

No. 19-416

IN THE
Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE CATO INSTITUTE AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER**

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QUESTION PRESENTED

Whether the judiciary has the authority under the Alien Tort Statute, 28 U.S.C. § 1350, to impose liability on domestic corporations.

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, conducts conferences, and files *amicus* briefs. This case concerns Cato because it raises vital questions about the role of federal judges in defining the scope of federal jurisdiction and the manner in which they interpret international law to define that scope.¹

SUMMARY OF ARGUMENT

The decision below held that a U.S. company can be sued under the Alien Tort Statute, 28 U.S.C. § 1350 (the “ATS”) for alleged crimes under international law. That decision, however, is irreconcilable with either prong of the rigorous two-step analysis mandated by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). While *Jesner*

1. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief. In addition, counsel to the parties have informed counsel for *amicus* that letters from the parties consenting to the filing of *amicus* briefs will be filed with the Clerk of the Court.

held that the ATS could not support claims against non-U.S. corporations for alleged violations of international law, the rationales underlying that holding apply equally to domestic corporations. In concluding otherwise, the Ninth Circuit decision raises a substantial federal question because it impermissibly expands the scope of federal jurisdiction under the ATS.

As a purely jurisdictional statute, this Court has instructed that the ATS implicates serious separation-of-powers and foreign-relations concerns, and accordingly, courts should be vigilant to read the ATS narrowly. Under *Sosa*, a plaintiff first must show that the alleged violation of international law involves a norm that is specific, universal, and obligatory under international law. Even if this threshold burden is met, the court must decide whether recognizing a particular claim is a proper exercise of judicial discretion or whether the political branches must grant specific authority before liability is imposed.

Underscoring the narrowness of this two-part test, the Court stressed that federal courts should require ATS claims “based on the present-day law of nations to 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 we have recognized.” *Sosa*, 542 U.S. at 725. Applying this specificity test, *Sosa* held that “arbitrary arrest” had not reached the level of a norm under international law, *and* that the implications of recognizing this type of claim under the ATS “would be breathtaking.” *Id.* at 735-36. *Jesner* then applied *Sosa*’s specificity test to determine *who* may be subject to a particular claim for a violation of the law of nations. Thus, notwithstanding the clarity as to the underlying crimes asserted, *Jesner* recognized

that (i) plaintiffs had not shown a specific, universal and obligatory international law norm for imposing liability on non-U.S. corporations for acts violating international law; (ii) there was no congressional imprimatur for extending ATS jurisdiction to include non-U.S. companies accused of crimes under international law; and (iii) extending federal jurisdiction to include claims against non-U.S. corporations would have serious and negative foreign-policy implications.

The Ninth Circuit ignored the rigorous analysis of *Sosa* and *Jesner*, creating substantial federal questions meriting certiorari. *First*, *Jesner* confirms that when *Sosa* referred to the “specificity comparable to the features of the 18th-century paradigms” it meant a specificity going *beyond* the elements of the crime at issue. In assessing ATS jurisdiction, courts must thus apply the same rigor in assessing *who* is a proper party under international law as in determining *the elements* of a specific crime under international law. Here, the Ninth Circuit ignored that individual liability for violations of international human rights law has consistently been limited to natural persons, and that the nations of the world expressly refused to extend that liability to corporations when given the opportunity. As also ignored below, not all nations of the world derive their corporate law from the Anglo-American legal system. Indeed, nations disagree strongly on what corporate liability looks like across a broad range of issues that have direct bearing on how any criminal claim under international law might apply to a corporate entity. *Sosa* and *Jesner* teach that it is for the executive and legislative branches to determine how the United States will navigate these complex differences—which have significant legal, economic, and foreign-policy consequences.

Second, Jesner shows how the specificity requirement relates to and supports *Sosa*'s expressed concern that the federal courts not extend the jurisdictional reach of the ATS absent an affirmative act of Congress. Even after recognizing that there was no universal norm supporting corporate liability, the plurality continued its analysis with respect to what Congress *affirmatively* had done in enacting—and limiting—the TVPA under the ATS. 138 S. Ct. at 1403-06. As in *Sosa*, the *Jesner* majority also then considered the negative implications for expanding federal jurisdiction in ways that created significant foreign-policy issues. *Id.* at 1406-07.

