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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER NESTLÉ USA, INC.

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QUESTIONS PRESENTED

1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extra-territoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity.

2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

PARTIES TO THE PROCEEDING

Nestlé USA, Inc., petitioner on review in No. 19-416 and respondent in No. 19-453, was a defendant-appellee below.

Cargill, Inc., respondent on review in No. 19-416 and petitioner in No. 19-453, was a defendant-appellee 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. was a defendant in the district court, but the claims against it were voluntarily dismissed.

John Does I-VI, each individually and on behalf of proposed class members, respondents on review, were the plaintiffs-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Congress enacted the Alien Tort Statute (ATS) as part of the first Judiciary Act in 1789 to grant federal courts jurisdiction over suits brought by aliens for torts "committed in violation of the law of nations." 28 U.S.C. § 1350. It did so in light of incidents under the Articles of Confederation in which foreign minis-

ters' persons or property had been violated and the national government was powerless to provide redress, a deficiency that exposed the fledgling Nation to the threat of war. Thus conceived, the ATS provided a federal forum to vindicate only a handful of limited private rights recognized by the contemporary law of nations. And in the following two centuries, it was invoked only sparingly to address core law-of-nations violations such as piracy in U.S. territorial waters.

Over the past few decades, however, plaintiffs have filed dramatically more-expansive suits to enforce far-more-recent and far-more-indefinite international-law liability theories. These cases often drag on for decades and draw vociferous objections by foreign governments, bringing the Judiciary into conflict with Congress and the Executive's foreign policies. To prevent that, this Court has told lower courts to be particularly cautious in crafting new causes of action under the ATS, to apply the presumption against extraterritorial application to claims brought under it, and not to entertain ATS suits against foreign corporations. Yet some lower courts persist in allowing suits with scant connection to the U.S. against corporations that ask the Judiciary to evaluate foreigners' conduct abroad based on novel theories of international law.

This case is one example. Plaintiffs here allege that unidentified foreigners enslaved them as children and forced them to work on cocoa farms in Côte d'Ivoire owned or protected by Ivorian government officials. Yet Plaintiffs are not suing the malefactors who trafficked or enslaved them—they are suing U.S. corporations, such as Petitioner Nestlé USA,

Inc., which they do not allege owned the farms they worked on or did business with their captors.

Nestlé USA has tremendous sympathy for Plaintiffs' suffering and unequivocally condemns child slavery. In all its forms. Everywhere. Indeed, Nestlé USA has taken major steps to combat child slavery in Côte d'Ivoire. But this case is not about child slavery, which is reprehensible and always wrong. It is about the legal standards that govern any accusation of wrongdoing. Over 15 years and three complaints, Plaintiffs have not alleged and cannot allege that Nestlé USA had any direct role in their injuries or any specific intent to support child slavery. All Plaintiffs have alleged is that Nestlé USA purchased cocoa from Côte d'Ivoire, that "Defendants" collectively provided money and some services to farmers in Côte d'Ivoire, and that Nestlé USA made high-level corporate decisions in the United States about cocoa purchases. That is not nearly enough to fit this case within the 1789 Alien Tort Statute, which was never intended to be used in such a way.

This lawsuit should be dismissed for two separate reasons. *First*, in *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), this Court held that the presumption against extraterritoriality applies to ATS suits. Because the ATS's "focus" is where the tort injury occurred, domestic application of the ATS requires that the suit allege domestic injury. That alone forecloses Plaintiffs' suit against Nestlé USA, as their injuries all occurred abroad at the hands of others. But even if the ATS's focus is broader, *any* reasonable extraterritoriality analysis leads to the conclusion that the minimal domestic conduct Plain-

tiffs allege is insufficient to render their suit a domestic application of the ATS.

Second, in *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018), the Court held that foreign corporations were not amenable to ATS suits. *Jesner*'s reasoning compels the same conclusion for domestic corporations: There is no universally recognized norm of corporate liability, and creating a cause of action for domestic corporations raises the same separation-of-powers and foreign-policy concerns as it does for foreign corporations. Recognizing that will not end ATS liability entirely; it will merely require ATS plaintiffs to sue the individuals who harmed them.

The Court should hold that this case is impermissibly extraterritorial and that domestic corporations cannot be sued under the ATS. By setting bright-line rules that ATS suits must be based on domestic injuries and must be brought against the culpable individuals, this Court can rein in the excesses of modern ATS litigation and restore it to its limited original purpose. It should be for Congress—not the Judiciary—to decide whether to extend the ATS beyond those limits, a decision which touches on deeply complicated questions of economic regulation and foreign policy. *See Kiobel*, 569 U.S. at 123-124.

OPINIONS BELOW

The district court's order dismissing Plaintiffs' case for the first time (JA 61-238) is reported at 748 F. Supp. 2d 1057. The Ninth Circuit's first opinion vacating and remanding is reported at 738 F.3d 1048, its revised opinion (JA 239-279) is reported at 766 F.3d 1013, and its first order denying en banc review (JA 280-302) is reported at 788 F.3d 946.

The district court's order dismissing Plaintiffs' case for a second time (Pet. App. 63a-84a) is not reported but is available at 2017 WL 6059134. The Ninth Circuit's second opinion reversing and remanding (Pet. App. 47a-62a) is reported at 906 F.3d 1120, and its revised opinion (Pet. App. 1a-6a, 34a-46a) is reported at 929 F.3d 623. Its second order denying en banc review (Pet. App. 1a-33a) is also reported at 929 F.3d 623.

JURISDICTION

The Ninth Circuit entered judgment on October 23, 2018, and denied a timely petition for rehearing on July 5, 2019. Nestlé USA filed its petition for a writ of certiorari on September 25, 2019, and the Court granted the petition on July 2, 2020. The Court's jurisdiction rests on 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 only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT

A. Plaintiffs' Allegations

Plaintiffs are pseudonymous Malian citizens who allege that "locators" sold them as children to Ivorian cocoa farms, where overseers forced them to work and beat them. JA 332-336. Plaintiffs' suit, however, is not against the locators that sold them, the overseers that mistreated them, or the farmers they worked for. Instead, Plaintiffs are suing two U.S. companies—Nestlé USA and Cargill, Inc. Plaintiffs

allege that Defendants aided and abetted human-rights abuses by purchasing cocoa beans from Ivorian farms despite knowing of "widespread use of child labor" and by providing Ivorian farmers with advance payments and personal spending money to maintain their "loyalty as exclusive suppliers." JA 316, 318.

Plaintiffs do not allege that Nestlé USA owned or operated farms in West Africa. Nor have they alleged that Nestlé USA purchased cocoa from the farms where they were enslaved or from any farm where child labor was used. Nestlé USA appears in only three of the 101 paragraphs in Plaintiffs' operative complaint. The first introduces Nestlé USA as a defendant. JA 304. The second and third allege that Nestlé USA "is a wholly-owned subsidiary of Nestlé S.A.," and "is one of the largest purchasers, manufacturers, and retail sellers of cocoa products in North America." JA 310, 315. Plaintiffs also allege that Nestlé, S.A.—Nestlé USA's Swiss parent—"control[s] every aspect of [Nestlé USA's] operations, particularly with respect to the sourcing, purchasing, manufacturing, distribution, and/or retailing of cocoa." JA 313.

Plaintiffs' operative complaint names three Nestlé entities—Nestlé USA, Nestlé, S.A., and Nestlé Côte d'Ivoire, S.A., JA 309-310—but largely makes undifferentiated allegations against "Nestlé" without distinguishing among them. And those collective allegations are conclusory as to Nestlé's domestic conduct. Plaintiffs allege that major decisions regarding "Nestlé's U.S. market" were made in the United States, that Nestlé "regularly had employees from their Swiss and U.S. headquarters inspecting

their operations in Côte d'Ivoire," and that Nestlé's literature advocating the eradication of child slavery was "published in the U.S." JA 315, 316, 320-324.

