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, INC.,

Petitioner,

v.

JOHN DOE I, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CHEVRON CORPORATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

Chevron Corporation is an integrated energy company with affiliates and subsidiaries that conduct business in approximately 180 countries. Chevron's affiliates and subsidiaries engage in every aspect of the oil and natural gas industry, including exploration and production, refining, marketing, and transportation.

Because of its affiliates' and subsidiaries' worldwide operations, Chevron has a strong interest in the proper interpretation of the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Corporations with a global presence like Chevron have been subjected to ATS claims that seek enormous damages for alleged wrongdoing by third parties—usually foreign governments—in foreign countries. Chevron recently won a motion to dismiss in one such suit, the appeal of which is now before the Ninth Circuit and presents questions similar to those raised by Petitioners. *See Brill v. Chevron Corp.*, No. 18-16862 (9th Cir.). Chevron has also been a defendant in several other ATS cases that alleged similar theories. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) (claim based on Saddam Hussein's human rights violations); *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (claim based on actions by Nigerian law enforcement).

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[1] In accordance with Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented in writing to the filing of this brief.

The enduring uncertainty over who may be sued under the ATS, and for what conduct, significantly burdens corporations like Chevron that have operations and investments overseas, particularly in developing countries. *Bowoto*, in particular, illustrates this problem. The *Bowoto* plaintiffs were Nigerian citizens who forcibly took over an oil platform in Nigeria operated by a Nigerian subsidiary of Chevron, held the workers hostage, and were allegedly injured by Nigerian law enforcement officers who removed them. The plaintiffs sued Chevron under the ATS for the conduct of the Nigerian law enforcement officers in freeing the hostages, on the ground that Chevron's Nigerian subsidiary had requested law enforcement help.

The *Bowoto* plaintiffs sued in 1999, and nine years of pretrial proceedings ensued, much of it spent trying to reconstruct what happened in Nigeria without the aid of discovery from the Nigerian authorities who were the primary actors. The Nigerian government refused to participate in the action, criticizing it as "contrary to all acceptable concepts of sovereignty" and "destined to undermine the mutually beneficial relationship" between Nigeria and the United States. Udoma Decl., Exh. A, *Bowoto v. Chevron Corp.*, No. 99-02506 (N.D. Cal. Filed Jan. 13, 2006), ECF No. 867-1 [hereinafter Letter from Nigerian Attorney General]. Ultimately, after a five-week trial in 2008—which focused on whether the Nigerian authorities' use of force against the Nigerian plaintiffs in Nigeria was excessive—the jury unanimously found for Chevron on all claims. The litigation finally ended after 13 years in 2012, when this Court denied certiorari following the Ninth Circuit's ruling affirming the judgment.

Bowoto, 621 F.3d 1116, *cert. denied*, 566 U.S. 961 (2012).

Chevron unequivocally condemns human rights abuses, and is committed to conducting its global commercial affairs in a lawful and responsible manner that is respectful of all persons wherever it does business. But Chevron also has a vital interest in ensuring that federal courts do not continue to indulge unduly broad applications of the ATS.

Chevron endorses Petitioners' arguments for review of both the extraterritoriality question and the corporate liability question identified by the Petitions. This brief will focus on a critical issue underlying the corporate liability question that affects all ATS litigation: a fundamental dissonance between this Court's decisions in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018). Had the Ninth Circuit applied *Jesner*'s strict limits on judge-made ATS causes of action, it would have rejected ATS liability not just for foreign corporations but also for domestic corporations. There is a pressing need for this Court to clarify that *Jesner* requires the lower courts to abandon the permissive approaches to ATS liability they adopted under *Sosa*.

SUMMARY OF ARGUMENT

The decision below that domestic corporations may be sued under the ATS highlights a disruptive tension between *Jesner* and *Sosa* regarding the basic separation-of-powers analysis that must be applied to any potential ATS cause of action. *Jesner* rejected the more permissive approach that many courts followed after *Sosa*, and held that this Court's heavy presumption against implied causes of action applies with

"particular force" to ATS actions. This strict limit on judicial lawmaking was enough—standing alone—to preclude judicial creation of ATS liability extending to foreign corporations. *See Jesner*, 138 S. Ct. at 1403.