The Ninth Circuit ignored all of this. Rather than identifying any affirmative congressional support for its conclusion, the court below turned *Sosa* on its head by concluding that the *absence* of legislative evidence was dispositive. Put another way, the Ninth Circuit never considered why, absent an express affirmative act of Congress, international law should be different for domestic corporations as opposed to foreign corporations. The Ninth Circuit also thereby created a distinction that exists nowhere in international law *and* which creates real foreign-policy implications for U.S. companies operating abroad: U.S. companies can now be sued under the ATS while non-U.S. companies—even companies related to U.S. companies—cannot be sued for the exact same claims. The Ninth Circuit nowhere considered the logic or implications of its holding and thereby dramatically broadened the scope of ATS jurisdiction.

Certiorari also is merited because, before *Jesner*, four circuit courts—including the Ninth Circuit—had held that the ATS allows federal courts to hear claims against

corporations for alleged crimes under international law. The Second Circuit, however, had held otherwise—finding that claims for crimes under international law could not be asserted against corporations.

Jesner should have resolved this circuit split conclusively. Specifically, the logic of its holdings has equal application to *any* corporation, because either (i) the reference point is liability under *international* law—not the domestic law of any one nation; and/or (ii) the foreign-policy implications of recognizing the claims at issue are magnified by attempting to distinguish between non-U.S. and U.S. companies. Yet, the Ninth Circuit’s decision serves only to render *Jesner*’s guidance a nullity and worsen the prior split by creating an artificial distinction between corporate entities based on corporate citizenship. This Court’s review therefore is urgently required to prevent the post-*Jesner* holding below from unwinding the analysis applied in *Sosa* and *Jesner*.

ARGUMENT

I. THE NINTH CIRCUIT’S DECISION CANNOT BE RECONCILED WITH THIS COURT’S LIMITS ON THE JURISDICTIONAL SCOPE OF THE ALIEN TORT STATUTE

The decision below held that a U.S. company can be sued under the Alien Tort Statute, 28 U.S.C. § 1350 (the “ATS”) for alleged crimes under international law. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018), *modified in other respects by* 929 F.3d 623 (9th Cir. 2019) (denying defendants’ petition for a panel rehearing or rehearing en banc). The Ninth Circuit’s decision, however,

is irreconcilable with the reasoning in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). While *Jesner* held that the ATS could not support claims against non-U.S. corporations for alleged violations of international law, the rationales used apply equally to domestic corporations. In concluding otherwise, the decision below raises a substantial federal question because it impermissibly expands the scope of federal jurisdiction under the ATS and ignores both prongs of the rigorous analysis this Court mandated in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and *Jesner*.

A. THIS COURT HAS DEVELOPED A RIGOROUS TEST FOR EVALUATING ASSERTIONS OF FEDERAL JURISDICTION UNDER THE ATS.

The ATS provides for federal jurisdiction as to “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.” In *Sosa*, the Court held that the ATS is “strictly jurisdictional” and does not by its terms define the content of causes of action under international law. 542 U.S. at 713. As reaffirmed in *Jesner*, the ATS must be interpreted narrowly to avoid the impermissible judicial expansion of federal jurisdiction absent an act of Congress, including because that expansion necessarily implicates serious separation-of-powers and foreign-policy concerns. *Jesner*, 138 S. Ct. at 1398 (citing *Sosa*, 542 U.S. at 727-28). For these reasons, this Court has admonished that ATS claims must be “subject to vigilant doorkeeping.” *Id.* (quoting *Sosa*, 542 U.S. at 729).

Before recognizing a cause of action under international

law, federal courts must apply *Sosa*'s rigorous two-part test. A plaintiff first must demonstrate that the alleged violation of the law of nations involves a norm under international law that is "specific, universal, and obligatory." 542 U.S. at 732 (internal quotation marks omitted). If that initial burden is met, the court then must determine whether recognizing a particular claim under the ATS is a proper exercise of judicial discretion or whether the political branches must grant specific authority before finding jurisdiction. *Id.* at 732-33 & nn. 20-21. Underscoring the narrowness of this test, the Court stressed that courts should require ATS claims "based on the present-day law of nations to 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 we have recognized." *Id.* at 725. Applying this test in *Sosa*, the Court held that "arbitrary arrest" had not reached the level of a norm under international law. *Id.* at 735-36. The Court also observed that the implications of recognizing this claim "would be breathtaking." *Id.* at 736. It "would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment." *Id.*