Not only do Plaintiffs' allegations not distinguish among the three named Nestlé entities, they do not distinguish between "Nestlé" and other companies. Plaintiffs allege that "Defendants" as a whole purchase "ongoing, cheap suppl[ies] of cocoa" from Côte d'Ivoire through "exclusive supplier/buyer relationships" with farmers and farming cooperatives in the country. JA 315-316. Plaintiffs further allege that unspecified "Defendants control" conditions in Côte d'Ivoire by providing "ongoing financial support," as well as "farming supplies" and "training and capacity building." JA 316. And Plaintiffs allege that these tasks "require frequent and ongoing visits to the farms either by Defendants directly or via their contracted agents." *Id.*

Plaintiffs also take issue with the "U.S. chocolate industry" for supporting the "Harkin-Engel Protocol," which implemented a "private, voluntary mechanism to ensure child labor free chocolate." JA 330-331. Plaintiffs point to Defendants' support of the Protocol to suggest they know of child slavery's existence in West Africa. *See* JA 330.[1] But Plaintiffs have admit-

[1] Plaintiffs also fault Nestlé USA and Cargill for not supporting a 2001 proposed bill that, they allege, would have been more effective at combatting child labor. As the District Court explained, the passage of the bill in late 2001 could not have prevented Plaintiffs' injuries, which ended in 2001. Pet. App. 78a-79a n.11. Moreover, that bill would merely have given the FDA funds to attach a "'slave free' label" to chocolate products. *Id.* at 77a n.9. The FDA opined that the proposed

ted that they cannot allege that Nestlé USA "specifically intended the human rights violations at issue," JA 266 (Rawlinson, J., concurring in part and dissenting in part) (internal quotation marks omitted), or that it "wanted child slave labor to go on," JA 164 n.52 (internal quotation marks omitted).

B. Procedural Background

1. First Dismissal And Appeal

Plaintiffs filed their initial complaint in 2005 and a first amended complaint in 2009. The district court dismissed the first amended complaint, holding in a comprehensive opinion that Plaintiffs had not plausibly pleaded either the *mens rea* or *actus reus* for aiding-and-abetting liability. JA 162-164. The district court also held that international law precludes ATS claims against corporate defendants because "there is no well-defined international consensus regarding corporate liability for violating international human rights norms." JA 204.

The Ninth Circuit vacated and remanded. It held that corporations could be liable under the ATS, JA 248-251, and that Plaintiffs had sufficiently pleaded *mens rea*, JA 259. The panel declined to decide whether Plaintiffs had sufficiently pleaded *actus reus*. JA 260-261. It also declined to decide whether the suit was impermissibly extraterritorial under *Kiobel*, which this Court had handed down while the case was on appeal. The panel instead remanded with directions for Plaintiffs to amend

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labeling program was "unrealistic and impossible to attain." 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin).

with allegations about what conduct took place in the United States. JA 265-266.

The Ninth Circuit denied a petition for en banc rehearing over an eight-judge dissent (JA 280-302), and this Court denied certiorari. *Nestle U.S.A., Inc.* v. *Doe I*, 136 S. Ct. 798 (2016) (mem.).

2. Second Dismissal And Appeal

Plaintiffs filed a second amended complaint in July 2016, which altered some of the named parties but continued to make group allegations against "Nestlé" as a whole and added no substantive allegations about Nestlé USA's domestic conduct. *See* JA 303-344. The district court again dismissed the complaint. Pet. App. 63a-84a. It held that Plaintiffs' alleged domestic activities were precisely the sort of "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." *Id.* at 72a-73a. The "focus" of Plaintiffs' claims was therefore outside the United States and impermissibly extraterritorial. *Id.* at 70a-78a.

The Ninth Circuit again reversed. The panel held that domestic corporations can be ATS defendants, concluding—without analysis—that it continued to be bound by prior circuit precedent despite the intervening *Jesner* decision because "*Jesner* did not eliminate *all* corporate liability under the ATS." Pet. App. 39a (emphasis added).

The panel then held that the ATS's "focus" encompassed any conduct that might constitute "aiding and abetting." *Id.* at 42a. And in applying that holding, the panel concluded that Plaintiffs' claims were not extraterritorial because Plaintiffs had alleged that

"[D]efendants" had provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier" and had received reports from employees sent to Côte d'Ivoire. *Id.* at 43a (internal quotation marks omitted). Although Plaintiffs' complaint did not allege it, the panel apparently inferred that the personal-spending-money payments were directed from the United States. *Id.* at 43a-44a.

The full Ninth Circuit again denied rehearing en banc, again over an eight-judge dissent. *Id.* at 1a-33a.[2] The dissenters explained that the case should have been dismissed on two independent grounds. First, "international law, of its own force, imposes no liabilities on corporations." *Id.* at 18a (internal quotation marks omitted). They explained that "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.* Second, Plaintiffs' claims are impermissibly extraterritorial. Plaintiffs alleged no more than domestic corporate presence and decision-making, meaning that "all the relevant conduct occurred abroad." *Id.* at 24a (internal quotation marks omitted).

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[2] On rehearing, the panel amended its opinion to address Article III standing. *Id.* at 5a-6a, 45a-46a. The panel acknowledged that Plaintiffs' allegations against Nestlé were not "clear," in part because of "plaintiffs' reliance on collective allegations against all or at least multiple defendants." *Id.* at 6a, 46a. The panel nonetheless remanded to give Plaintiffs yet another chance to amend. *Id.*

This Court granted Nestlé USA's petition for certiorari and consolidated it with Cargill's petition from the same Ninth Circuit judgment.

SUMMARY OF ARGUMENT

I. Plaintiffs' threadbare allegations do not add up to a "domestic application" of the ATS. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

The ATS's "focus" is the location of the law-of-nations tort injury. All the cases that motivated the ATS or in which it was applied shortly after its enactment involved torts committed within the United States' jurisdiction, and the law-of-nations offenses recognized in 1789 to bind individuals evince a focus on domestic injuries. General transsubstantive principles of extraterritoriality also support a domestic-injury requirement. And to the extent there is any doubt about how to define the "focus" of an ATS claim, this Court should use its common-lawmaking discretion to impose a bright-line domestic-injury rule. Such a rule is particularly important in the aiding-and-abetting context, which focuses on where the principal violation occurred. Because Plaintiffs have never alleged a domestic injury, their claims are impermissibly extraterritorial.

Even if this Court adopts a different "focus" rule, Plaintiffs' claims do not allege sufficient domestic conduct. The only allegations about Nestlé USA are that it does business in the United States and therefore makes some corporate decisions here. Plaintiffs' "domestic" allegations amount to nothing more than general corporate supervisory activity and knowledge about *other parties'* conduct abroad. That would be true of nearly every large company that

purchases goods sourced from overseas; such allegations do not support ATS liability.

Finally, the reasons for applying the presumption against extraterritoriality are at their zenith here. Plaintiffs' suit invites the Judiciary to sit in judgment of foreign governments' conduct and to interfere with the political branches' policy judgments. This Court should accordingly hold that Plaintiffs have not displaced the presumption against extraterritoriality.

II. This Court cannot and should not craft a cause of action for domestic corporate liability under the ATS.

First, there is at best "weak support" for an international norm of corporate liability, which hardly satisfies the "high bar" imposed by this Court's cases. *Jesner*, 138 S. Ct. at 1400-01 (plurality opinion). Because there is no "specific, universal, and obligatory" international-law norm of corporate liability, there should be no ATS cause of action against domestic corporations. *Id.* at 1399 (plurality opinion) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

Second, even assuming the Court *can* recognize a new ATS cause of action, it should not do so here. Every cautionary factor the Court identified as counseling against recognizing foreign corporate ATS liability applies to domestic corporations, too. As in *Jesner*, Congress's decision not to create corporate liability under the Torture Victim Protection Act—the only statute that created an express cause of action under the ATS—is "all but dispositive." *Id.* at 1403-04 (plurality opinion). And there are significant foreign-affairs risks that come with recognizing

domestic corporate ATS liability: It would place the Judiciary in the middle of foreign-policy debates, harm our economy, enable litigants to sidestep *Jesner*, and reduce the ATS's deterrent effect. And it may yield little, if any, benefit in return. The Judiciary should defer to Congress, which has never passed any sort of law authorizing anything close to the scope of liability Plaintiffs seek to impose here.

ARGUMENT

The ATS was originally used sparingly: it was invoked just twice in the late 18th century and only once more over the following 167 years. *Kiobel*, 569 U.S. at 114. In 1980, however, the Second Circuit held that plaintiffs could bring ATS actions based on modern human-rights norms. *Filartiga* v. *Pena–Irala*, 630 F.2d 876 (2d Cir. 1980).

Since then, ATS litigation has ballooned in the lower courts. The three times this Court has taken up the ATS, it has had to remind lower courts that the statute was intended to apply to only a few claims and in limited circumstances. In *Sosa* v. *Alvarez-Machain*, the Court acknowledged that the ATS allows courts to "provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" of its enactment. 542 U.S. at 724. But the Court warned that courts must exercise "great caution" before allowing ATS claims to move forward. *Id.* at 727-728. It therefore limited courts to creating ATS causes of action *only* when supported by a "specific, universal, and obligatory" international-law norm, *and* when countervailing policy concerns do not dictate otherwise. *Id*. at 727-728, 732 (internal quotation marks omitted).