The Ninth Circuit failed to apply this strict separation-of-powers analysis, evidently believing (erroneously) that *Jesner* left intact the less-demanding standards the Ninth Circuit had applied under *Sosa*. This failure to recognize the new analysis required by *Jesner* undermines this Court's separation-of-powers holding and permits the continued undisciplined proliferation of judge-made ATS causes of action. This Court's intervention is necessary to clarify that *Jesner* requires a far stricter analysis.

In addition, the substantive corporate liability issue raised by Petitioners is independently worthy of review. This issue implicates a longstanding split in authority and would resolve a high percentage of ATS cases at the threshold. Moreover, the result below cannot be squared with *Jesner*'s reasoning. The heavy presumption against judge-made liability—which was an independently sufficient ground for *Jesner*'s holding about foreign corporations—similarly precludes judicial creation of an ATS cause of action against domestic corporations. And the same is true for the alternative bases on which the members of the *Jesner* majority rejected the creation of ATS liability for foreign corporations.

This Court should therefore grant the petitions for certiorari.

ARGUMENT

I. This Court's Intervention Is Necessary to Clarify the Strict Limits on Judicial Creation of ATS Causes of Action.

The decision below underscores a pressing need for this Court's intervention that goes beyond the splits in authority identified by Petitioners. By ignoring the stringent limits *Jesner* placed on judicial recognition of ATS liabilities—limits so strict they arguably "preclude courts from *ever* recognizing any new causes of action under the ATS," 138 S. Ct. at 1403 (emphasis added)—the Ninth Circuit's opinion highlights a tension between *Jesner* and *Sosa* that undermines those fundamental restrictions.

Before *Jesner*, many lower courts interpreted *Sosa* as authorizing a relatively permissive approach to creating international-law rights of action under the ATS. *Sosa* seemed to underplay this Court's normally strong presumption against implying causes of action when it stated that the presumption was a mere "reason[] . . . for judicial caution," 542 U.S. at 725, 727, and did not treat that consideration as dispositive. *Id.* at 729. The Court instead imposed a requirement that any ATS cause of action must be premised on an international-law norm "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" thought to have motivated passage of the ATS. *Id.* at 725.

Sosa described this requirement as a mere first step "to raise even the possibility of a private cause of action." *Id.* at 738 n.30. It contemplated a second-

step determination of whether authorizing a particular ATS claim would be "a proper exercise of judicial discretion, or instead" must await action by "the political branches." *Jesner*, 138 S. Ct. at 1399 (citing *Sosa*, 542 U.S. at 732–33). But *Sosa* itself did not reach the second step—the claim there failed the first step—or specify how to apply it. And many lower courts failed to recognize that any second step was required. Those courts, including the Ninth Circuit, interpreted *Sosa* as effectively permitting judge-made ATS claims anytime they concluded that the first step's definition-and-acceptance requirement was satisfied—with no other prerequisite and no consideration of the usual presumptions against judicial creation of private rights of action. *See, e.g.*, *Doe v. Drummond Co.*, 782 F.3d 576, 583 (11th Cir. 2015) ("[T]he ATS empowers federal courts to recognize private claims under federal common law, when those claims sufficiently state an international law violation with the requisite definite content and acceptance among civilized nations.") (internal quotation marks omitted); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 764 (9th Cir. 2011) (en banc) (international-law prohibition on war crimes is actionable under ATS because it is "sufficiently specific, obligatory, and universal"), *vacated on other grounds*, 569 U.S. 945 (2013); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 117 (2d Cir. 2008) ("Whether an alleged norm of international law can form the basis of an ATS claim will depend upon whether it is (1) defined with a specificity comparable to these familiar paradigms; and (2) based upon a norm of international character accepted by the civilized world.").

