. *Id.* at 59a. In particular:

- Defendants' statements to U.S. consumers "are either not dated, or occurred in 2005 and 2006," and the complaint did not "plausibly allege[d] how statements made years after Plaintiffs' injuries could have aided and abetted such injuries." Pet. App. 63a. Moreover, the statements fell outside the "focus" of the ATS and failed to support a claim because "[t]here are no allegations that these publications helped the perpetrators commit the underlying human rights abuses." *Id.* at 64a.
- Defendants' lobbying efforts "are not 'relevant conduct' under the 'focus' test because Plaintiffs do not plausibly plead how these lobbying efforts aided and abetted the underling perpetrators." Pet. App. 64a.
- Defendants' U.S.-based corporate oversight conduct was simply "synonymous with the fact that all Defendants are U.S. based corporations. These

> are all activities that ordinary international businesses engage in, and thus do not 'touch and concern' the United States with any more force than Defendants' mere citizenship status." Pet. App. 60a. The court held that the complaint's allegations show only that Defendants "had legitimate business relations with overseas parties," and did not show "that Defendants planned or directed the use of forced child labor from the United States—or that Defendants planned or directed the underlying violations at all." *Id.* at 62a.

Finally, "even considering all domestic factors, Plaintiffs' allegations are essentially that Defendants are U.S. corporations (that, unsurprisingly, provide legitimate funds and supplies to their operations overseas) and that Defendants had general corporate supervision over subsidiaries in Côte d'Ivoire." Pet. App. 69a. The court ruled that such "allegations do not 'touch and concern' the United States with sufficient force to displace the presumption" against extraterritorial application of U.S. law. *Ibid.*

E. The Second Appeal.

1. Plaintiffs again appealed, and the Ninth Circuit again reversed and remanded. Pet. App. 40a-51a.

The panel majority (D. Nelson & Christen, JJ.[5]) first addressed the question of corporate ATS liability, which Defendants had raised in light of this Court's intervening decision in *Jesner*. Stating that *Jesner*'s holding "did not eliminate all corporate liability under

[5] District Judge Shea, sitting by designation, concurred only "in the result," without filing an opinion. Pet. App. 51a. He subsequently recommended granting the petition for rehearing *en banc*. *Id.* at 3a.

the ATS," the panel without further analysis reaffirmed its prior holding "as applied to domestic corporations." Pet. App. 45a.

Next, the panel majority held that Plaintiffs' allegations displaced the presumption against extraterritoriality.

The majority recognized that the relevant standard is the "focus" test that this Court set forth in *Morrison* and *RJR Nabisco*. Pet. App. 46a-47a. The majority then held that under that test, the ATS's "focus * * * is not limited to principal offenses," but extends to "aiding and abetting" a tort committed in violation of international law. *Id.* at 48a. The majority therefore looked to "the location where the alleged aiding and abetting took place." *Ibid.*

Based on the complaint's allegation that "defendants provided 'personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier," the panel majority ruled that "plaintiffs have alleged that defendants funded child slavery practices in the Ivory Coast." Pet. App. 49a. The majority "infer[red] that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that was not obtainable without employing child slave labor." *Ibid.* The panel majority did not cite any allegation of the complaint in support of that inference.

The majority further stated that "Defendants also had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these fi-

nancing decisions, or 'financing arrangements,' originated." Pet. App. 49a-50a (citation omitted). It stated that "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States" and held that such a "narrow set of domestic conduct is relevant to the ATS's focus." *Id.* at 50a.[6]

The panel declined to address whether Plaintiffs had sufficiently alleged the *actus reus* element of an aiding-and-abetting claim, instead granting Plaintiffs leave to amend the complaint for the third time—to remove the foreign corporations named as defendants and to eliminate the "problematic" use of group pleading. Pet. App. 50a-51a.

2. The Ninth Circuit again denied Cargill's petition for rehearing and rehearing *en banc* (Pet. App. 1a-3a), over the dissent of eight judges (*id.* at 4a-39a (Bennett, J., joined by Bybee, Callahan, Bea, Ikuta, and R. Nelson, JJ., and in part by M. Smith and Bade, JJ.)).[7]

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[6] The panel majority did not dispute the district court's determinations that the statements to U.S. consumers and lobbying activity alleged in the complaint were irrelevant to the extraterritoriality determination.

[7] Cargill's rehearing petition pointed out that the panel had failed to address Cargill's argument that Plaintiffs lacked Article III standing because the operative complaint did not allege facts supporting a plausible inference that Cargill had purchased cocoa from farms on which Plaintiffs worked at the times that Plaintiffs worked on the farms—and therefore Plaintiffs' claimed injury was not "fairly traceable" to the violation alleged in the complaint. Cargill Pet. for Reh'g at 20-21, *Doe* v. *Nestlé, U.S.A.,* 929 F.3d 623 (9th Cir. 2019) (No. 17-55435), Dkt. 71.

The panel amended its opinion to add a discussion of Article III standing and stated that the traceability requirement was

All eight *en banc* dissenters rejected the panel's extraterritoriality ruling. The dissenters explained that "the ATS's focus is * * * conduct that violates international law, which the ATS 'seeks to regulate' by giving federal courts jurisdiction over such claims." Pet. App. 20a (quoting *Morrison*, 561 U.S. at 267; other citation and internal quotation marks omitted). That conduct, the dissenters stated, is limited to "Plaintiffs' [alleged] enslavement on cocoa plantations." *Ibid.* "Because all [of that] relevant conduct took place abroad," the dissenters would have affirmed the district court's dismissal. *Id.* at 19a.

The dissent explained that the panel majority erred in holding the complaint's allegations sufficient to render the claims not extraterritorial. First, the dissent observed that "[e]ven if payments to cocoa farmers could be properly characterized as 'kickbacks' (though they were never described in the complaint as such), the payments * * * all took place in Africa." Pet. App. 21a. Indeed, it pointed out that "[t]he complaint does not even allege that the funds originated in the U.S." *Ibid.* Such foreign transactions, the dissent concluded, cannot establish the requisite connection to the United States. *Ibid.*[8]

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satisfied "because [Plaintiffs] raise sufficiently specific allegations regarding Cargill's involvement in farms that rely on child slavery" (Pet. App. 2a)—but the panel did not cite any portion of the complaint or explain how Plaintiffs' injuries could be traceable to Cargill's actions if Plaintiffs never worked on a farm doing business with Cargill. See *id.* at 21a n.4 (*en banc* dissent).

[8] The *en banc* dissent rejected the panel majority's characterization of the spending money payments as "kickbacks," stating that "the complaint itself, which never uses the word 'kickback,' is devoid of any allegation that the provision of 'spending money' was improper or illegal. * * * Plaintiffs could not plausibly make such

The dissent similarly observed that any "[a]lleged 'inspections' of cocoa farms * * * took place in Africa," and so "cannot sustain an ATS claim." Pet. App. 21a.