The next two cases elaborated on what it means to exercise "great caution" in recognizing novel ATS causes of action. *Kiobel* held that "the presumption against extraterritoriality applies to claims under the ATS." 569 U.S. at 124-125. But because "all the relevant conduct" in that case "took place outside the United States," *id.*, the Court "did not need to determine" the ATS's "focus." *RJR Nabisco*, 136 S. Ct. at 2101. Then, in *Jesner*, the Court declined to extend ATS liability to foreign corporations. It reiterated that ATS litigation "must be 'subject to vigilant doorkeeping.'" 138 S. Ct. at 1398 (quoting *Sosa*, 542 U.S. at 729). And it "rejected the view that the ATS was meant to transform the federal courts into forums for the litigation of all human rights suits." *Id.* at 1412 (Alito, J., concurring in part and concurring in the judgment). It did not decide, however, whether domestic corporations can be liable under the ATS.

This case squarely presents the two key questions that *Kiobel* and *Jesner* left open: What is the ATS's "focus," and does general corporate supervisory activity fall within it? And may corporate defendants be liable under the ATS? The answer to both is no.

I. PLAINTIFFS' CLAIMS IMPERMISSIBLY SEEK TO APPLY THE ATS EXTRATERRITORIALLY.

It is a universal rule of statutory interpretation that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). This Court uses "a two-step framework for analyzing extraterritoriality," drawn from *Morrison* and *Kiobel*.

RJR Nabisco, 136 S. Ct. at 2101. At step one, the Court "ask[s] whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* If not, then at step two, the Court "determine[s] whether the case involves a domestic application of the statute" by considering "the statute's 'focus.' " *Id.* "[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." *Id.*

Kiobel already held that nothing in the ATS rebuts the presumption against extraterritoriality. 569 U.S. at 124. The question, then, is what constitutes the "focus" of an ATS claim. History and the Court's extraterritoriality cases supply the answer: The ATS's focus is on the *injury* resulting from a tort committed in violation of the law of nations. Because all the human-rights injuries Plaintiffs allege occurred in Cote d'Ivoire and Mali at the hands of foreign actors, Plaintiffs' allegations are impermissibly extraterritorial. But even if the ATS's focus were broader, Plaintiffs' generic allegations that Nestlé USA directed or oversaw foreign purchases from the United States is not enough to make Plaintiffs' proposed application of the ATS domestic.

A. The ATS's Focus Is Where The Plaintiffs' Injury Occurred, And Here All Of Plaintiffs' Injures Occurred Overseas.

The ATS's history and purpose, as well as this Court's precedents, teach that the ATS's "focus" is on the *injury* resulting from a tort in violation of the law of nations.

1. Congress enacted the ATS with a narrow and specific purpose: "[T]o avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an *injury* to a foreign citizen." *Jesner*, 138 S. Ct. at 1397 (emphasis added). Congress was focused on rectifying "its potential inability to provide judicial relief to foreign officials injured in the United States." *Kiobel*, 569 U.S. at 123. There was accordingly "no evidence that Congress was concerned about remedying aliens' injuries that occurred in foreign lands," and there was not any "particular reason that Congress would have been [so] concerned" because "[r]emedies for such injuries could be provided * * * by foreign sovereigns under their countries' laws." *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

All the cases motivating the ATS or in which it was applied contemporaneously involved injuries suffered within U.S. territory. The "[t]wo notorious episodes" that motivated the ATS both "concerned the rights of ambassadors, and each involved conduct within the Union." *Kiobel*, 569 U.S. at 120. In the 1784 "Marbois Affair," a French adventurer assaulted the Secretary of the French Legion in Philadelphia. *See id*. A few years later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants. *Id*. Under the Articles of Confederation, the national government was powerless to redress these incidents and accordingly feared that they "could rise to an issue of war." *Sosa*, 542 U.S. at 715. The Framers responded by extending the judicial

power to "all Cases affecting Ambassadors, other public Ministers and Consuls," U.S. Const. art. III, § 2, and the First Congress followed through with the ATS. *Sosa*, 542 U.S. at 717.

"The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States." *Kiobel*, 569 U.S. at 120. One involved the "wrongful seizure of slaves from a vessel while in port in the United States," and the other the "wrongful seizure" of a ship "in United States territorial waters." *Id.* (citing *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.C.D.S.C. 1795) (No. 1,607), and *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D.C.D. Pa. 1793) (No. 9,895)).

Congress in 1789 was also legislating against a common-law backdrop in which few " 'rules binding individuals * * * overlapped with' the rules governing the relationships between nation-states." *Jesner*, 138 S. Ct. at 1397 (quoting *Sosa*, 542 U.S. at 715). The overlap was limited to "three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* (quoting *Sosa*, 542 U.S. at 715, and citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). Congress's "concern" in enacting the ATS was "focus[ed]" on these three offenses. *Kiobel*, 569 U.S. at 126 (Alito, J., concurring) (alterations in original) (quoting *Morrison*, 561 U.S. at 266).

The first two Blackstone offenses—violation of safe conducts and infringement of ambassadors' rights—concern injuries occurring in the United States, where an ambassador's person or property may be violated. Blackstone described these offenses "in

terms of conduct occurring *within the forum nation*." *Id.* at 119 (majority opinion) (emphasis added). The right to safe conducts was "for those 'who are here.'" *Id.* (quoting 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)). And Blackstone's discussion of ambassadors' rights "detail[ed] their rights in the state 'wherein they are appointed to reside.'" *Id.* (quoting 1 W. Blackstone, Commentaries on the Laws of England 245-248 (1765)); *see also id.* at 119-120 (looking to a treatise explaining that an ambassador was "under the protection of the law of nations" only upon "entering the country to which he is sent") (quoting E. De Vattel, Law of Nations 465 (J. Chitty et al. transl. and ed. 1883)).

As for the third Blackstone offense, "pirates may well be a category unto themselves," *id.* at 121, because "[t]he high seas are jurisdictionally unique" and "governed by no single sovereign," *Exxon*, 654 F.3d at 78 (Kavanaugh, J., dissenting in part). At most, piracy's peculiar nature may permit extending the ATS's "focus" to the high seas for piratical torts. But it does not suggest that Congress was concerned generally with injuries suffered outside the United States, and certainly not within the territory of other sovereigns.[3]

In sum, Congress's focus in enacting the ATS was on law-of-nations violations that occurred in the

[3] Consistent with that understanding, Attorney General Bradford opined in 1795 that "the ATS applies to conduct in the United States or on the high seas," but he "d[id] not say that the ATS extends to conduct in foreign lands." *Exxon*, 654 F.3d at 80 (Kavanaugh, J., dissenting in part) (citing Breach of Neutrality, 1 Op. Att'y Gen. 57, 58-59 (1795)).

United States and that "if not adequately redressed could rise to an issue of war." *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment) (quoting *Sosa*, 542 U.S. at 715). "[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms," and "[i]t is implausible to suppose that the First Congress wanted their fledgling Republic * * * to be the first" to "pretend[ ] to be the *custos morum* of the whole world." *Kiobel*, 569 U.S. at 123 (internal quotation marks omitted). That history indicates that the ATS's focus is where an injury occurred that could bring the young Nation to the brink of war.

2. This Court's extraterritoriality cases point in the same direction.

In *RJR Nabisco*, the Court held under the extraterritoriality step-one analysis that the Racketeer Influenced and Corrupt Organizations Act's (RICO) civil-suit provision does not rebut the presumption against extraterritoriality, even though many of the underlying predicate RICO crimes may. 136 S. Ct. at 2106. RICO civil plaintiffs must therefore allege sufficient domestic conduct at the "focus" of the statute to displace the presumption against extraterritorial application. *See id.* at 2101, 2106. The Court explained that a RICO civil suit, even if based on a predicate crime that has extraterritorial reach, must "allege and prove a *domestic* injury." *Id.* at 2106.

The same is true of the ATS. It does not displace the presumption against extraterritoriality at step one, even though the law-of-nations norms underlying it are universal. Like civil RICO suits, then, an ATS suit should require a domestic injury to displace

the presumption against extraterritorial application. *RJR Nabisco*'s reasoning applies equally to the ATS: In the private-enforcement context, "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct" and also "'unjustifiably permit[s] [foreign] citizens to bypass their own less generous remedial schemes.'" *Id.* (quoting *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 167 (2004)). And even if international friction would not "necessarily result in every case," the potential for friction "militates against recognizing foreign-injury claims without clear direction from Congress." *Id.* at 2107.