As a result, despite *Sosa*'s statement that the door to possible ATS claims was merely "ajar" and needed "vigilant doorkeeping," 542 U.S. at 729, lower courts have authorized a plethora of ill-defined substantive causes of action extending far beyond the limited international-law norms mentioned in *Sosa*. *See, e.g.*, Jury Instructions at 9, *Bowoto*, No. 99-02506 (N.D. Cal. Filed Nov. 24, 2008), ECF No. 2246 (cruel, inhumane, or degrading treatment). And they have used *Sosa* to extend liability to corporations and to engraft aiding-and-abetting and other forms of secondary liability onto ATS causes of action. *See, e.g.*, *Sarei*, 671 F.3d at 765 ("customary international law gives rise to a cause of action for aiding and abetting a war crime under the ATS"). Notwithstanding *Sosa*'s "mood . . . of caution," *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1016 (7th Cir. 2011) (Posner, J.), what ensued in the lower courts was a broad expansion of ATS claims. *See, e.g.*, Stephen Breyer, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 156 (2015) ("Many lower courts seemed to find in *Sosa* a green light, not a note of caution."); John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2, 5 (2009) ("ATS litigation continues largely unabated, despite the Supreme Court's attempt in *Sosa* to rein it in . . . almost four years later, litigation has showed no signs of slowing down.").

Jesner made clear that this permissive approach is inconsistent with fundamental limits on the judicial role. Invoking "separation-of-powers concerns," *Jesner* held that "this Court's general reluctance to extend judicially created private rights of action" is not

simply a "reason" for restraint with the ATS (as *Sosa* put it) but rather a critical limit "on the authority of courts," which typically "'*must* refrain from creating [a] remedy'" when Congress has not itself done so. 138 S. Ct. at 1402–03 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)) (emphasis added). Whereas *Sosa* suggested that the strong disfavor for implied rights of action had less force with the ATS, *see* 542 U.S. at 727, *Jesner* made clear that the ATS creates no "exception to these general principles." 138 S. Ct. at 1403. Indeed, *Jesner* emphasized that the heavy presumption against implied causes of action applies with "particular force" to judicial recognition or expansion of ATS liabilities, because Congress is better equipped than the judiciary to assess the foreign-policy implications inherent in ATS litigation. *Id.*

This holding of *Jesner*—which sets a bar so high that, as noted, it arguably "preclude[s] courts from *ever* recognizing any new causes of action under the ATS," *id.* (emphasis added)—requires an analysis far stricter than the permissive approach many lower courts interpreted *Sosa* to countenance. Some lower courts have expressly recognized that *Jesner* corrects the permissive view of *Sosa*. *See, e.g.*, *Doe I v. Exxon Mobil Corp.*, 391 F. Supp. 3d 76, 91–93 (D.D.C. 2019). But others, exemplified by the Ninth Circuit below, have not.

The stricter analysis *Jesner* requires was argued to the Ninth Circuit. Yet, as the dissent from denial of en banc review observed, *see* Nestle Pet. App. 8a–9a, the court's opinion did not even acknowledge the approach *Jesner* requires, much less purport to find any basis on which domestic corporate liability could overcome the strong presumption against judge-made

ATS claims. Instead, the Ninth Circuit treated *Jesner* as if it left undisturbed that court's expansive pre-*Jesner* approach under which all "universal" norms are actionable. As the Ninth Circuit put it, because "*Jesner* did not eliminate all corporate liability under the ATS, . . . we . . . continue to follow *Nestle I*'s holding as applied to domestic corporations." Nestle Pet. App. 13a.[2]

This failure to perceive and apply the analysis required by *Jesner* reflects an unsettling dissonance between *Sosa* and *Jesner*. Perhaps because *Jesner* drew on and described its analysis as "consistent" with *Sosa*—and did not expressly disapprove the permissive approach of many courts interpreting *Sosa*—it was not sufficiently clear to courts like the one below that *Jesner* required a fundamentally different, and stricter, analysis. The decision below highlights the need to make even clearer that *Jesner* definitively ended ATS exceptionalism, and established that this Court's long line of jurisprudence limiting judge-made causes of action applies with full force to the ATS.