Turning to the alleged supervision from and decision-making in the United States, the dissent stated that "corporate presence and decision-making" cannot displace the presumption against extraterritoriality. Pet. App. 22a. The dissenters reasoned that "vague allegations of domestic" decisions cannot "imbue an otherwise entirely foreign claim with the territorial connection that the ATS absolutely requires." *Id.* at 23a.

Because the complaint's allegations are "clear that all the relevant misconduct took place in Côte d'Ivoire, not the United States," the dissenters concluded that the panel's ruling "essentially eliminates the presumption against extraterritoriality." Pet. App. 26a.

Six judges dissented from the denial of rehearing regarding the panel's corporate-liability holding. The dissenters concluded that "*Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS" (Pet. App. 5a) and that the circuit precedent on which the panel majority had relied is now "discredited" (*id.* at 7a). Under the correct analysis, "[c]orporations are no longer viable ATS defendants" and "[i]t was error for the panel majority to hold otherwise." *Ibid.*

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an assertion." Pet. App. 25a. Rather, "*the factual* allegations in the complaint show only that Defendants sought to stabilize their supply lines and minimize costs by entering into exclusive-dealing arrangements," which "provide well-recognized economic benefits." *Id.* at 25a-26a (citation and internal quotation marks omitted).

The dissent explained that the question of corporate liability should be analyzed in a "two-step process." Pet. App. 7a. First, a court should determine whether the particular international-law norm at issue is "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Ibid.* (quoting *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting) (internal quotation marks omitted)). If that requirement is met, the court must proceed to step two and consider "whether allowing a particular case to proceed is an appropriate exercise of judicial discretion." *Ibid.* (quoting *Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting) (internal quotation marks omitted)).

With respect to the first step, the dissent "agree[d] with Justice Kennedy's plurality opinion in *Jesner*, Judge Cabranes's opinion for the Second Circuit in *Kiobel* [v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010)] and then-Judge Kavanaugh's dissent in [*Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011),] that allowing an ATS claim against a corporation does not 'rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' on which the ATS was based." Pet. App. 13a (citations omitted). And "[t]hat conclusion is dispositive—in the absence of a clearly defined, universal norm of corporate liability under customary international law, the remaining domestic corporate defendants are entitled to dismissal." *Id.* at 14a.

Turning to the second inquiry, the dissent concluded that Plaintiffs' claims fail "for two reasons: the Congressional enactment of the Torture Victim Protection Act of 1991 ('TVPA'), and th[is] Court's *Bivens* jurisprudence." Pet. App. 17a. As to the first point, the

dissent explained that the cause of action created under the TVPA is "the *only* ATS cause of action created by Congress," and it "expressly limits liability to 'individuals.'" *Ibid.* "[T]he fact that corporations cannot be sued under 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.'" *Ibid.* (citations omitted).

As to the second point, the dissent cited this Court's rejection of corporate liability in *Bivens* actions in *Correctional Services Corp*. v. *Malesko*, 534 U.S. 61 (2001), on which the *Jesner* plurality had relied. Pet. App. 17a-19a. The dissent explained that the principal purpose of customary international law is to "punish[] those natural persons directly responsible for affronts to the law of nations." *Id.* at 18a. The dissenters concluded imposing civil liability on corporations does not serve that purpose: "[t]he complaint here amply demonstrates that if given the choice between pursuing a corporate defendant or the individuals responsible for violating international law, plaintiffs will choose the former" as the deep-pocket defendant. *Ibid*. And even if "sound policy would counsel for * * * extending ATS liability to corporations, th[is] Court has clearly stated that such a policy determination is for Congress and not the courts." *Ibid.* Thus, "[u]nder *Malesko* and *Jesner*, ATS liability does not attach to corporate defendants." *Id.* at 18a-19a.

Citing Justice Alito's concurring opinion in *Jesner*, the dissent further observed that "[c]orporate liability would 'not materially advance the ATS's objective of avoiding diplomatic strife,'" explaining that "'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.'" Pet. App. 10a-11a (quoting *Jesner*, 138 S. Ct. at 1401 (Alito, J., concurring in part and concurring in judgment)).

The dissenters also invoked Justice Gorsuch's conclusion that "the courts lack authority to create *any* new causes of action under the ATS other than those recognized by the First Congress, which would not include the claims that Plaintiffs here raise." Pet. App. 11a (citing *Jesner*, 138 S. Ct. at 1412-13 (Gorsuch, J., concurring in part and concurring in judgment)).

The dissenters concluded that under this Court's precedents, "corporations (foreign or not) are clearly not proper ATS defendants." Pet. App. 7a.

SUMMARY OF ARGUMENT

I. This Court held in *Kiobel* that the ATS does not apply extraterritorially. Plaintiffs' claims here do not come close to asserting a domestic application of the statute, for three separate reasons.

First, a claim is extraterritorial if all of the "relevant conduct" occurred outside the United States. *RJR Nabisco*, 136 S. Ct. at 2101. Here, the relevant conduct all occurred in Côte d'Ivoire.

That is where Plaintiffs allegedly were trafficked and subjected to the forced-labor conditions violating international law and incurred the resulting injuries. The aiding-and-abetting claims similarly rest on claimed conduct in Côte d'Ivoire—that is where Defendants allegedly purchased the cocoa and provided farming supplies, training, and financial support.

The Ninth Circuit—relying on the complaint's allegation of general headquarters oversight of "major operational decision[s]"—construed the complaint to

allege that Cargill's U.S. headquarters personnel had approved "kickbacks" to farmers designed to encourage forced labor. But the complaint does not allege that the payments were approved in the United States.

Accepting the Ninth Circuit's view that relevant domestic conduct may be inferred from a general allegation of corporate headquarters oversight would mean that every ATS plaintiff suing a U.S. corporation could satisfy the threshold requirement of alleging relevant conduct within the United States—simply by asserting general headquarters oversight of "major decisions." But that result conflicts with this Court's statement in *Kiobel* that "it would reach too far to say that mere corporate presence suffices" to "displace the [extraterritoriality] presumption." 569 U.S. at 125. Because there accordingly is no "relevant conduct" within the United States, the ATS claims must be dismissed.

Second, even if the Court determines that some "relevant conduct" occurred within the United States, the conduct relevant to the ATS's "focus" occurred abroad. As this Court has explained, "[i]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101.

The ATS's "focus" is the principal international-law violation that directly injures the plaintiff—which makes a claim extraterritorial when the conduct constituting the principal international-law violation and resulting injury occur outside the United States. Aiding-and-abetting activity cannot constitute the statute's focus because a plaintiff cannot be harmed by

aiding and abetting alone—it is the principal violation that directly injures the plaintiff.

Indeed, the statute's use of the word "tort" to describe the claims for which it provides jurisdiction, provides additional support for these conclusions. In tort, the law that applies to a claim is generally the law of the place where the tortfeasor injures the plaintiff—thus confirming that the ATS should apply only when that conduct and resulting injury occurs in the United States. Moreover, aiding and abetting is not a "tort," but rather a doctrine of secondary liability for torts committed by others, and the statute's use of "tort" thus confirms that aiding and abetting is not the statute's focus.