Prior cases are consistent with a default domestic-injury rule. In *Morrison*, the Court held that "the focus of the Exchange Act [wa]s not upon the place where the deception originated," but where the transaction was consummated. 561 U.S. at 266. Such a rule assures that anyone bringing suit was injured in the United States. And in the patent context, "a single act of supply from the United States" does not create a "springboard for liability each time a copy of the software is subsequently made abroad." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 456 (2007) (internal quotation marks and brackets omitted). Rather, if a patent-holder "desires to prevent copying in foreign countries," it must "obtain[] and enforc[e] foreign patents." *Id.* By requiring a patent-holder to show an unlawful act of copying in the United States, *Microsoft* also assured a domestic injury.

These cases all indicate the same thing about a statute's "focus": It does not extend to all domestic conduct that may initiate or further a foreign violation. Rather, the focus is the resulting injury. This trans-substantive principle is just as applicable to the ATS. The *Jesner* dissenters suggested just that when they described potential violations of the law of nations that would "touch and concern the United States" with sufficient force to displace the presumption against extraterritorial application. 138 S. Ct. at 1435 (Sotomayor, J., dissenting). All three of their examples involved injuries *in the United States*: "the assault on the Secretary of the French Legation *in Philadelphia*," a "fleet of vessels" directed "to seize other ships *in U.S. waters*," and "forcibly transporting foreign nationals *to the United States*." *Id.* (emphases added).

3. To the extent the ATS's history and trans-substantive principles of extraterritoriality leave any doubt as to the focus of an ATS claim, the Court should—as a matter of discretion—recognize ATS claims only to the extent they allege domestic injuries. In defining ATS causes of action, courts must exercise "an element of judgment about the practical consequences of making that cause available." *Sosa*, 542 U.S. at 732-733. In exercising that judgment, "the principles underlying" the presumption against extraterritoriality should "constrain courts." *Kiobel*, 569 U.S. at 116.

ATS suits inherently risk "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," and "attempts by federal courts to craft remedies for the violation of *** international law *** raise risks of adverse foreign

policy consequences." *Sosa*, 542 U.S. at 727-728. Making clear that the ATS's focus is the *injury* assures an appropriate domestic nexus for ATS suits.

Focusing on the injury's location yields an easily administrable rule. Any extraterritoriality rule that does not draw a bright line "will still be hotly litigated by ATS plaintiffs, and it may be years before incorrect initial decisions about their applicability can be reviewed by the courts of appeals." *Jesner*, 138 S. Ct. at 1411 (Alito, J., concurring in part and concurring in the judgment). And because this Court "review[s] but a tiny fraction of" those cases, many decisions transgressing a hazy rule's proper boundaries will be allowed to stand. *Sosa*, 542 U.S. at 750-751 (Scalia, J., concurring in part and concurring in the judgment). A clear focus rule is essential to enforcing this Court's repeated admonitions to construe and apply the ATS narrowly.

Assuming the ATS permits aiding-and-abetting liability, a focus on the place of injury is especially warranted for those claims. "[A]iding and abetting does not constitute a discrete criminal offense but only serves as a more particularized way of identifying persons involved in the underlying offense." *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 280 (2d Cir. 2007) (Katzmann, J., concurring) (internal quotation marks omitted), and "[i]nternational law is consistent with domestic law on this point." *Id.* (collecting sources). Aiding and abetting therefore "borrows the criminality of the act committed by the principal perpetrator." *Id.* at 282 (quoting *Prosecutor* v. *Akayesu*, Case No. ICTR–96–4–T, Trial Chamber Judgment, ¶ 528 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998)). That means the focus of an

aiding-and-abetting offense must be the same as the focus of the principal offense. The extension of aiding-and-abetting liability to the civil-law context is "at best uncertain" in American law, but to the extent there is a civil-liability analogue to criminal aiding and abetting, its focus is likewise where the principal violation, and hence the injury, occurred. *See Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (explaining that, if civil aiding-and-abetting analogue exists, it holds an actor "liable for harm resulting to a third person from the tortious conduct of another").

4. Because Plaintiffs have not alleged a domestic injury, they cannot show that their claims constitute a domestic application of the ATS. Plaintiffs' alleged injuries all occurred in Mali or Côte d'Ivoire; all the alleged trafficking and forced labor occurred in those countries; and Plaintiffs do not allege they have ever been to the United States, much less that they have been injured here. *See* JA 306-308, 332-336. Their claims should therefore be dismissed.

B. Under Any Reasonable Focus Inquiry, Plaintiffs Have Not Alleged Sufficient Domestic Conduct.

Even if the Court does not limit the ATS's focus to the place of injury, Plaintiffs have not alleged sufficient domestic conduct to displace the presumption against extraterritorial application under any focus standard consistent with this Court's extraterritoriality cases.

1. The only allegations against Nestlé USA in Plaintiffs' operative complaint—filed three years after *Kiobel* and a month after *RJR Nabisco*—are

that the corporation does business in the United States and that it is controlled by its Swiss parent company. *See* JA 304, 310, 313, 315. Plaintiffs do not allege that Nestlé USA did anything that violated the law of nations, nor that Nestlé USA even did business with the slavers or farmers responsible for Plaintiffs' injuries. Far from meeting *Kiobel*'s and *RJR Nabisco*'s rigorous standard, Plaintiffs' allegations against Nestlé USA are tantamount to alleging "mere corporate presence" in the United States, which does not "suffice[]" to "displace the presumption against extraterritorial application." *Kiobel*, 569 U.S. at 124-125; *see Jesner*, 138 S. Ct. at 1429 (Sotomayor, J., dissenting).

Rather than evaluate the specific allegations against Nestlé USA, however, the Ninth Circuit considered the collective allegations against all "the[] defendants" while acknowledging that because Plaintiffs' allegations were so imprecise, it was "not possible * * * to connect culpable conduct" to specific companies. Pet. App. 43a-44a. Plaintiffs' vague group allegations do not provide "factual content that allows the court to draw the reasonable inference that" Nestlé USA "is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).

In fact, as even the Ninth Circuit recognized, because of Plaintiffs' "reliance on collective allegations against all or * * * multiple defendants," it is not even "clear" that Plaintiffs' injuries are traceable to Nestlé USA for standing purposes. Pet. App. 46a. Article III requires "a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent

action of some third party not before the court." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks, brackets, and ellipses omitted). But as the Ninth Circuit acknowledged, Plaintiffs have not alleged any relationship between Nestlé USA and Plaintiffs' traffickers and enslavers, let alone the direct connection Article III requires. *See Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (allegations "dependent on speculation about the possible actions of third parties not before the court" are insufficient to establish standing).

That the Ninth Circuit *simultaneously* held that these same allegations were enough to displace the presumption against extraterritoriality only highlights the importance of clarifying the extraterritoriality bar. If Plaintiffs' injuries are not even clearly traceable to Nestlé USA, then they surely do not allege a sufficient connection to the United States.

2. Even under the Ninth Circuit's dubious collective-pleading approach, the panel identified only threadbare factual allegations of U.S. conduct. First, unspecified Defendants allegedly "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices." Pet. App. 43a. Second, "financing decisions * * * originated" in those offices. *Id.* at 43a-44a. Those "financing decisions" consisted of unspecified Defendants "provid[ing] personal spending money" to farmers in Côte d'Ivoire to establish them as "exclusive suppliers" and to "maintain ongoing relations." *Id.* at 43a (internal quotation marks omitted). Read generously, the Ninth Circuit held that the presumption against extraterri-

torial application was displaced because unspecified Defendants did business with cocoa farms in Côte d'Ivoire, there was some U.S. corporate supervision of those foreign business relationships, and Defendants were generally "aware that child slave labor is a pervasive problem in the Ivory Coast." Pet. App. 36a.[4]

Allowing high-level corporate supervisory activity and generalized knowledge that *other parties* are violating the law of nations *in other countries* to displace the presumption flies in the face of this Court's precedents. "[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States," but "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.