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[2] Other courts have also read *Jesner* narrowly. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 320 F. Supp. 3d 781, 784 & n.4 (E.D. Va. 2018) (professing "serious doubts about whether *Jesner* required" that ATS claims overcome any presumption against judicial creation and stating that the "better reading" was that separation of powers concerns would prevent judicial recognition of ATS liabilities only in the "exceptional case")*; Estate of Alvarez v. Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 648 (D. Md. 2019) ("declin[ing] to apply . . . literally" *Jesner*'s "dictum" that "'if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress'" (quoting *Jesner*, 138 S. Ct. at 1402)).

This case thus presents the Court with an opportunity not only to correct the Ninth Circuit's unjustified disregard of *Jesner*'s requirements, but also to resolve the serious tension between *Jesner* and *Sosa*, and thereby to clarify the constraints on judicial creation of ATS liabilities. Permitting continued lower-court disregard of those constraints would mean ongoing judicial encroachment into judgments properly reserved for Congress and the Executive; ongoing assertions of federal jurisdiction over cases where no federal cause of action properly exists; ongoing divergence between those courts that adhere to *Jesner*'s restrictions and those that take a permissive approach to judicial creation of ATS liabilities; and ongoing imposition of unjustified costs on defendants for cases that have no place in a federal court.

Accordingly, even aside from the splits identified by Petitioners, this case raises important and broadly applicable issues that require this Court's intervention.

II. Whether *Jesner* Permits ATS Liability for Domestic Corporations Is an Exceedingly Important Question That Has Divided the Lower Courts, and That the Ninth Circuit Decided Incorrectly.

The principal issue in this case to which the *Jesner* analysis applies—whether courts (without Congress's directive) may create causes of action for corporate liability under the ATS—is independently worthy of this Court's intervention, and was wrongly decided below.

This Court has repeatedly recognized the importance of this question, having twice granted certiorari to resolve the enduring circuit split on it. *See Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 114 (2013); *Jesner*, 138 S. Ct. at 1395. In *Kiobel*, however, the Court did not reach the question because the plaintiffs' claims were impermissibly extraterritorial. And in *Jesner*, the Court limited its holding (though not its reasoning) to foreign corporations like the one before it.

The lower-court conflict that brought *Kiobel* and *Jesner* to this Court thus persists. The Second Circuit still holds that domestic corporations cannot be liable under the ATS. *See Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 121 (2d Cir. 2011), *aff'd on other grounds*, 569 U.S. 108 (2013); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219–20 (2d Cir. 2016). The Ninth Circuit squarely disagrees, even after *Jesner*. *See* Nestle Pet. App. 38a–39a. And other lower courts have divided over *Jesner*'s impact on the question. *Compare Doe I*, 391 F. Supp. 3d at 78 (declining "to recognize domestic corporate liability under the ATS" in light of the reasoning in *Jesner*), *with Estate of Alvarez*, 373 F. Supp. 3d at 646 (holding that *Jesner* "did not preclude the possibility" of ATS liability for domestic corporations, for whom "the need for judicial caution is markedly reduced"), *and Al Shimari*, 320 F. Supp. 3d at 787 & n.6 (concluding that "the *Jesner* Court did not intend to disturb" the circuit split over ATS liability "with respect to domestic corporations").

Moreover, the decision below is plainly incorrect. Under *Jesner*'s reasoning, domestic corporations cannot be liable under the ATS. This is so for two reasons

corresponding to the two independent bases of the decision in *Jesner*. *First*, the separation-of-powers constraints that a majority of the Court found to be an independent ground of decision—in Part II.B.1 of *Jesner*—turn on the respective roles of the courts and Congress, not on the defendant's place of incorporation. And *second*, the various additional grounds cited by the five members of the majority apply to domestic corporations as well as to foreign ones.

A. The Separation-of-Powers Holding of *Jesner* Forecloses Judicial Creation of Any ATS Cause of Action Against Domestic Corporations.

Jesner's analysis leaves no doubt that courts must defer to Congress to decide whether to create an ATS cause of action against domestic corporations, just as *Jesner* held for foreign corporations. The separation-of-powers constraints on judicial creation of ATS causes of action—which was an independent ground of decision, in a portion of *Jesner* joined by a majority of the Court (Part II.B.1, 138 S. Ct. at 1403)—applies to all judicial creation and extension of causes of action, regardless whether the defendant is domestic or foreign. This is clear from the *Jesner* Court's express language, which highlights that the limitation on judicial creation of private rights of action applies with "particular force" to *all* ATS cases. *Id.* And it follows from the cases that *Jesner* cited in support of this holding—*Correctional Services Corporation v. Malesko*, 534 U.S. 61, 72 (2001), and *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001). *See Jesner*, 138 S. Ct. at 1402–03.