Third, even if aiding and abetting could somehow qualify as a "tort" falling within the ATS's statutory "focus," Plaintiffs' claims are still extraterritorial. Where, as here, the principal conduct occurs outside the United States, the plaintiffs are injured outside the United States, and the overwhelming majority of the alleged aiding-and-abetting conduct occurs outside the United States, the claims do not "touch and concern" the United States "with sufficient force to displace the presumption against extraterritoriality." *Kiobel*, 569 U.S. at 124-25.

Finally, permitting ATS claims to proceed based on facts such as those here—essentially allegations of U.S. headquarters oversight—would greatly increase conflict with other nations and undermine U.S. foreign policy. The Court has in the past rejected interpretations of the ATS that would lead to those results, and it should do so again here.

II. The Ninth Circuit's judgment should be reversed for the independent reason that the ATS does

not impose liability upon domestic corporations. The reasoning of the opinions in *Jesner* compels that conclusion.

As a threshold matter, there is no "specific, universal, and obligatory [international-law] norm of liability for corporations," as the *Jesner* plurality recognized. 138 S. Ct. at 1400. To the contrary, the international community has consistently rejected corporate liability, starting with the Nuremberg Tribunal and carrying through to the Rome Statute of the present-day International Criminal Court.

Next, separation-of-powers principles weigh heavily against imposing liability on domestic corporations. The Court has repeatedly held that federal courts lack authority to create private rights of action, and *Jesner* determined that "this caution extends to the question whether the courts should * * * impos[e] liability on artificial entities like corporations." 138 S. Ct. at 1402-03. Just as the Court declined to create such liability in *Jesner* and in *Malesko* (with respect to *Bivens* actions), it should decline to do so here.

Indeed, recognizing domestic corporate liability would force the Court to address a range of subsequent questions regarding the metes and bounds of such liability—such as when a corporation may be liable for its employees' acts; whether domestic subsidiaries of foreign corporations should be subject to liability; and so on. Congress, not the courts, has the expertise necessary to make these determinations, especially given the "foreign-policy and separation-of-powers concerns inherent in ATS litigation." *Jesner*, 138 S. Ct at 1403.

Analogous statutes enacted by Congress also require rejection of domestic corporate liability. Critically, Congress chose not to impose liability on corporations when it enacted the TVPA, and permitting such suits under the ATS would effectively undermine that determination by permitting foreign citizens to sue corporations. When Congress does create private actions, it prescribes detailed elements that plaintiffs must satisfy—as in the Anti-Terrorism Act, 18 U.S.C. § 2333.

Importantly, Congress has never distinguished between domestic and foreign corporations in this area—another reason for the Court to refuse to create a claim against domestic corporations and instead leave the issue for Congress.

Last, a cause of action against domestic corporations is not necessary to serve the ATS's goals. Federal criminal laws, regulatory systems, and congressionally established private causes of action are all available. And, as in *Jesner*, recognition of a new cause of action might lead plaintiffs to "ignore the human perpetrators and concentrate instead on multinational corporate entities." 138 S. Ct. at 1405 (plurality).

For all of these reasons, the Court should decline to create a new ATS cause of action, and should instead leave the issue to be addressed by Congress.

ARGUMENT

I. Plaintiffs' ATS Claims Are Extraterritorial.

This Court has established "a two-step framework for analyzing extraterritoriality issues." *RJR Nabisco*, 136 S. Ct. at 2101. "At the first step, [the Court] ask[s] * * * whether the statute gives a clear,

affirmative indication that it applies extraterritorially." *Ibid.*

Kiobel resolved that question with respect to the ATS, holding that the statute does not apply extraterritorially. 569 U.S. at 124.

When the statute is not extraterritorial, the Court proceeds to the "second step" and "determine[s] whether the case involves a domestic application of the statute." *RJR Nabisco*, 136 S. Ct. at 2101. If "'all the relevant conduct' regarding [the alleged] violations 'took place outside the United States,'" then the proposed application of the statute is extraterritorial and the claim must be dismissed. *Ibid.* (quoting *Kiobel*, 569 U.S. at 124).

If *some* of the relevant conduct is domestic, then the Court must determine the statute's "focus." *RJR Nabisco*, 136 S. Ct. at 2101. The claim may proceed only if "the conduct *relevant to the statute's focus* occurred in the United States." *Ibid.* (emphasis added). Conversely, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*

Finally, "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" for the ATS to permit a cause of action. *Kiobel*, 569 U.S. at 124-25.

Respondents' claims are extraterritorial, and therefore must be dismissed, for three separate reasons. *First*, all of the alleged relevant conduct occurred outside the United States. *Second*, even if some relevant alleged conduct occurred within the United

States, all of the conduct relating to the ATS's focus occurred outside of the United States. *Third*, even if some claimed conduct relating to the statute's focus allegedly occurred within the United States, the overwhelming majority of the relevant conduct occurred outside of the United States, and the claims therefore are insufficiently related to the United States to displace the presumption against extraterritoriality.

A. All Of The Relevant Conduct Occurred Outside The United States.

The complaint here fails at the outset because it does not allege that any of the "'relevant conduct'" took place in the United States. *RJR Nabisco*, 136 S. Ct. at 2101 (quoting *Kiobel*, 569 U.S. at 124).

There can be no dispute that the alleged violations of international law took place in Côte d'Ivoire. That is where Plaintiffs allegedly were trafficked and subjected to forced labor by Ivorian farmers. J.A. 304, 306-07, 332-36 (¶¶ 1, 6-11, 70-75).

Similarly, the claimed aiding and abetting of those international-law violations rests on alleged acts in Côte d'Ivoire. That is where "Defendants" are alleged to have assisted the asserted international-law violations "by providing local farmers and/or farmer cooperatives" with "financial support," "farming supplies," and "training and capacity building." J.A. 316, 320, 338-43 (¶¶ 37, 51, 78-99).[9]

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[9] The Ninth Circuit did not disturb the district court's conclusion (Pet. App. 63a-66a) that Plaintiffs' allegations of U.S. lobbying efforts and statements to U.S. consumers were not relevant to the ATS claim and therefore should not be considered in the extraterritoriality inquiry. See page 12 n.6, *supra*.

The Ninth Circuit panel interpreted the operative complaint to allege that Defendants provided "personal spending money" to Ivorian farmers that was "outside the ordinary business contract" and akin to "kickbacks." Pet. App. 49a. That is an unsupportable interpretation of the complaint.[10]

But, regardless, any payments were allegedly made to farmers in Côte d'Ivoire. As the *en banc* dissenters recognized, "[e]ven if payments to cocoa farmers could be properly characterized as 'kickbacks' (though they were never described in the complaint as such), the payments, like the slavery, all took place in Africa." Pet. App. 21a.