Thus, in *Morrison*, it was not enough that the defendant company's senior executives manipulated financial models in Florida or that some defendants "made misleading public statements there." *Id.* And in *RJR Nabisco*, it was not enough that the defendant companies had "directed and managed [racket-

[4] The Ninth Circuit declined to treat as relevant Plaintiffs' allegations about "Nestlé's" U.S. statements opposing child labor or its alleged role in developing the Harkin-Engel Protocol. That is not surprising. It would be startling for public statements and policies opposed to child labor and slavery to be evidence of aiding and abetting child labor and slavery, and holding that an exercise of First Amendment petition rights is a law-of-nations violation would raise significant constitutional questions.

eering activity] from the United States," even when they were alleged to have "received in the United States funds known to them to have been generated by illegal narcotics trafficking and terrorist activity"; "provided material support to foreign terrorist organizations in the United States"; and "used U.S. mails and wires in furtherance of" the scheme. 136 S. Ct. at 2114-15 (Ginsburg, J., concurring in part and dissenting in part and from the judgment) (internal quotation marks omitted).

If anything, those cases presented a stronger case for displacing the presumption because the defendants at least engaged in wrongful conduct in the United States. Here, by contrast, Nestlé USA's alleged U.S. conduct is consistent with benign international commerce—supposedly receiving reports from foreign operations and authorizing payments to foreign suppliers.

The Ninth Circuit "infer[red]" that Defendants' payments to farmers were "outside the ordinary business contract" and made so that they "could continue receiving cocoa at a price that would not be obtainable without employing child slave labor." Pet. App. 43a. From that logical leap, the court said that the "allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States." *Id.* at 44a. But if courts are permitted to make such unsupported inferences, "the presumption against extraterritorial application would be" just the "timid sentinel" this Court has warned against. *Morrison*, 561 U.S. at 266. Any American person who does business abroad in a country and industry known to suffer from human-rights violations could be the subject of an ATS suit

just because funds used to conduct the foreign business originated in the United States.

Kiobel and *Jesner* point to the same conclusion. In *Kiobel*, the plaintiffs alleged that the defendants had paid persons who had committed law-of-nations violations. 569 U.S. at 113. But the plaintiffs also alleged that the defendants purposefully allowed the "Nigerian military to use" their "property as a staging ground for attacks" that violated the law of nations. *Id.* Even so, the Court unanimously agreed that there was an insufficient U.S. nexus to support an ATS claim. *Id.* at 124-125 (majority opinion); *id.* at 139-140 (Breyer, J., concurring in the judgment). Justice Breyer noted in concurrence that the actual human-rights violations "took place abroad," and that the plaintiffs did not allege "that the defendants directly engaged in" law-of-nations violations, but "helped others (who are not American nationals) to do so." *Id.* at 140. Under the Ninth Circuit's reasoning, if the *Kiobel* plaintiffs had made a conclusory allegation that the defendants' U.S. offices had played some oversight or financial role, the case would have come out the other way. That is implausible.

The *Jesner* plaintiffs alleged that the defendant bank helped finance foreign terrorism by clearing financial transactions through its New York branch and laundering money for a Texas-based organization. 138 S. Ct. at 1394-95. Although the Court decided the case on other grounds, the dissent suggested that it could have been dismissed by applying the presumption against extraterritoriality because of the "relatively minor connection between the terrorist attacks * * * and the alleged conduct in the

United States," *id.* at 1429 (Sotomayor, J., dissenting), a connection that was nonetheless stronger than the one alleged here.

Pre-*Morrison* cases also teach that U.S. law should not apply to legal violations abroad simply because some suit-related conduct took place in the United States. For instance, the Court held that the 1991 version of Title VII did not apply to employment actions taken abroad, even when the plaintiff employee had been hired in the United States and was transferred abroad from the United States. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 247, 259 (1991). Long before that, the Court held that a federal eight-hour-workday requirement for contracts with the United States did not apply to construction projects abroad, even though the construction was being done for the United States government and the contractor agreed to "abide by all applicable laws * * * and other rules of the United States." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 282-283, 290-291 (1949) (internal quotation marks omitted). Yet the Ninth Circuit's decision would allow these tenuous corporate links to overcome the presumption in an ATS case.

No matter the focus standard this Court adopts, Plaintiffs have not alleged sufficient domestic conduct to displace the presumption against extraterritoriality.

C. The Policies Underlying The Presumption Against Extraterritoriality Weigh Against Entertaining This Suit.

Plaintiffs' suit also implicates many of the policy concerns motivating the Court's unwillingness to apply American law to foreign conduct without clear

Congressional authorization. It invites the Judiciary to sit in judgment of foreign governments and to interfere with the political branches' policies for combatting child labor and promoting economic development.

1. "[F]oreign-policy and separation-of-powers concerns" are "inherent in ATS litigation," *Jesner*, 138 S. Ct. at 1403, and this case is no exception. Plaintiffs repeatedly allege that "several farms" that "continue the use of child labor" are "owned" or "protected" "by [Ivorian] government officials." JA 339, 341-342. Plaintiffs accuse "Defendants" of acting "under color of law" or "on behalf of those acting under color of official authority" or "acting with the implicit sanction of the [Ivorian] state." JA 341. Plaintiffs are therefore asking a U.S. federal court to evaluate foreign officials' participation in law-of-nations violations within their own country, thereby using "corporations as surrogate defendants to challenge the conduct of foreign governments." *Jesner*, 138 S. Ct. at 1404 (plurality opinion).

That is not unusual for ATS cases, which "have often *engendered* conflict with other sovereign nations, rather than avoided it." *Exxon*, 654 F.3d at 77 (Kavanaugh, J., dissenting in part). Many countries, including Canada, Germany, Indonesia, South Africa, Switzerland, and the United Kingdom, "have complained that the ATS improperly interferes with their rights to regulate their citizens and conduct in their own territory." *Id.* at 78. Avoiding that entanglement is all the more reason for this Court to enforce a firm extraterritoriality rule.

Moreover, although the presumption against extraterritoriality applies "regardless of whether there is

a risk of conflict between the American statute and a foreign law," *RJR Nabisco*, 136 S. Ct. at 2100 (internal quotation marks omitted), there is an actual conflict here. Plaintiffs allege they were enslaved during a period of civil war in Côte d'Ivoire when the "cocoa-production regions" were "mostly within the government controlled southern zone." JA 313-314. Plaintiffs also allege that "there is no law in Mali" that would allow them to recover and that they could not bring claims in Côte d'Ivoire because "the judicial system is notoriously corrupt." JA 304-305. There is thus no way for Plaintiffs to prevail without a U.S. court finding, implicitly or explicitly, that the Ivorian government is not abiding by the law of nations. And that judgment would come even as the Ivorian government has recently taken steps to improve anti-child-trafficking enforcement. *See, e.g.*, Nellie Peyton, *Ivory Coast pledges trafficking crackdown as 137 child victims are rescued*, Reuters (Jan. 13, 2020), https://reut.rs/31Gnxx7 (recounting anti-trafficking raids and police officials' statements that they will "multiply this kind of operation").

Plaintiffs' suit also invites other nations to "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Kiobel*, 569 U.S. at 124. Aiding and abetting is merely a form of vicarious liability for a principal offense that violates the law of nations, *see supra* pp. 22-23, and so if U.S. courts have jurisdiction over the offense because of incidental U.S. corporate decision-making, it would be challenging to argue that courts in the forum where the principal conduct occurred lack jurisdiction over purported American abettors.

2. Plaintiffs' suit also invites the judiciary to veto the political branches' policies addressing child labor in West Africa. The Harkin-Engel Protocol, organized under the leadership of Senator Tom Harkin and Representative Eliot Engel, is the cornerstone of the Executive's anti-child-labor efforts in the West African cocoa industry. Entered into between the U.S. Department of Labor, representatives of the cocoa industry, and the Ivorian and Ghanaian governments, the Protocol encourages investment in and monitoring of West African cocoa farms. U.S. Dep't of Labor, 2018 CLCCG Annual Report 2-3, https://bit.ly/3126eVI (last accessed Aug. 31, 2020). The Department of Labor is "a driving force" in promoting the Protocol and has invested more than $29 million since 2010 "to combat child labor" under its framework. Bureau of Int'l Labor Affairs, *Child Labor in the Production of Cocoa*, U.S. Dep't of Labor, https://bit.ly/30WdOks (last accessed Aug. 31, 2020). And Nestlé, Cargill, and other major cocoa-using companies formed the Cocoa Global Issues Group to implement the Protocol. *See* 2018 CLCCG Annual Report, *supra*, at 2 n.1; JA 331. Since the Protocol was established, the cocoa industry has spent over $150 million in Côte d'Ivoire and Ghana to combat child labor, including funding child-protection services and education for school-age children. 2018 CLCCG Annual Report, *supra*, at 38-39.

Plaintiffs' suit attacks the Protocol as ineffective. *See* JA 330-331 (alleging the Protocol "guarantee[s] the continued use of * * * child slaves" and "serve[s] as a tool to * * * mislead the U.S. market"). Plaintiffs are therefore asking the courts to decide that they know better than the political branches how to

address the difficult problem of combating forced child labor in cocoa-producing countries. But "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. at 1403.