In *Jesner*, the Court applied *Sosa*'s specificity test to determine *who* may be subject to a particular claim for a violation of the law of nations. Accordingly, and notwithstanding the clarity as to the underlying crimes asserted in that case, the plurality examined whether there is a specific, universal, and obligatory international law norm imposing liability on corporations—in *Jesner*, a

non-U.S. banking company—for acts of their employees that contravene fundamental human rights. *See id.* at 1399-1402.

After noting that defendants prosecuted under the Nuremberg Charter were limited to natural persons, the plurality recognized that subsequent international human rights tribunals had continued that limitation. *Id.* at 1400-01. Most importantly, the Court observed that the nations of the world, in fashioning the Rome Statute delineating the International Criminal Court, limited the tribunal's jurisdiction to natural persons, including by *expressly* rejecting a proposal that would have granted the tribunal jurisdiction over corporations. *Id.* at 1401. The reference to the Rome Statute is particularly important here because that treaty encompasses crimes that are at issue in this case, *i.e.*, crimes against humanity. Rome Statute of the International Criminal Court, art. 7, Jul. 1, 2002, , 2187 U.N.T.S. 90, 93-94. The plurality concluded that these authorities, among others, established the “international community’s conscious decision to limit the authority of these international tribunals to natural persons” and this “counsel[ed] against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.” *Jesner*, 138 S. Ct. at 1401.

Given the constitutional implications of interpreting the ATS in a way that expands federal jurisdiction, the plurality next considered whether any analogous statutes supported extending ATS jurisdiction to include non-U.S. corporations accused of crimes under international law. *Id.* at 1403-05. The plurality found that its analysis of the obvious analog, the Torture Victim Prevention Act

(“TVPA”) under the ATS, was all but dispositive of the question. 138 S. Ct. at 1404. The TVPA is the only cause of action created by Congress under the ATS. In creating a remedy for torture in violation of international law, Congress “took care to delineate the TVPA’s boundaries,” and those boundaries excluded liability for corporations. *Id.* at 1403-04. The plurality concluded that the TVPA’s narrow scope illustrated the foreign-policy concerns that required the courts to “draw a careful balance in defining the scope of actions under the ATS.” *Id.* at 1404. Similar to what the Court observed in *Sosa*, the plurality then noted the implications of broadly recognizing corporate liability for crimes under the law of nations, including that doing so would hinder global investment in developing economies where American corporations could be subject to massive liability for the acts of their employees and subsidiaries abroad. *Id.* at 1405-06.

The decision below eschewed this rigorous two-part test in simply applying a pre-*Jesner* ruling by the Ninth Circuit that had allowed corporations to be sued under the ATS for claims arising under international law. That concern is no less acute in this case, where the court below interpreted international law to allow suits against domestic corporations by foreign plaintiffs for alleged injuries occurring entirely abroad. *Doe*, 906 F.3d at 1124.

**B. BY FAILING TO APPLY *SOSA* AND *JESNER*,
THE NINTH CIRCUIT DRAMATICALLY
EXPANDED FEDERAL JURISDICTION.**

Jesner highlighted in two ways the importance of *Sosa*’s specificity requirement in ensuring that the federal courts are vigilant doorkeepers of federal jurisdiction under the ATS. The Ninth Circuit ignored both prongs

of *Sosa*'s holding in its analysis.

First, Jesner shows that in assessing potential claims under the ATS, federal courts must apply the same rigor in assessing *who is a proper party* under universally accepted international law as in determining *the elements of a specific crime*. *Jesner* confirms that when *Sosa* referred to the “specificity comparable to the features of the 18th-century paradigms,” 542 U.S. at 725, it meant a specificity going *beyond* the elements of the crime at issue. It means that, as part of vigilant doorkeeping, this Court requires specificity as to more than the bare elements of a purported international law claim. Rather, the Court requires developed normative clarity on the underlying supporting structure of the international law claim asserted.