The complaint also alleges that

> Cargill [is] headquartered in and [has its] management operations in the U.S., and every major operational decision by [the company] is made or approved in the U.S. * * * Cargill * * * regularly had employees from [its] U.S. headquarters inspecting [its] operations in Côte d'Ivoire and reporting back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground.

J.A. 314-15 (¶ 34).

The inspections of operations in Côte d'Ivoire cannot qualify as domestic conduct. Those inspections "took place in Africa." Pet. App. 21a (*en banc* dissent).

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[10] As explained above (at page 13-14 n.8, *supra*), the *en banc* dissent demonstrated that the complaint "is devoid of any allegation that the provision of 'spending money' was improper or illegal." Pet. App. 25a.

That leaves as the only even possibly relevant domestic conduct the allegations that "every major operational decision by [Cargill] is made in or approved in the U.S." and that the Cargill employees who inspected the company's operations in Côte d'Ivoire "report[ed] back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground." J.A. 314-15 (¶ 34).

The Ninth Circuit panel construed the complaint to allege that "financing decisions, or 'financing arrangements,'" relating to the "spending money" payments "originated" in the United States. Pet. App. 49a-50a.

But the complaint does not include any allegation that the "spending money" payments originated in the United States or were directed from the United States—it says nothing about where those alleged decisions were made, or where the alleged payments originated. The only conceivable basis in the complaint for the panel's assertion is the complaint's general allegation (reprinted above) regarding headquarters oversight of "major operational decision[s]" and reports to headquarters about inspection visits to Côte d'Ivoire.

That general allegation is insufficient as a matter of law to overcome the presumption against extraterritoriality. Were such an allegation capable of displacing the presumption, a plaintiff suing a U.S. company under the ATS would *always* be able to demonstrate some "relevant conduct" satisfying the second step of the extraterritoriality inquiry—simply by alleging that "every major operational decision is made or approved" at the company's U.S. headquarters and that the company's headquarters personnel received reports regarding operations outside the United States.

That is equivalent to the proposition that the Court *rejected* in *Kiobel*, when it explained that "it would reach too far to say that mere corporate presence suffices" to "displace the [extraterritoriality] presumption." 569 U.S. at 125.

The Ninth Circuit's erroneous approach would have significant adverse consequences not limited to ATS actions. In any lawsuit invoking a non-extraterritorial statute, a boilerplate allegation that "major operational decisions" were made or approved at the U.S. headquarters would require the court to embark on the often-complex "focus" inquiry to determine whether or not the claim must be dismissed as extraterritorial.

The Court should hold that boilerplate allegations of headquarters oversight not tied to the conduct giving rise to the plaintiff's claims, like the general allegations here, are not sufficient to support an inference of "relevant conduct" within the United States for purposes of the extraterritoriality inquiry. Therefore, "'all the relevant conduct'" here "'took place outside the United States,'" and Plaintiffs' claims must be dismissed as extraterritorial. *RJR Nabisco*, 136 S. Ct. at 2101 (quoting *Kiobel*, 569 U.S. at 124).

B. The Very Limited Allegations Of U.S. Conduct Fall Outside The ATS's Focus.

Even if the complaint could be interpreted to allege some domestic conduct relevant to Plaintiffs' claims, the claims are impermissibly extraterritorial because the conduct relevant to the ATS's "focus" occurred outside the United States.

The Court has recognized that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever

some domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. Therefore, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101.

The "focus" of an ATS claim is the principal violation of international law that directly injures the plaintiffs. Here, that is the forced-labor conditions that Plaintiffs allege injured them in Côte d'Ivoire. Because that conduct and resulting injury occurred outside the United States, Plaintiffs' claims are extraterritorial.

Even if, contrary to our submission, the "focus" of Plaintiffs' claims is the alleged aiding-and-abetting activity, the claims are extraterritorial because virtually of the relevant conduct, and Plaintiffs' injury, occurred in Côte d'Ivoire.

1. The ATS's "focus" is the principal violation of international law that injures the plaintiffs—and all of that conduct occurred in Côte d'Ivoire.

To determine a statute's "focus," the Court looks to "the objects of the statute's solicitude"—the persons whom "the statute seeks to 'protec[t]'"—and the conduct that "the statute seeks to 'regulate.'" *Morrison*, 561 U.S. at 267 (citations omitted).

In *Morrison*, for example, the Court held that Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), "seeks to protect" the parties to securities transactions, by "seek[ing] to regulate" those transactions. 561 U.S. at 267 (brackets omitted). The securities transactions themselves are therefore "the objects

of the statute's solicitude" and constitute its "focus." *Ibid.*

Here, the ATS's "focus" is the principal violation of the law of nations that directly injures the plaintiff.

First, the persons that the statute "seeks to 'protect,'" *Morrison*, 561 U.S. at 267 (citations omitted), are those injured by international-law violations—the ATS's purpose is to "provide a forum for adjudicating such incidents." *Kiobel*, 569 U.S. at 124; see also *id.* at 123 (Congress principally sought "to provide judicial relief to foreign officials injured in the United States" by international-law violations).

And what the ATS "seeks to 'regulate,'" *Morrison*, 561 U.S. at 267, are the principal international-law violations that inflict that injury. As this Court has explained, a "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" were "probably on the minds of the men who drafted the ATS"—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Jesner*, 138 S. Ct. at 1397; accord *Kiobel*, 569 U.S. at 126 (Alito, J., concurring) ("when the ATS was enacted, 'congressional concern' was 'focused' on the 'three principal offenses against the law of nations' that had been identified by Blackstone") (citations, brackets, and some internal quotation marks omitted).

The statute's "focus" therefore is the principal international-law violation that directly injures the

plaintiff. And a claim is extraterritorial when the conduct constituting the principal international-law violation occurs outside the United States.[11]

Indeed, "[t]he two cases in which the ATS was invoked shortly after its passage * * * concerned conduct within the territory of the United States" claimed to violate international law. *Kiobel*, 569 U.S. at 120. That is significant evidence that it is the location of the conduct and the resulting injury within the United States that renders application of the statute permissible.

Aiding-and-abetting activity cannot constitute the statute's "focus," because a plaintiff cannot be harmed by aiding and abetting alone. Aiding-and-abetting conduct serves only to assist or encourage the principal violator in accomplishing the principal violation—it is "substantial assistance or encouragement" to the principal wrongdoer. Restatement (Second) of Torts § 876(b) (1979). That conduct standing alone does not inflict harm or constitute a legal wrong; the principal violation is what injures the plaintiff. Here, for example, the conduct alleged to constitute aiding and abetting—buying cocoa and supporting farmers—could

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[11] Reflecting this understanding, then-Judge Kavanaugh explained in *Exxon* that because the ATS "does not extend to conduct that occurred in foreign lands," it did not permit imposing aiding-and-abetting liability on Exxon where the underlying conduct occurred in Indonesia. 654 F.3d at 74 (Kavanaugh, J., dissenting in part). This was so even though Exxon was alleged to have aided and abetted the principal violations in part through "decisions made in the United States." *Id.* at 16 (majority opinion). The principal violations of international law (a variety of human-rights abuses allegedly committed by members of the Indonesian military, see *id.* at 15) occurred abroad, and that was enough for the presumption against extraterritoriality to foreclose liability.

not have caused Plaintiffs' alleged injuries in the absence of the farmers' principal violations.