3. Plaintiffs' suit essentially asks the Judiciary to replace the Harkin-Engel Protocol with a functional embargo or international sanction against the Ivorian cocoa industry. *See Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009). Under Plaintiffs' theory, any company doing business from the United States with Ivorian cocoa farmers is subject to an ATS suit because every such company will make financial decisions regarding and engage in some supervision of their Ivorian counterparties. Even if some corporations were willing to accept the litigation risk—and the costs associated with a 15-year lawsuit over meritless claims—it nonetheless acts as a punishment for anyone using Ivorian cocoa. And a large and uncertain punishment at that: Plaintiffs are seeking compensation for anyone who lived in Mali from 1996 to the present and was trafficked to Côte d'Ivoire for child labor. JA 307-308. Plaintiffs' theory would also place U.S. firms at a competitive disadvantage compared to companies in countries without an ATS analogue, and it would discourage foreign investment in the United States by foreign firms concerned about triggering expansive ATS liability.

Whether to impose these heavy burdens on U.S. companies and Côte d'Ivoire is a question for the political branches. That is particularly true here, as adopting Plaintiffs' policy preferences would "*dis-*

courage[ ] American corporations from investing abroad" in a region with "a history of alleged human-rights violations," thereby "deter[ring] the active corporate investment" the Executive Branch has sought to *encourage* to combat those abuses. *Jesner*, 138 S. Ct. at 1406 (plurality opinion) (emphasis added). Forced child labor is wrong and should be vehemently opposed. But *how* to oppose it is something that the Executive and Congress should decide systemically and comprehensively—not the courts through ad hoc holdings in private-party money-damages ATS lawsuits.

II. DOMESTIC CORPORATIONS CANNOT AND SHOULD NOT BE HELD LIABLE UNDER THE ATS.

The ATS provides jurisdiction for a "modest number of international law violations with a potential for personal liability," *Sosa*, 542 U.S. at 724, that would "threaten[] serious consequences in international affairs" if the United States did not recognize them. *Id.* at 715. That number is indeed modest. At the time Congress enacted the ATS, there was "no basis to suspect Congress had any examples in mind" past the "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724.

In the over 15 years since *Sosa*, this Court has never recognized another cause of action under the ATS. *Sosa* declined to completely "close the door to further independent judicial recognition of actionable international norms," but it emphasized that "the door is still ajar subject to vigilant doorkeeping." *Id.* at 729. A federal court's power to fashion a new common-law cause of action to redress a violation of the law of nations is accordingly "narrow," "limited,"

and "should be undertaken, if at all, with great caution." *Id.* at 727-730.

Consistent with that cautionary language, before a court may recognize a new norm under the ATS, it must apply *Sosa* and *Jesner*'s two-step test. First, the norm must be "specific, universal, and obligatory." *Jesner*, 138 S. Ct. at 1399 (plurality opinion) (quoting *Sosa*, 542 U.S. at 732). Second, the court must consider whether any of the serious separation-of-powers and foreign-affairs concerns identified in *Sosa* and *Jesner* caution against judicially recognizing the cause of action. *Jesner*, 138 S. Ct. at 1398; *Sosa*, 542 U.S. at 725-728. The Ninth Circuit's domestic-corporate-liability norm fails at both steps.

A. There Is No Specific, Universal, Obligatory International-Law Norm Of Corporate Liability.

1. *Sosa*'s first step imposes a "high bar." *Jesner*, 138 S. Ct. at 1400 (plurality opinion). It is not enough to demonstrate that "liability might be permissible under international law in *some* circumstances." *Id.* at 1401 (plurality opinion) (emphasis added). Rather, it must be "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Sosa*, 542 U.S. at 725.

There are good reasons for that stringent standard. "At the time of the founding, [i]f a nation failed to redress injuries" that violated universal norms, it could provide "the offended nation with just cause for reprisals or war." *Jesner*, 138 S. Ct. at 1416 (Gorsuch, J., concurring in part and concurring in the judgment) (alteration in original and internal quotation marks omitted). The ATS remedied that prob-

lem by "'ensur[ing] that the United States could provide a forum for adjudicating such incidents' and thus helping the Nation avoid further diplomatic imbroglios." *Id.* at 1410 (Alito, J., concurring in part and concurring in the judgment) (alteration in original) (quoting *Kiobel*, 569 U.S. at 124). But if other countries do not recognize the infraction, then the United States not furnishing a forum does not risk diplomatic strife.

In "determin[ing] whether a norm is sufficiently definite to support a cause of action," courts must address "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." *Sosa*, 542 U.S. at 732 & n.20; *see id.* at 760 (Breyer, J., concurring in part and concurring in the judgment) ("The norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."). In other words, courts must "look to customary international law not only for the substantive content of the tort but also for the categories of defendants who may be sued." *Exxon*, 654 F.3d at 81 (Kavanaugh, J., dissenting in part); *accord* Pet. App. 15a-17a (Bennett, J., dissenting from denial of rehearing en banc).

2. Here, then, *Sosa*'s first step asks whether there is a specific, universal, and obligatory "international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights." *Jesner*, 138 S. Ct. at 1399 (plurality opinion); *id.* at 1400 (explaining there is "considerable force and weight to" that approach). There is not. There is at best "weak support" for corporate liability in international law, which hardly hurdles *Sosa*'s

high bar. *Id.* at 1400-01; *see* Cato Cert.-Stage Amicus Br. 8, 10-12, 16-18 & n.2; Coca-Cola Cert.-Stage Amicus Br. 11-19.

The international community has made a "conscious decision to limit the authority of * * * international tribunals to natural persons." *Jesner*, 138 S. Ct. at 1401 (plurality opinion). Traditionally, customary international law imposed legal obligations only on sovereigns. *Exxon*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part) (citing 1 Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987) (Reporters' Notes)). "The singular achievement of international law since" World War II was to extend those obligations to individuals through the Nuremberg trials. *Jesner*, 138 S. Ct. at 1400 (plurality opinion) (quoting *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010)). But although many Nuremberg prosecutors considered charging some corporations directly, they ultimately did not. Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1151 (2009); *see Jesner*, 138 S. Ct. at 1400 (plurality opinion). Even the firm that supplied Zyklon B gas, which the Nazis used to kill millions, was not indicted—the prosecutions were instead against the owner and two employees. 1 U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals 93-94 (1947) (*The Zyklon B Case*).[5]

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[5] Although some of the Nuremberg tribunal's language suggests that it sought to punish corporations, *see* 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under

"Every international tribunal since Nuremberg that has enforced customary international law has followed this path, extending liability to individuals but not to corporations." *Exxon*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part). The International Criminal Tribunals for the Former Yugoslavia and Rwanda limited jurisdiction to "natural persons." *Jesner*, 138 S. Ct. at 1400-01 (plurality opinion) (internal quotation marks omitted). And the framers of the Rome Statute, which established the International Criminal Court, rejected "a proposal to give [that court] jurisdiction over corporations." *Id.* at 1401.[6]

Nothing about this evidence or these conclusions is specific to foreign corporations. As then-Judge Kavanaugh put it, "there is no *corporate* liability in customary international law." *Exxon*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part) (emphasis added). Indeed, in *Jesner*, the petitioners and respondents "agree[d]," and plurality recognized, "that

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Control Council Law No. 10, at 1140-41 (1953) (*The I.G. Farben Case*), it clarified that "corporations act through individuals" and could not "be subjected to criminal penalties in these proceedings," *id.* at 1153.

[6] Although these are criminal-law tribunals, they are still relevant to determining international-law civil-law norms. Because other countries do not "permit[] the imposition of civil liability for what [they] deem uniquely criminal violations," that modern international criminal tribunals do not recognize corporate liability "is a serious blow for those claiming that" there is "broad international support" for a corporate-liability norm. Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va. J. Int'l L. 353, 384 (2011).

customary international law does not *require* corporate liability as a general matter." 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment).

There is good reason for the international community's reluctance. Even assuming corporations *can* be held liable under international law, there is no settled consensus over *how* to do so. To take some examples: What forms of artificial entities are subject to potential liability? Can corporations form intent, and if so, how should the *mens rea* of a multimember body be determined? *See* JA 227-228 n.69; Cato Cert.-Stage Amicus Br. 11-12 (noting significant differences in countries' legal standard for whether and how individuals' conduct can be attributed to corporate persons). And how would international bodies overcome the "tremendous evidentiary problems" associated with "prosecuting legal entities"? Albin Eser, *Individual Criminal Responsibility*, *in* 1 Rome Statute of the International Criminal Court: A Commentary 767, 779 (A. Cassese et al. eds. 2002).