That this type of specificity existed in the 18th century is confirmed by the law of piracy and prize—two of the most prevalent 18th-century paradigms of international law when the ATS was enacted—and is shown in decisions like *The Paquete Habana*, 175 U.S. 677 (1900). There, this Court looked to the international law of prize for its rule of decision in an admiralty case where there was no federal common law rule. *Id.* at 686. The depth of the Court’s decision shows the level of specificity that delineated a well-recognized 18th-century paradigm of international law: The law of prize had developed remarkably well beyond the elements of the claim itself. *Id.* at 686-712 (parsing multiple sources of international law regarding detailed aspects of claim at issue). In *The Paquete Habana*, the precise rules of prize law encompassed differences relating to the purpose of the vessel seized and even whether the fish in a ship’s hold were being

transported to port alive or dead. *Id.* at 713-14.

Applying that logic here highlights the significant federal question created by the Ninth Circuit's truncated analysis below. Since at least the Nuremberg trials, "the principle of individual liability for violations of international law has been limited to natural persons . . . because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an 'international crime' has rested solely with the individual men and women who have perpetrated it." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010). As explained at Nuremberg: "Crimes 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 (United States v. Goering)*, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946). Since then, no international tribunal considering human rights claims—including claims like those asserted here—has deviated from that principle.

As also ignored by the Ninth Circuit, not all nations of the world derive their corporate law from the Anglo-American legal system. Nations disagree strongly on what corporate liability looks like across a broad range of issues that have direct bearing on how any criminal claim under international law might apply to a corporate entity. For example, there are significant differences around whether corporations may be liable for all crimes or only specifically enumerated crimes. *See, e.g.*, Cristina de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, 4 Wash. U. Global Stud. L. Rev. 547, 552 (2005) (comparing Australia (all crimes) to France

(limited enumerated crimes)). Thus, corporations are not routinely treated in the same way as natural persons. This divergence grows when considering *who* can incur liability for the corporation as a whole.

The U.S. model fully embraces the *respondeat superior* approach, wherein a corporation is liable if (i) an agent, (ii) acting within the scope of his/her employment, (iii) with the intent to benefit the corporation violates the law. *See id.* at 553. That is not the rule in other countries, such as France, where only acts committed by key corporate officers are attributable to the corporate person. *Id.* at 554. Even the definition of corporate *mens rea* lacks cohesion. Some jurisdictions, including the United States, consider the “corporate culture” when attributing intent to a corporation’s wrongdoing. *Id.* at 558. Other nations, however, look only to the mindset of the key actors whose actions can be attributed to the corporation at all. *Id.* at 556-57.

It was, no doubt, these types of issues that led to the rejection of the Rome Statute provision on corporate liability cited in *Jesner*. *See Jesner*, 138 S. Ct. at 1401. More importantly, these issues highlight what was recognized in *Sosa* and *Jesner*, that it is for the executive and legislative branches to determine how the United States will navigate these differences. *See Jesner*, 138 S. Ct. at 1407-08; *Sosa*, 542 U.S. at 727. These are complex issues, with significant legal, economic, and foreign-policy consequences, and it is not for the federal courts to expand their jurisdictional reach without rigorously applying the analysis applied in *Sosa* and *Jesner*. That is something the Ninth Circuit failed to do, with consequences that reach any U.S. company operating abroad.

Second, *Jesner* shows how the specificity requirement relates to and supports *Sosa*'s expressed concern that courts refrain from extending the jurisdictional reach of the ATS absent an affirmative act of Congress. *Sosa*'s concern over congressional action was driven by the separation-of-powers and foreign-policy concerns inherent in discovering and applying international law in U.S. courts. Thus, in addition to noting the "breathtaking" implications of broadly recognizing claims for arbitrary arrest under international law, the Court observed that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727, 736. Accordingly, the Court held that "we have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728.

Similarly, in *Jesner*, even after finding that there was no universal norm supporting corporate liability, the plurality continued its analysis with respect to what Congress had done in enacting—and limiting—the TVPA. *Jesner*, 138 S. Ct. at 1403-04. As in *Sosa*, the majority also then considered the negative implications of expanding federal jurisdiction in ways that created significant foreign-policy issues. *Id.* at 1406-07; *see also Sosa*, 542 U.S. at 727 ("[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in

managing foreign affairs.”). The Ninth Circuit ignored all of this, thereby creating a distinction that exists nowhere in international law *and* creates real foreign-policy issues with respect to U.S. companies operating abroad. U.S. companies can now be sued in some federal courts under the ATS, while non-U.S. companies – even those related to U.S. companies – cannot be sued in any federal court for the exact same claims. The Ninth Circuit nowhere considered the logic or implications of its holding and thereby dramatically broadened the scope of ATS jurisdiction.