Put differently, just as Section 10(b) of the Securities Exchange Act "does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of [a] security,'" *Morrison*, 561 U.S. at 266 (citation omitted), the ATS does not provide a remedy for conduct such as providing "spending money." If the ATS provides such a remedy at all, it does so only because those otherwise-lawful acts are connected to a principal violation of a specific, universal human-rights norm. Thus, just as the "purchase-and-sale transactions" (not the deceptive statements) were the focus in *Morrison*, the principal violations of international law (not any otherwise unobjectionable aiding-and-abetting conduct) are the "focus" in an ATS case.

The fact that the alleged aiding-and-abetting conduct facilitated the principal violation does not change the analysis. In *Morrison*, the Court held the "focus" was the securities transactions, even though the existence of a transaction is just one of the elements of a Section 10(b) plaintiff's claim and other conduct, such as the making of a material false statement, is an essential element of the plaintiff's claim.

So too here, the focus is the principal international-law violation that directly injures the plaintiff, even though proof of that violation is just one element of an aiding-and-abetting claim.

Second, the ATS's text provides additional support for this conclusion.

The statute grants jurisdiction with respect to a civil action for "a tort only" in violation of the law of nations or a treaty. 28 U.S.C. § 1350.

The principal violation of international law plainly qualifies as such a "tort"—like a common-law tort it is the breach of a legal norm that inflicts injury on the plaintiff. Holding that the ATS's "focus" is the place of the principal international-law violation is therefore consistent with the statute's description of the claim as a "tort." See generally *Sosa*, 542 U.S. at 705-07 (collecting authorities and discussing traditional rule in "tort cases" of "*lex loci delicti*: courts generally applied the law of the place where the injury occurred").

Aiding and abetting, by contrast, is not a "tort." It imposes liability on a third party for harm inflicted by tortious conduct engaged in by another. As the Court has explained, "[a]iding and abetting is 'a method by which courts create secondary liability' in persons other than the violator" of a legal prohibition. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 648 n.24 (1988)).

The Restatement similarly states that "one is subject to liability" "[f]or harm resulting to a third person *from the tortious conduct of another*," if he knowingly assists or encourages the tortfeasor. Restatement (Second) of Torts § 876(b) (emphasis added); see also, *e.g.*, *Hefferman* v. *Bass*, 467 F.3d 596, 601 (7th Cir. 2006) (collecting cases; aiding and abetting is not "an independent tort" but "a theory for holding the person who aids and abets liable for the tort itself"). Professor Dobbs describes aiding-and-abetting liability as a form of "vicarious liability"—"liability for the tort of another person"—through which the aider and abettor becomes "jointly and severally liable * * * along with the person who actually carries out the tortious

acts." Dan B. Dobbs *et al.*, Dobbs' Law of Torts §§ 425, 435 (2d ed.).

Because aiding and abetting is not a tort, but rather a form of vicarious liability for injury resulting from a tort committed by another, the "tort" on which the ATS is textually focused must be the injury-causing principal violation of the law of nations—and not on ancillary conduct alleged to permit secondary liability. The primary tortious conduct injuring the plaintiff is the "object[] of the [ATS's] solicitude." *Morrison*, 561 U.S. at 267.

Third, the presumption against extraterritorial application of U.S. law is "a canon of construction, or a presumption about a statute's meaning." *Morrison*, 561 U.S. at 255. The presumption means that, in the absence of a contrary indication of congressional intent, courts should read territorially restrictive words into the statute.

So, for example, the effect of applying the presumption in *Morrison* was to construe Section 10(b) to mean: "It shall be unlawful * * * [t]o use or employ, in connection with the purchase or sale of any security [*within the territorial jurisdiction of the United States*] * * * any manipulative or deceptive device or contrivance * * *." See 561 U.S. at 255, 262.

Applying the same canon of construction to the ATS yields the following: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed [*within the territorial jurisdiction of the United States* and] in violation of the law of nations or a treaty of the United States." See 28 U.S.C. § 1350. Just as the question in *Morrison*

was where the "purchase or sale" took place, the question in this ATS case is where the "tort" at issue was "committed."

Because the "tort" is the principal international-law violation that injures the plaintiff, the statute can only be read to require that the conduct constituting that violation to occur within the United States.

* * *

Here, the principal international-law violations that injured Plaintiffs are the forced labor and other abuses allegedly engaged in by Ivorian farmers in Côte d'Ivoire. Thus, all of "the conduct relevant to the [ATS's] focus occurred in a foreign country," and "the case involves an impermissible extraterritorial application" of the ATS. *RJR Nabisco*, 136 S. Ct. at 2101. And this is true "regardless of any other conduct"—including any ancillary aiding-and-abetting conduct of whatever nature—"that occurred in U.S. territory." *Ibid.*

2. Even if aiding and abetting were the relevant "focus," Plaintiffs' claims are extraterritorial.

Even if aiding and abetting could qualify a "tort" falling within the ATS's statutory "focus" (as opposed to a means of imposing secondary liability for a tort committed by someone else), Plaintiffs' claims still must be dismissed as extraterritorial.

This Court has not addressed how this step of the extraterritoriality analysis applies when some of the conduct relevant to the statute's focus occurred outside the United States and some relevant conduct occurred within the United States.

But the lower courts, other than the Ninth Circuit, have rejected the contention that *any* relevant conduct within the United States is sufficient to render an ATS claim domestic rather than extraterritorial. Rather, they have pointed to the *Kiobel* Court's statement that a claim must "touch and concern the territory of the United States" with "sufficient force to displace the presumption" against extraterritoriality (569 U.S. at 124-25)—and have resolved extraterritoriality questions by assessing the relative strength of the connection to the United States.

In the Second Circuit, the domestic conduct must at minimum be sufficient by itself to establish the elements of aiding-and-abetting liability. *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 186 (2d Cir. 2014); see also *Licci by Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217-18 (2d Cir. 2016).

Other courts apply a balancing test, comparing the relative weight of the U.S. conduct to the total conduct relevant to the aiding-and-abetting claim. *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir. 2017) (plaintiffs' allegations of "domestic payments" were insufficient to overcome extraterritoriality bar where underlying tortious conduct all occurred abroad); *Doe* v. *Drummond Co.*, 782 F.3d 576, 598 (11th Cir. 2015) (holding that "the domestic location of the [defendant's] decision-making alleged in general terms * * * does not outweigh the extraterritorial location of the rest of Plaintiffs' claims."); *Baloco* v. *Drummond Co.*, 767 F.3d 1229, 1236 (11th Cir. 2014) (holding that domestic decision-making, including decision to provide funding to paramilitary groups in a foreign country, did not displace presumption against extraterritoriality); *Cardona* v. *Chiquita*

Brands Int'l, Inc., 760 F.3d 1185, 1189 (11th Cir. 2014) (same).