In short, there is no specific, universal, obligatory international norm of corporate liability. That should be the end of this case.

B. Congress, Not The Judiciary, Must Be The One To Create Domestic Corporate ATS Liability.

Even if there were a specific, universal, obligatory international norm of corporate liability, every cautionary factor that counseled against creating a cause of action against foreign corporations in *Jesner* applies equally to domestic corporations.

1. *Sosa*'s second step asks whether it is appropriate for the Judiciary, rather than the Legislature, to recognize the cause of action in question. *See Jesner*, 138 S. Ct. at 1402-03. Several "reasons argue for judicial caution when" creating ATS causes of action. *Sosa*, 542 U.S. at 725. These concerns fall into two related categories: separation of powers and foreign affairs.

Because federal courts no longer have general common-lawmaking powers, they should typically refrain from invading the legislative sphere and creating private causes of action. Post-*Erie* "federal common law [is] self-consciously 'made,'" not "discovered." *Id.* at 741 (Scalia, J., concurring in part and concurring in the judgment). This understanding "of the role of the federal courts in making" common law "counsels restraint in judicially applying internationally generated norms." *Id.* at 725-726 (majority opinion).

"[T]his Court has recently and repeatedly" affirmed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727 (citing *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001), and *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001)). The "Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017)). That is especially true in the ATS context, as the Constitution vests Congress with the power to "define and punish * * * Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Courts should accordingly exercise substantial "caution"

before creating new ATS causes of action for international-law violations. *Sosa*, 542 U.S. at 725.

Justice Scalia would have gone even further, instructing courts to refrain entirely from creating "private federal causes of action for violations of customary international law." *Id.* at 747 (Scalia, J., concurring in part and concurring in the judgment). He explained in *Sosa* that "[p]ost-*Erie* federal common lawmaking * * * is so far removed from that general-common-law adjudication which applied the 'law of nations' that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter." *Id.* at 745. Indeed, Justice Scalia warned that by leaving the door "ajar," the Court was inviting the Ninth Circuit and other courts to "create rights where Congress has not authorized them to do so." *Id.* at 746-747. Consistent with Justice Scalia's view, *Jesner* suggested that courts should never "recogniz[e] any new causes of action under the ATS." 138 S. Ct. at 1403.[7]

Relatedly, courts should be "particularly wary of" creating new ATS causes of action because of the "potential implications for * * * foreign relations" and the risk of "impinging on the discretion of the Legis-

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[7] Several Justices made this point explicit: Justice Thomas explained that "[c]ourts should not be in the business of creating new causes of action under the Alien Tort Statute." *Jesner*, 138 S. Ct. at 1408 (Thomas, J., concurring). And Justice Gorsuch wrote that "judges should exercise *good* judgment by declining" to create new ATS causes of action "before we create real trouble." *Id.* at 1414 (Gorsuch, J., concurring in part and concurring in the judgment).

lative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727. The ATS, after all, was enacted "to help the United States *avoid* diplomatic friction." *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment) (emphasis added). Federal courts should accordingly "decline to create federal common law causes of action under *Sosa*'s second step whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife." *Id.*; *see id.* at 1408 (Thomas, J., concurring).

2. The Court should decline to create an ATS cause of action against domestic corporations for all the same reasons it declined in *Jesner* to create an ATS cause of action against foreign corporations.

a. The *Jesner* plurality found Congress's decision not to create corporate liability in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 105-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), "all but dispositive" on the question of foreign corporate liability. 138 S. Ct. at 1404 (plurality opinion). It is all but dispositive on the question of domestic corporate liability, too.

The TVPA "establish[ed] an unambiguous and modern basis for a cause of action under the ATS," *Jesner*, 138 S. Ct. at 1403 (plurality opinion) (internal quotation marks omitted), by allowing plaintiffs to seek civil damages from any "individual who engages in torture or extrajudicial killing." 106 Stat. at 73 (preamble). Because the TVPA is "the only cause of action under the ATS created by Congress," it is the most "logical place to look for a statutory analogy to an ATS common-law action." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). In drafting the

statute, Congress made several "decisions" that carry "significant foreign policy implications." *Id.* (quoting *Kiobel*, 569 U.S. at 117). Most notably, Congress limited TVPA liability to natural persons. *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 453-454 (2012). The decision to "exclude all corporate entities" from TVPA liability "reflects Congress' considered judgment of the proper structure for a right of action under the ATS"—one that does not include foreign corporate liability. *Jesner*, 138 S. Ct. at 1403-04 (plurality opinion).

That analysis applies equally here. The TVPA remains the most logical ATS analogue, and it still does not permit any corporate liability—whether the corporation is domestic or foreign. This Court should once again defer to "Congress' considered judgment" in this area and decline to create a cause of action for ATS domestic corporate liability. *Id.* at 1403.

No "compelling justification" exists for "deviat[ing] from that model." *Id.* That Congress made different choices in the Anti-Terrorism Act, 18 U.S.C. § 2333 *et seq.*, and Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. § 1581 *et seq.*, only underscores the importance of leaving the decision in its hands. *See Jesner*, 138 S. Ct. at 1405 (plurality opinion). Each of Congress's limits—who may be liable, whether plaintiffs may sue for extraterritorial conduct, the statute of limitations, and all the rest—carries foreign policy implications best weighed by the political branches. *See Kiobel*, 569 U.S. at 117. And recognizing a cause of action here would allow Plaintiffs to "bypass Congress's express limitations on liability under the" TVPRA—which authorizes any "individual" who is a victim of a violation of the

statute's prohibition against forced labor to sue "the perpetrator" in certain circumstances, 18 U.S.C. § 1595(a)—"simply by bringing an ATS lawsuit." *Jesner*, 138 S. Ct. at 1405.

That is yet more reason for caution: Where Congress has already crafted a remedy for the sort of conduct in question, this Court has been "extremely reluctant to imply a cause of action * * * that is significantly broader than the remedy that Congress chose to provide." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574 (1979). Accordingly, "even if the [TVPRA] were a suitable model for an ATS suit, * * * Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include [domestic] corporations." *Jesner*, 138 S. Ct. at 1405 (plurality opinion).

b. Amplifying the separation-of-powers concerns are the "risks of adverse foreign policy consequences"—an area within the exclusive province of the political branches. *Sosa*, 542 U.S. at 727-728. Just like ATS suits against foreign corporations, ATS suits against domestic corporations can create friction with other nations. Indeed, in the second *Kiobel* argument, when Justice Alito asked the United States to "[s]uppose that the defendant in this case were a U.S. corporation," the Solicitor General admitted that "the possible risk of foreign relations friction would be comparable." Transcript of Oral Argument at 45:5-9, *Kiobel*, 569 U.S. 108 (No. 10-1491) (Oct. 1, 2012) ("*Kiobel* Oral Arg. Tr.").

That makes sense. Many multinational companies have affiliates in the United States, as Nestlé, S.A. does here in Nestlé USA, and a suit against a domestic affiliate implicates many of the same

foreign policy concerns as a suit against the foreign parent. *See Jesner*, 138 S. Ct. at 1402-03 (majority opinion); *id.* at 1405-06, 1407-08 (plurality opinion); *id.* at 1410-12 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1418-19 (Gorsuch, J., concurring in part and concurring in the judgment). Allowing ATS suits against domestic corporations therefore still risks "embroil[ing]" the United States in "international controversies"—exactly what that statute was designed to prevent. *Jesner*, 138 S. Ct. at 1411 (Alito, J., concurring in part and concurring in the judgment).

Recognizing a cause of action for domestic corporate liability also risks placing the Judiciary in the middle of foreign-policy issues beyond its ken. *See, e.g.*, *id.* at 1414 (Gorsuch, J., concurring in part and concurring in the judgment) (describing these as "matters that implicate neither judicial expertise nor authority"). For instance, must a court assess whether imposing liability on a domestic subsidiary would offend a foreign parent in a manner that conflicts with U.S. foreign policy? Is the answer norm- or case-specific? And how should courts assess a claim against a domestic corporation that is a subsidiary of a state-owned foreign parent? *See, e.g.*, *Silva* v. *Gonzales*, No. 3:13-cv-1587-CAB-KSC, 2014 WL 12663140, at *3, *12 (S.D. Cal. May 23, 2014) (ATS suit seeking to impose liability on Citgo, which is majority-owned by a Venezuelan state-owned company).