In *Malesko*, a case that implicated no foreign-policy concerns, the Court declined to create *Bivens* liability for corporate defendants because, as *Jesner* put it, that was "a question for Congress, not us, to decide." 138 S. Ct. at 1403 (citation and quotation marks omitted). Similarly, in *Sandoval*, the Court deferred to Congress and refused to create a private cause of action to enforce regulations under Title VI of the Civil Rights Act of 1964—again, an issue lacking foreign-policy implications. 532 U.S. at 286–87.

The separation-of-powers constraints on the judicial creation of federal causes of action are familiar ones. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Id.* at 287 (internal quotation marks omitted). This institutional constraint applies with full force to all potential causes of action, regardless of whether the prospective defendant is domestic or foreign. In either context, "private rights of action to enforce federal law must be created by Congress." *Id.* at 286.

Although these bedrock separation-of-powers principles apply broadly, *Jesner* noted that they have "particular force" in ATS cases because of the foreign-policy concerns "inherent in ATS litigation." 138 S. Ct. at 1403. "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns." *Id.* (citing *Kiobel*, 569 U.S. at 116–17). Accordingly, one of the cases *Jesner* cited was *Ziglar*, which declined to recognize a *Bivens* claim where doing so could implicate "sensitive issues of national security" that are "the prerogative of the Congress and President." 137 S. Ct. at 1861. *Jesner* thus underscored that the strong presumption against

implied causes of action applies fully, and indeed with special force, to the ATS.

The *Jesner* majority held that this stringent constraint on judge-made rights of action, alone, was sufficient reason to conclude that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations." 138 S. Ct. at 1403. Although the Court's majority addressed only the case before it—in which the defendant was a foreign corporation—none of its supporting reasoning turned on the corporate domicile, and precisely the same reasoning applies to domestic corporations. Indeed, the primary case on which the Court relied, *Malesko*, declined to extend *Bivens* liability to domestic corporations. It necessarily follows that judicial creation of an ATS cause of action against domestic corporate defendants would likewise be "inappropriate" "absent further action from Congress." *Jesner*, 138 S. Ct. at 1403.

B. The Additional Grounds Cited By the *Jesner* Plurality and Concurrences Also Preclude ATS Liability for Domestic Corporations.

In addition to the majority's separation-of-powers holding, the alternative bases provided by the five members of the *Jesner* majority for rejecting a cause of action against foreign corporations likewise compel the same conclusion for domestic corporations.

Justice Kennedy, writing for a plurality that included the Chief Justice and Justice Thomas, emphasized that the only cause of action that Congress has created for claims within the scope of the ATS—the Torture Victim Protection Act, 28 U.S.C. § 1350

note—limits liability to natural persons. 138 S. Ct. at 1403–04 (plurality op.) (citing *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 453–56 (2012)). Excluding corporate liability "reflects Congress' considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model." *Id.* at 1403. This reasoning applies equally to domestic and foreign corporations.

Likewise, the plurality explained that "the lack of a clear and well-established international-law rule [of corporate liability] is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so." *Id.* at 1405. This concern, too, applies equally to foreign and domestic corporations. And the same is true of the Court's concern about "establish[ing] a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts," and where "economic development . . . so often is an essential foundation for human rights." *Id.* at 1406.