Whatever test applies, when the principal international-law violation that directly injures the plaintiff occurs outside the United States, and therefore the plaintiff's injury occurs outside the United States, and the conduct within the United States is minor in comparison with the relevant conduct outside the country—then the claim simply cannot be characterized as domestic rather than extraterritorial. And that is particularly true when the only alleged U.S. conduct is general headquarters oversight, because holding a claim not extraterritorial based on that conduct is equivalent to resting that determination on the "mere corporate presence" that the Court rejected in *Kiobel*. See 569 U.S. at 125.

Here, the conduct relevant to Plaintiffs' claims occurred in Africa. The principal violation is an essential element of an aiding-and-abetting claim, and all of the conduct relevant to the forced labor took place in Côte d'Ivoire—and it is that conduct that directly injured Plaintiffs. That is where Plaintiffs were allegedly trafficked and made to endure forced labor and other atrocities. J.A. 304, 306-07, 332-36 (¶¶ 1, 6-11, 70-75).

Côte d'Ivoire is also where all of Cargill's alleged "substantial assistance" was provided: All of the financial support to Ivorian farmers, all of the "training and capacity building," and all of the provision of farming supplies occurred there—not in the United States. J.A. 316, 320, 338-43 (¶¶ 37, 51, 78-99).

The only relevant *domestic* conduct at issue is the alleged headquarters' oversight or, in the Ninth Circuit panel's view, the approval of "financing decisions"

relating to payments of "spending money" that ultimately were allegedly delivered to Ivorian farmers in Africa. Pet. App. 49a-50a.

That minimal U.S. conduct is far outweighed by the alleged principal conduct and even the alleged direct aiding-and-abetting conduct (the actual provision of funds and other assistance to farmers)—all of which took place in Africa. On these allegations, the U.S. conduct relevant to Plaintiffs' aiding-and-abetting claims simply do not carry "sufficient force to displace the presumption" against extraterritoriality. *Kiobel*, 569 U.S. at 125.

C. Permitting ATS Claims To Proceed Based Solely On Corporate Headquarters Oversight Would Greatly Increase Clashes With Foreign Nations And Interference With U.S. Foreign Policy.

The Court has repeatedly cautioned against construing the ATS cause of action in a manner that heightens the risk of clashes with other nations or interferes with U.S. foreign policy. *Jesner*, 138 S. Ct. at 1403; *id.* at 1408 (Alito, J., concurring in part and concurring in judgment); *Kiobel*, 569 U.S. at 115; *Sosa*, 542 U.S. at 727-28. But that would be the inevitable result of permitting ATS aiding-and-abetting claims to proceed based on nothing more than an inference from the mere presence of the corporation's headquarters in the United States.

Such claims—like the ones here—would inevitably "provide a cause of action for conduct occurring in the territory of another sovereign." *Kiobel*, 569 U.S. at 124. That, in turn, will require U.S. courts to pass judgment on events taking place on foreign soil, producing the very "unwarranted judicial interference in

the conduct of foreign policy" that this Court has held impermissible. *Id.* at 116; see also *Exxon*, 654 F.3d at 78 (Kavanaugh, J., dissenting) (objecting to "extension of the ATS to conduct occurring in foreign lands").

Adjudication of such claims in U.S. courts fosters the perception that "the U.S. Government does not recognize the legitimacy of [other countries'] judicial institutions," which is likely to be harmful to diplomatic relations. Letter from Legal Adviser William H. Taft in *Mujica* v. *Occidental Petroleum Co.,* No. 2:03-cv-2860 (C.D. Cal. Dec. 3, 2004), https://2009-2017.state.gov/s/l/2004/78089.htm.

These problems would be exacerbated by the ready allowance of aiding-and-abetting claims, which can turn corporations into "surrogate defendants to challenge the conduct of foreign governments." *Jesner*, 138 S. Ct. at 1404 (plurality). Plaintiffs often assert that a company facilitated wrongdoing by a foreign government or, as here, misconduct by foreign officials. J.A. 319-20 (¶ 50) (alleging that "several of the cocoa farms in Côte d'Ivoire from which Defendants source [cocoa] are owned * * * or are otherwise protected by government officials"); *id.* at 341-42 (¶ 91) (alleging that "Defendants" acted "on behalf of those acting under color of official authority" or "with the implicit sanction of" the Ivorian government). Because a U.S. court faced with such a claim must determine whether the principal alleged wrongdoer violated international law in order to impose secondary aiding-and-abetting liability, the actions of the foreign government would literally be on trial in the U.S. court.

Indeed, given how readily the Ninth Circuit inferred relevant domestic conduct from allegations of generic corporate oversight of foreign operations, its

approach could open the U.S. courts to private litigants' attacks on foreign government conduct based merely on a corporation's affiliates having done business with that government. See, *e.g.*, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (ATS suit against energy company that allegedly aided and abetted Sudanese government officials' wrongdoing in the course of developing Sudanese oil concessions); *Corrie* v. *Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (ATS suit against manufacturer of bulldozers used by Israeli government to destroy Palestinian homes).

Moreover, by entertaining this federal class-action lawsuit challenging Ivorian child-labor practices, the United States would likely be seen as doubting the bona fides or the efficacy of Côte d'Ivoire's commitment to addressing the issue. Those efforts are serious and ongoing.[12] Injecting U.S. litigation into the mix would undermine and disrupt another sovereign nation's efforts to address a problem in its own territory.

These consequences will be exacerbated by the reality that private litigants are not constrained by "the check imposed by prosecutorial discretion," and courts

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[12] See Nellie Payton, Cocoa-growing Ivory Coast draws up new plan to stop child labor, Reuters (June 26, 2019), https://tinyurl.com/y4nl7f82 (Côte d'Ivoire recently announced a new and "wide-reaching" strategy "to tackle household poverty as the root cause of child labor"); Nellie Payton, Ivory Coast pledges trafficking crackdown as 137 child victims are rescued, Reuters (Jan. 13, 2020), https://tinyurl.com/yyl2njnn (Côte d'Ivoire recently rescued nearly 140 trafficked children, pledging to "multiply this kind of operation" in order to "send a strong signal" to traffickers); Leanne de Bassompierre, Ivory Coast Rescues 137 Children in Raid on Traffickers, Bloomberg (Jan. 13, 2020), https://tinyurl.com/y3xb3hht.

lack the expertise to determine "the potential implications for the foreign relations of the United States" of ATS actions. *Sosa*, 542 U.S. at 727.

Such an approach would also lead to international friction that would likely impair the political branches' ability to address human-rights abuses abroad. For example, by threatening U.S. companies with draconian monetary liability in the form of civil damages, the Ninth Circuit's rule would convert the ATS into "a vehicle for private parties to impose embargos or international sanctions through civil actions in United States Courts." *Presbyterian Church of Sudan*, 582 F.3d at 264.