Although these concerns may not arise in every ATS case, they are at the forefront here. Plaintiffs allege that Nestlé, S.A.—Nestlé USA's Swiss parent—"control[s] every aspect of [Nestlé USA's] opera-

tions, particularly with respect to the sourcing, purchasing, manufacturing, distribution, and/or retailing of cocoa." JA 313. Under Plaintiffs' allegations, holding Nestlé USA liable is akin to holding Nestlé S.A. liable, and carries the same foreign-policy risks that led the Court to reject liability for foreign corporations in *Jesner*. *See, e.g.*, 138 S. Ct. at 1402-03; *see also supra* p. 30 (allegations against Ivorian government officials); *Jesner*, 138 S. Ct. at 1407 (noting Jordan's concerns about the litigation in that case).

Creating domestic corporate ATS liability might also prompt other nations to allow their citizens to indirectly hold American corporations liable in their courts. Allowing foreign corporations' domestic affiliates, like Nestlé USA, to be haled into American courts "would imply that other nations, also applying the law of nations, could hale" U.S. corporations' foreign affiliates "into their courts for alleged violations of the law of nations." *Jesner*, 138 S. Ct. at 1405 (plurality opinion) (quoting *Kiobel*, 569 U.S. at 124); *see Kiobel* Oral Arg. Tr. at 45:5-11 (Solicitor General acknowledging that, in a suit against a domestic corporation, "[t]he risk of reciprocal exposure to American companies would also exist"). That "could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their * * * subsidiaries around the world, all as determined in foreign courts, thereby hindering global investment in developing economies, where it is most needed." *Jesner*, 138 S. Ct. at 1405-06 (plurality opinion) (internal quotation marks and brackets omitted). And it is true whether or not the Court limits ATS liability to domestic injuries. By contrast, declining

to recognize domestic corporate ATS liability would not "give other nations just cause for complaint against the United States." *Id.* at 1410 (Alito, J., concurring in part and concurring in the judgment).

There are few benefits to offset these serious costs. In fact, imposing corporate liability could increase human rights violations. The high cost of ATS litigation means that some U.S. businesses may be forced to discontinue programs designed to combat human rights abuses abroad, *see* Coca-Cola Cert.-Stage Amicus Br. at 8-11, especially if this Court does not limit the focus of an ATS suit to the location of the injury. Thus, if the Court were to hold that domestic corporations are subject to ATS suits, they may respond by divesting from countries with tarnished human-rights records—often developing countries that need foreign investment most. *See Jesner*, 138 S. Ct. at 1405 (plurality opinion). Allowing ATS suits against domestic corporations would also put them at a competitive disadvantage compared to non-liable foreign corporations, making it easier for domestic corporations to be displaced by foreign "competitors that have no incentive to respect" human rights norms. *See* Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 Geo. L.J. 2161, 2194-96 (2012).

Ultimately, "[w]hether the benefits of" corporate liability "outweigh [its] costs is a classic question of public policy that should not be answered by appointed judges." *Rapanos* v. *United States*, 547 U.S. 715, 752-753 (2006) (plurality opinion) (internal quotation marks omitted). Because "there are sound reasons to think Congress might doubt the efficacy or

necessity of a damages remedy," this Court should "refrain from creating th[at] remedy in order to respect the role of Congress." *Jesner*, 138 S. Ct. at 1402 (quoting *Abbasi*, 137 S. Ct. at 1858).

c. Other reasons for declining to recognize domestic corporate liability under the ATS abound.

First, permitting domestic corporate ATS liability will harm our economy. "In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations * * *." U.S. Chamber of Commerce et al. Cert.-Stage Amicus Br. 17.[8] ATS suits often drag on for years and inflict reputational harm, drain corporate coffers, and hurt stock prices and bond ratings. *See, e.g.*, *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116, 1120-21 (9th Cir. 2010) (affirming dismissal of claims against Chevron filed more than a decade earlier); *see also* U.S. Chamber of Commerce et al. Cert.-Stage Amicus Br. 17-18 (collecting examples). Even meritless actions will prove costly. *See Kiobel*, 621 F.3d at 116 & nn.5-6; *see also Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (lax legal rules "permit[ ] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value"). And differentiating between domestic and foreign corporations will

[8] This figure represents cases filed through 2010. There is every reason to expect this trend will continue, and, after *Jesner*, suits will be filed against only U.S. companies. *See, e.g.*, Class Action Complaint, *Hee Nam You* v. *Japan*, No. 3:15-cv-03257, 2015 WL 4237365 (N.D. Cal. July 13, 2015) (putative class action against domestic corporations, among others, seeking relief for World War II-era actions).

discourage foreign investment in the United States and create artificial barriers to foreign firms operating through U.S. affiliates. *See* Sykes, *supra*, at 2196-97.

Second, prohibiting foreign corporate liability but allowing domestic corporate liability would create an inequitable regime, *see* U.S. Cert.-Stage Br. 11, and allow litigants to sidestep *Jesner* anytime the foreign company they seek to sue has a domestic affiliate. That is precisely what Plaintiffs seek to do here by asking the Court to hold the domestic subsidiary of a foreign corporation liable, even though the *foreign* entity allegedly "control[s] every aspect of the [domestic] subsidiar[y's] operations." JA 313. The Court has not countenanced similar attempts to circumvent its decisions before. *E.g.*, *Elkins* v. *United States*, 364 U.S. 206, 208, 215, 223 (1960) (ending the "silver platter doctrine," which allowed federal prosecutors to use evidence illegally seized by state officers, but not federal officers). It should not start now.

Such disparate treatment is particularly inappropriate because "[t]here is no indication" the First Congress intended for the ATS "to treat U.S. businesses worse than foreign businesses engaged in exactly the same conduct." U.S. Cert.-Stage Br. 11. In fact, there is no indication that the First Congress intended for the ATS to hold corporations liable *at all*; the incidents that inspired the ATS's creation involved individuals. *Sosa*, 542 U.S. at 717, 720-721; *see supra* p. 16.

Third, recognizing ATS liability against domestic corporations would diminish the statute's deterrent effect. "Crimes against international law are com-

mitted by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Kiobel*, 621 F.3d at 119 (quoting *The Nurnberg Trial* (*United States* v. *Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)). Allowing plaintiffs to focus ATS lawsuits—and collections efforts—on corporate defendants would undermine the suits' deterrent effect on individuals. That, in turn, would reduce the deterrence created by statutes like the TVPA, which authorize damages against only natural persons. This Court invoked the same rationale in declining to allow *Bivens* claims against corporations. *See Malesko*, 534 U.S. at 70-71 (recognizing a cause of action "against an individual's employer" would eliminate any "reason for aggrieved parties to bring damages actions against individual officers" (internal quotation marks omitted)). And it is yet another reason to exercise "caution" in "mandat[ing] a rule that imposes liability upon artificial entities like corporations." *Jesner*, 138 S. Ct. at 1402-03; *see* U.S. Cert.-Stage Br. 10.

3. The Court should finally rule on this question. The Second Circuit decided *Kiobel*, creating a circuit split on corporate liability, a decade ago. 621 F.3d 111; *see* Pet. 25. This Court has now granted certiorari three times to consider whether to recognize corporate liability under the ATS. *Kiobel*, 569 U.S. at 114; *Jesner*, 138 S. Ct. at 1395; *supra* p. i. In the meantime, plaintiffs have continued to press existing suits against corporate defendants. *See* U.S. Chamber of Commerce et al. Cert.-Stage Amicus Br. 17-18 (collecting examples); Chevron Corp. Cert.-Stage Amicus Br. 16 nn. 3-4 (same). And lower courts have let these lawsuits proceed, despite this Court's

repeated reminders over the last 16 years that ATS suits "must be 'subject to vigilant doorkeeping.'" *Jesner*, 138 S. Ct. at 1398 (quoting *Sosa*, 542 U.S. at 729); *see Kiobel*, 569 U.S. at 116-117.

Regardless of how it decides the extraterritoriality question, the Court should hold that it will not create an ATS cause of action for domestic corporations. "[I]f there is no liability for [Nestlé USA], the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless." *Jesner*, 138 S. Ct. at 1399 (plurality opinion); *see, e.g.*, *McMillian* v. *Monroe County*, 520 U.S. 781 (1997) (affirming dismissal where defendant was not subject to liability). And Plaintiffs have never sought to add individual defendants to this suit, nor suggested that they could make out an ATS claim against any individuals. As a result, holding that there is no ATS liability for domestic corporations will bring this Jarndycian litigation at long last to a close. The Court should do so.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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