II. BY SUMMARILY APPLYING ITS PRE-*JESNER* PRECEDENT, THE NINTH CIRCUIT CREATED A DIRECT CONFLICT WITH *JESNER* AND *SOSA*

Prior to *Jesner*, four circuit courts had held that the ATS allows federal courts to hear claims against corporations for alleged crimes under international law. *See, e.g., Doe I v. Nestle USA, Inc.* (“*Nestle I*”), 766 F.3d 1013, 1022 (9th Cir. 2014) (applying *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) (en banc), *vacated on other grounds by Rio Tinto PLC v. Sarei*, 569 U.S. 945 (2013)); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds by Doe VIII v. Exxon Mobil Corp.*, 527 F. App’x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). The Second Circuit, however, had held otherwise—finding that claims for crimes under international law could not be asserted against corporations. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010).

Jesner should have resolved this circuit split. Specifically, the logic of its holdings has equal application to any corporation, non-U.S. or U.S. because either (i) the reference point is liability under *international* law—not the national law of any one nation; and/or (ii) the foreign-policy implications of recognizing the claims at issue are magnified by attempting to distinguish between non-U.S. and U.S. companies. Yet, the Ninth Circuit’s decision serves only to render *Jesner*’s guidance a nullity and worsen the prior split by creating an artificial distinction between corporate entities based on corporate citizenship. Without any analysis of *Jesner*, the Ninth Circuit simply reaffirmed in its entirety the holding in *Nestle I*, which relied on and applied *Sarei*, save for the holding that the ATS extended to non-U.S. corporations. *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018) (stating without discussion that “*Jesner* did not eliminate all corporate liability under the ATS”), *modified in other respects by* 929 F.3d 623 (9th Cir. 2019) (denying defendants’ petition for a panel rehearing or rehearing en banc).

But this Court’s rigorous analysis of corporate liability in *Jesner* required that the Ninth Circuit reexamine its holding in *Sarei* to reconsider the status of claims against domestic corporations. Had the lower court done so, it would have been compelled to conclude that *Jesner* left no room to hold that the ATS could accommodate a distinction between U.S. and non-U.S. corporations, and that no aspect of *Sarei* remains good law. Indeed, this was precisely the argument of the five circuit judges dissenting below, who would have held that *Sarei* was no longer good law because, under either prong of the *Sosa* test as applied in *Jesner*, “corporations are no longer viable ATS defendants.” *Doe v. Nestle S.A.*, 929 F.3d 623, 627 (9th Cir. 2019).

First, Sarei made no mention of the Rome Statute and the import of the nations of the world rejecting a universal norm as to corporate liability in a treaty codifying the very crimes under international human rights law that are at issue here. Instead, in *Sarei*, the Ninth Circuit relied on a case decided by the International Court of Justice (“ICJ”) to discover a universal rule allowing corporate liability for crimes under international law—a reliance that was flawed. *See Sarei*, 671 F.3d at 759-60. As an initial matter, by the very U.N. legislation that created it, the ICJ *itself* does not treat its rulings as having binding force under international law outside of any given case. *See* Statute of the International Court of Justice, art. 59, Oct. 24, 1945. Thus, as compared to the actions of all U.N. states in formulating the Rome Statute, which are indicative of what the nations of the world consider universal obligatory norms, the ICJ does not view its rulings as creating universal norms under international law.

More importantly, the Ninth Circuit in *Sarei* relied upon an ICJ ruling that found only that “a state may be responsible for genocide committed by groups or persons whose actions are attributable to states.” *Sarei*, 671 F.3d at 760 (quoting *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. 43 (Feb. 26)). But the question in *Bosnia and Herzegovina* concerned whether certain amorphous groups or persons comprised *individuals* whose acts could be attributed to a state. *Id.* at 161 (“[T]he Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent

under [the] rules of State responsibility . . .”). The ICJ said nothing about, nor even considered, the liability of synthetic persons – like corporations – for crimes under international law.