General allegations of U.S. oversight can be made with respect to virtually every large company that engages in cross-border commerce, and many such companies rely on trade with developing nations as sources of raw materials, agricultural products, or manufactured goods.[13] The only way for companies to avoid a private damages action would be to stop doing business in the developing countries in which these issues often can be present.

These private embargos would interfere with the political branches' ability to craft deliberate solutions to difficult international problems. For example, the Executive Branch and members of Congress have sought to address the issue of forced labor in the Ivo-

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[13] See World Trade Organization, *World Trade Statistical Review 2019* 5, 12-15, 57-65 (2019), https://tinyurl.com/y2ja42p7 (describing developing economies' "increasingly important role in world trade").

rian cocoa industry through the Harkin-Engel Protocol, which also involves the cocoa industry and the governments of Côte d'Ivoire and Ghana.[14]

More generally, the threat of ATS litigation would "discourage[] American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations," thus deterring "the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (plurality).

In sum, the concerns about increased friction with foreign nations and interference with U.S. foreign policy that led the Court to reject expansive interpretations of the ATS in *Sosa*, *Kiobel*, and *Jesner* require a holding here that Plaintiffs' claims are extraterritorial.

II. Domestic Corporations Are Not Subject To ATS Liability.

Jesner held that foreign corporations are not subject to ATS liability, reserving the question of ATS liability for domestic corporations. But the reasoning set forth in *Jesner*'s majority, plurality, and concurring opinions compels the conclusion that the ATS

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[14] See Br. for National Confectioners Ass'n et al. as Amici Curiae Supporting Petitioners at 11-14, *Nestlé USA, Inc.* v. *Doe*, Nos. 19-416, -453 (U.S. Oct. 28, 2019) (describing development and voluntary international implementation of the Harkin-Engel Protocol for combating forced child labor in West African cocoa production). As *amici* note, this effort involved "extensive oversight and support" from the Department of Labor. *Id.* at 12-13.

does not authorize claims against domestic corporations such as Petitioners.

A. There Is No Specific, Universal, And Obligatory International-Law Norm Imposing Liability On Corporations For Employees' Acts That Violate International Human-Rights Norms.

The *Jesner* plurality began its analysis by considering "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory.'" 138 S. Ct. at 1399 (quoting *Sosa*, 542 U.S. at 732). The plurality did not decide that there is no such international law norm of corporate liability, but a review of the relevant materials leaves no doubt that there is no specific, universal, and obligatory norm recognizing corporate liability.

To begin with, the *Jesner* plurality concluded that there is a "strong argument" that there is no "specific, universal, and obligatory norm of liability for corporations." 138 S. Ct. at 1400. As the plurality explained, the international community has made a "conscious decision to limit the authority of * * * international tribunals to natural persons." *Id.* at 1401.

The Nuremberg Tribunal "had jurisdiction over natural persons only"; while the Tribunal prosecuted crimes arising from a slave-labor camp operated by employees of the German corporation IG Farben, the corporation itself "was not held liable" because "corporations act through individuals." *Jesner*, 138 S. Ct. at 1400 (plurality) (discussing 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; internal quotation marks omitted). As the Tribunal explained, "[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 1946*, 6 F.R.D. 69, 110 (1946), quoted in *Jesner*, 138 S. Ct. at 1402 (plurality).

Similarly, "the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach." *Jesner*, 138 S. Ct. at 1400 (plurality). The international tribunals arising out of events in Rwanda and the former Yugoslavia had jurisdiction "limited to 'natural persons.'" *Id.* at 1400-01 (citing Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 25, 1993); Statute of the International Tribunal for Rwanda, Art. 5, S.C. Res. 955, Art. 5 (Nov. 8, 1994)). And the 1998 Rome Statute of the International Criminal Court likewise limits that court's jurisdiction to "natural persons." *Id.* at 1401 (citing Rome Statute of the International Criminal Court, Art. 25(1), July 17, 1998, 2187 U.N.T.S. 90). Indeed, "[t]he drafters of the Rome Statute considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations." *Ibid.*

The *Jesner* plurality rejected the plaintiffs' few counter-examples, holding that "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." 138 S. Ct. at 1401.

Other analyses of international law have reached the same conclusion. *Exxon*, 654 F.3d at 83 ("customary international law *does not* extend liability to corporations") (Kavanaugh, J., dissenting); *id.* at 83-85 (collecting authorities); *Kiobel*, 621 F.3d at 120, 132-

37 (Cabranes, J.) (concluding that jurisdiction of international tribunals is consistently limited to natural persons); *id.* at 186 (Leval, J., concurring in judgment) (conceding that "international law of its own force, imposes no liabilities on corporations or other private juridical entities" and premising corporate liability on other grounds); see also Pet. App. 13a-14a (*en banc* dissent) (rejecting corporate liability because "international law, of its own force, imposes no liabilities on corporations or other private juridical entities").

Indeed, Justice Alito observed in *Jesner* that "[s]ome foreign states appear to interpret international law as *foreclosing* civil corporate liability for violations of the law of nations." 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in judgment) (emphasis added).

There thus is no "'specific, universal, and obligatory'" norm of imposing corporate liability in international law. *Jesner*, 138 S. Ct. at 1399 (plurality) (quoting *Sosa*, 542 U.S. at 732). The judgment of the international community is that such violations should be pursued against the individual men and women who actually committed them: "only by punishing individuals * * * can the provisions of international law be enforced." *The Nurnberg Trial 1946*, 6 F.R.D. at 110.

Under *Sosa*, the absence of a specific, universal, and obligatory norm of corporate liability by itself requires dismissal of the complaint.

B. Separation-Of-Powers Principles Bar Judicially Created Corporate Liability.

The *Jesner* majority held that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS," because the "political

branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy" considerations that must inform whether to recognize new forms of ATS liability. 138 S. Ct. at 1403. That factor applies just as strongly to preclude judicially-created liability for domestic corporations.

The *Jesner* Court began its analysis by emphasizing that this 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.'" 138 S. Ct. at 1402 (quoting *Sosa*, 542 U.S. at 727). "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.'" *Ibid.* (quoting *Ziglar* v. *Abbasi*, 127 S. Ct. 1843, 1857 (2017)).

Jesner held that "[t]his 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." 138 S. Ct. at 1402-03. It pointed out that in *Malesko* the Court refused to subject corporations to liability under the implied cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Jesner*, 138 S. Ct. at 1403. "Whether corporate defendants should be subject to suit was 'a question for Congress, not us, to decide.'" *Ibid.* (quoting *Malesko*, 534 U.S. at 72).

The Court then held that concerns about intruding on Congress's authority are magnified in the ATS context. Because of "the foreign-policy and separation-of-powers concerns inherent in ATS litigation," the

"federal courts must exercise 'great caution' before recognizing new forms of liability under the ATS." *Jesner*, 138 S. Ct. at 1403. "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Ibid.*

Judicially-created claims against domestic corporations implicate these same considerations and therefore are subject to the same "'high bar.'" *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 727).