Finally, in a portion of the opinion that commanded a majority, Justice Kennedy emphasized the risk of antagonizing foreign governments and harming rather than helping foreign relations—contrary to the goal of "harmony in foreign relations" that motivated passage of the ATS. *Id.* Although those risks may be marginally greater when a foreign corporation is the defendant, they raise serious concerns even when the defendant is a domestic corporation. Only

foreigners can sue under the ATS. These foreign plaintiffs typically allege injuries sustained on foreign soil, at the hands of foreigners, and typically implicate the conduct of foreign governments.[3] As the *Bowoto* litigation against Chevron illustrates (*see supra*, p. 1–2), even where the defendant is a domestic corporation, it is often sued for the conduct not just of foreign governments but also of its foreign affiliates (whether named or unnamed).[4] And, as various governments have complained in cases involving domestic corporations, ATS litigation can interfere with the struggle against international terrorism, infringe foreign sovereigns' rights to regulate matters within their territories, discourage foreign investment, and create tension between the United States and foreign sovereigns.[5] *See also Jesner*, 138 S. Ct. at 1406 (plurality

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[3] *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1017 (9th Cir. 2014); *Kiobel*, 569 U.S. at 113–14 (suing corporate defendants for "aiding and abetting the Nigerian Government" in crimes against humanity); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977–79 (9th Cir. 2007) (suing domestic corporation for selling bulldozers to Israel for its demolition program); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247, 248–51 (2d Cir. 2009) (suing corporate defendant for aiding and abetting human rights abuses by the Government of Sudan in Khartoum).

[4] *See, e.g.*, *Bowoto*, 621 F.3d at 1120–22; *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22–23, 25 (D.D.C. 2005); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004), *aff'd in part, vacated in part*, *sub nom. Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Mujica v. AirScan Inc.*, 771 F.3d 580, 584–85 (9th Cir. 2014).

[5] *See, e.g.*, *Exxon*, 393 F. Supp. 2d at 22; Br. for Gov'ts of United Kingdom and Australia as Amicus Curiae Supporting Appellees, Nos. 09-56381, 02-56256, 02-56390, 2009 WL 8174961, at *9 (Dec. 16, 2009), *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2013); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 553;

op.); *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc) (noting that the panel opinion allows "a single plaintiff's civil action to effect an embargo of trade with foreign nations"). These concerns provide "sound reasons to think Congress might doubt the efficacy or necessity," *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar*, 137 S. Ct. at 1858), of an ATS damages remedy against domestic corporations.

In addition to joining dispositive portions of Justice Kennedy's opinion, Justice Alito was separately even more skeptical of the possibility of corporate liability under the ATS. He explained that "[t]he ATS was meant to help the United States avoid diplomatic friction"—which it did by ensuring that federal courts could provide redress in circumstances in which other nations would view it to be required. *Id.* at 1410 (Alito, J., concurring). But Justice Alito saw no dispute "that customary international law does not *require* corporate liability as a general matter," *id.*, and accordingly saw no basis for the ATS to allow such liability. "[I]f customary international law does not require corporate liability," he explained, "then declining to create it under the ATS cannot give other nations just cause for complaint against the United States"—which, in turn, mandates restraint "under

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Br. for United States as Amicus Curiae Supporting Affirmance, No. 05-36210, 2006 WL 2952505, at 2, 13–14, 27–29 (Aug. 11, 2006), *Corrie*, 503 F.3d 974 (original image pagination) (United States objecting that suit against U.S. corporation would interfere with foreign relations with Israel); Letter from Nigerian Attorney General, *supra* (Nigerian government objecting to *Bowoto*).

Sosa." *Id.* Again, nothing about this analysis depends on whether the corporation is foreign or domestic.

Justice Gorsuch, in his concurrence, explained that he "would have gone even further." Nestle Pet. App. 15a. As he sees it, "a proper application of *Sosa* would preclude courts from *ever* recognizing any new causes of action under the ATS"—regardless of the defendant's identity. 138 S. Ct. at 1414 (Gorsuch, J., concurring).

* * *

In short, the conclusion that domestic corporations cannot be held liable under the ATS is dictated by the Court's reasoning in *Jesner*. Yet the Ninth Circuit, like other courts, closed its eyes to this and dismissed *Jesner*'s broader force in just a single sentence. *See* Nestle Pet. App. 13a ("*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations."). This Court should clarify the force of *Jesner* and reinforce the extreme caution courts must exercise when creating causes of action under the ATS.

CONCLUSION

For these reasons, the Petitions should be granted.

OCTOBER 28, 2019

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