In ignoring *Jesner*'s analysis, the Ninth Circuit also overlooked that the nations of the world are capable of explicitly addressing the reach of international law, including when that reach extends to corporations. For example, in contrast to the Rome Statute (which rejected any form of corporate liability), the Convention Against Transnational Organized Crime allows for liability as to non-natural persons such as corporations. But what is striking is that the treaty expressly recognizes that corporate liability is not uniform, and will be tailored to the specific laws of each State Party. Convention Against Transnational Organized Crime, Nov. 15, 2000, S. Treaty Doc. 108-16, 2225 U.N.T.S. 209. Article 10 states that each State Party shall adopt measures regarding “legal persons” as are “consistent with its legal principles” to combat racketeering crimes delineated in the treaty. These measures, again subject to the legal principles of any given State Party, may be criminal, civil or administrative—and are “without prejudice to the criminal liability of the natural persons who have committed the [delineated] offences.” *Id.* art. 10(3).

Similarly, Article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 2802 U.N.T.S. 225, 230, done Dec. 17, 1997, S. Treaty Doc. No. 105-43, provides that each State “shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery

of a foreign public official.” The commentaries to the treaty then drive home the point that corporate liability under this treaty may not be uniform nor universal by stating: “In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.” Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on Nov. 21, 1997, para. 20.²

2. As the Second Circuit correctly understood, while these treaties might “suggest a trend towards imposing corporate liability in *some special contexts*,” they cannot—especially in light of the Rome Statute—establish that corporate liability has been recognized as a universal and obligatory norm under the customary international law of human rights. *See Kiobel*, 621 F.3d 111, 141 (2d Cir. 2010) (emphasis in original). *Kiobel* also correctly recognized that writings on international law confirm that there is no norm of corporate liability under international human rights law that is specific, universal, and obligatory. *See, e.g.*, Milena Sterio, *Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act*, 50 Case W. Res. J. Int’l. L. 127, 150 (2018) (“International law does not contain a universal norm on civil corporate liability . . .”). As *Kiobel* explained, leading academics have concluded that customary international law does not recognize liability for corporations that violate its norms. 621 F.3d at 143. Even those who favor using the ATS against corporations acknowledge “the universe of international criminal law does not reveal any prosecutions of corporations per se.” *Id.* at 143-44 (internal quotation marks omitted). Tellingly, when *Kiobel* was decided, “most proponents of corporate liability under customary international law discuss[ed] the subject as merely a possibility or a goal, rather than an established norm of customary international law.” *Id.* at 144 n. 48. That remains true today, with one scholar speculating that perhaps “the growing trend in legal systems in Europe, Asia, and South America to incorporate

These treaties also underscore the expressed concerns of the *Jesner* majority by highlighting the divergence of views around how different nations understand corporate liability.

Second, *Jesner* makes abundantly clear that *Sarei* misapplied *Sosa* in its attempt to draw congressional support for ATS corporate liability from the language and legislative history of the ATS itself. *See Sarei*, 671 F.3d at 747-48. Rather than identifying any congressional support for its conclusion, *Sarei* turned *Sosa* on its head by concluding that the *absence* of legislative evidence was dispositive. *See id.* at 748 (concluding that there was “no such legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended”). This reasoning is directly counter to the analysis applied in *Sosa* and *Jesner*, which demand *affirmative* expressions of congressional action before a federal court expands federal ATS jurisdiction. Put another way, the Ninth Circuit never stopped to consider why, absent an express affirmative act of Congress, international law should be different for domestic corporations as opposed to foreign corporations. As noted above, the Seventh, Eleventh and D.C. Circuits reached equally flawed holdings prior to *Jesner*. This Court’s review is thus urgently required to prevent the post-*Jesner* holding below from unwinding the analysis enunciated and applied in *Sosa* and *Jesner*.

extraterritorial corporate liability for international crimes” will one day “bring the issue of corporate liability back to the agenda of the state parties” to the Rome Statute. *See* Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 *The Geo. Wash. Int’l. L. Rev.* 351, 353-54 (2016).

CONCLUSION

For the foregoing reasons, the Cato Institute respectfully requests that this Court grant certiorari and reverse the holding below with respect to corporate liability under the ATS.

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