To begin with, allowing *any* corporate liability under would be "a 'marked extension'" of the ATS, and "[n]either the language of the ATS nor the precedents interpreting it support an exception to these general principles [against judicially-created causes of action] in this context." *Jesner*, 138 S. Ct. at 1403 (quoting *Malesko,* 534 U.S. at 74).

ATS claims may be brought only by non-U.S. plaintiffs, and they virtually always involve claims alleging principal violations by foreign parties—like the claims here—with the domestic corporation sued as an aider and abettor. Because these claims often use "corporations as surrogate defendants to challenge the conduct of foreign governments," *Jesner*, 138 S. Ct. at 1404 (plurality), they create diplomatic friction regardless of whether the surrogate defendant is foreign or domestic. See pages 36-37, *supra.*

Moreover, many foreign corporations (Nestlé, S.A., for example) have subsidiaries in the United States. Allowing suits against domestic corporations would presumably mean allowing suits against such domestic subsidiaries—which would carry many of the same foreign-policy concerns as a suit against the foreign parent.

Respect for separation-of-powers principles therefore weighs strongly against creating liability for domestic corporations.

That is particularly true because, as the separate concurring opinions in *Jesner* recognized, "[c]ourts should not be in the business of creating new causes of action under the Alien Tort Statute." 138 S. Ct. at 1408 (Thomas, J., concurring); see also *id*. at 1412 (Gorsuch, J., concurring in part and concurring in judgment) ("I would end ATS exceptionalism. We should refuse invitations to create new forms of legal liability"); *id* at 1408 (Alito, J., concurring in part and concurring in judgment).

Indeed, recognizing domestic corporate liability would not end the process of cause-of-action construction, but rather would force the Court to engage more deeply to address a variety of additional questions: Under what circumstances should a corporation be held liable for acts of its employees? What about the acts of non-employees, such as independent contractors? And liability for the acts of subsidiaries? Will the U.S. subsidiaries of foreign corporations be subject to liability?

Congress is fully capable of creating a cause of action if it deems one necessary—and of addressing these questions regarding the metes and bounds of any corporate liability it decides to create. The Court should leave these questions for resolution by Congress.

C. Guidance From Analogous Statutes Enacted By Congress Weighs Heavily Against Corporate Liability.

The *Jesner* plurality looked to "analogous statutes for guidance on the appropriate boundaries of judge-

made causes of action," pointing out that "[d]oing 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.'" 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 726).

The plurality found it "all but dispositive" that Congress determined not to create corporate liability under the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 (note). 138 S. Ct. at 1404. That statute "reflects Congress' considered judgment of the proper structure for a right of action under the ATS." *Id.* at 1403. "It would be inconsistent with th[e] balance [reflected in the TVPA] to create a remedy broader than the one created by Congress." *Id.* at 1404. "Absent a compelling justification, courts should not deviate from that model." *Id.* at 1403.

Indeed, allowing domestic corporate liability under the ATS "produces the rather bizarre outcome that *aliens* may sue corporations in U.S. courts for aiding and abetting [international-law violations], but *U.S. citizens* may *not* sue U.S. corporations [under the TVPA] for [the same violations]." *Exxon*, 654 F.3d at 88 (Kavanaugh, J., dissenting). "[I]t is implausible to think that Congress intended such a discrepancy." *Ibid.*; accord Pet. App. 17a (*en banc* dissent).

Where Congress has created corporate liability, moreover, as in the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, it has prescribed "detailed regulatory structures" that "reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism." *Jesner*, 138 S. Ct. at 1405 (plurality). See also 18 U.S.C. § 1595 (creating a carefully-limited private

cause of action under the Trafficking Victims Protection Reauthorization Act).

Courts lack the expertise to make judgments about liability standards, particularly in a context in which foreign-policy expertise is needed. Courts are limited to addressing the issues presented in particular cases. So the development of liability standards necessarily proceeds slowly, and on a piecemeal basis that often makes it difficult to assess the consequences produced by the interaction of various liability elements prescribed separately in different judicial decisions.

Moreover, it is highly relevant that Congress—in the statutes that the *Jesner* plurality deemed relevant—did not distinguish between domestic and foreign corporations. All corporations, domestic and foreign, are excluded from TVPA liability; all corporations, domestic as well as foreign, are subject to ATA liability.

That is not surprising. Differentiating between U.S. and foreign corporations would uniquely discourage U.S. companies from investing in developing economies—giving foreign corporations an advantage in the global economy.

Such a rule would also discourage investment in the United States. Foreign companies might seek to restructure or to move operations out of this country in order to avoid the burden and risk of ATS litigation.

Congress's similar treatment of corporations thus weighs heavily against a judicially-created rule imposing unique burdens on domestic entities.

There are, in short, a multitude of "'sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy'" against domestic corporations under the ATS. *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar*, 137 S. Ct. at 1858). This Court should respect Congress's role by declining to create a remedy that Congress has never enacted.

D. Domestic Corporate Liability Is Not Necessary To Serve The ATS's Goals.

The *Jesner* plurality concluded that it "has not been shown that corporate liability under the ATS is essential to serve the goals of the statute." 138 S. Ct. at 1405. That determination applies equally to domestic corporate liability.

To begin with, ATS liability "will seldom be the only way * * * to hold the perpetrators liable" for acts violating universal human rights norms. *Jesner*, 138 S. Ct. at 1405 (plurality). Federal law imposes criminal liability for genocide (18 U.S.C. § 1091), forced labor and trafficking in persons (18 U.S.C. §§ 1581-1594 & 1596), terrorism (18 U.S.C. §§ 2331-2339D), and torture (18 U.S.C. § 2340A). See also 19 U.S.C. § 1307 (authorizing Secretary of the Treasury to issue regulations prohibiting the entry into the United States of goods produced using forced labor).

Some of these statutes, such as the TVPA, provide for carefully delineated private civil actions. See, *e.g.*, 18 U.S.C. §§ 1595 & 2333.

Judicial recognition of corporate liability may work counter to the ATS's other goals. For example, "[i]f the Court were to hold that [domestic] corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetra-

tors and concentrate instead on multinational corporate entities." *Jesner*, 138 S. Ct. at 1405 (plurality). Plaintiffs seek to do just that in this case.

Moreover, allowing the subsidiaries of multinational corporations to be sued under the ATS would imply that other nations could do the converse—haling the foreign subsidiaries of U.S. multinationals into their courts to face "massive liability for the alleged conduct of their employees and subsidiaries around the world." *Jesner*, 138 S. Ct. at 1405 (plurality) (quoting Br. for the United States as *Amicus Curiae* in Support of Petitioners at 20, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389). This would "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." *Id.* at 1406. The result would be to "deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Ibid.*

* * *

In sum, the factors invoked in *Jesner* apply with equal force to judicial recognition of domestic corporate liability. The Court should therefore refuse to recognize such liability, and leave the issue to be addressed by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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