No. 19-416

# In The Supreme Court of the United States

NESTLÉ U.S.A., INC.,

*Petitioner,*

v.

JOHN DOE I et al.,
INDIVIDUALLY AND ON BEHALF OF
PROPOSED CLASS MEMBERS,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether a claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extraterritoriality bar where the claim is based on violations of international law by aiding and abetting slavery and forced labor from the United States.

2. Whether domestic corporations are excepted from liability under the Alien Tort Statute despite the lack of an explicit exception in the statute.

## RELATED PROCEEDINGS

Another petition for a writ of certiorari seeks review of the judgment entered in *Doe I v. Nestlé, S.A.*, No. 17-55435 (9th Cir. July 5, 2019):

*Cargill, Inc. v. Doe I*, No. 19-453 (Oct. 3, 2019)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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## INTRODUCTION

This Court should deny the petition given that the court below expressly remanded this case with instructions for Respondents to amend their complaint and to provide further detail about Petitioner's domestic conduct so that the application of *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), can be determined on a complete record. Pet. App. 44a–45a, 46a. Respondents should have the opportunity to do so, particularly since this Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) set forth new requirements under the ATS, 28 U.S.C. § 1350, after their operative complaint was filed in 2016.

Petitioner claims the allegations here are too "scant" to overcome the extraterritoriality bar, but the adequacy of Respondents' pleadings should not be determined until they have had an opportunity to amend their complaint. Pet. 10. To the extent there is an issue about which conduct is attributable to Nestlé USA after the affiliated companies were dismissed pursuant to *Jesner*, this can only be determined after the complaint is amended.

Petitioner's argument that there is a circuit split on the issue of aiding and abetting in this context is over-stated. There is no circuit split as to whether a corporation aiding and abetting a law of nations violation is a cognizable ATS claim. The Circuits are aligned on the availability of aiding and abetting liability under the ATS. Here too, a decision on the applicable aiding and abetting standards should be

made after Respondents amend their complaint. Respondents' amended complaint will also address the traceability of Nestlé U.S.A.'s conduct and Article III standing.

The domestic corporate liability holding below is in accord with the decisions in the Fourth, Fifth, Seventh, Eleventh, and D.C. Circuits, in refusing to create a categorical rule barring corporate liability under the ATS. This Court has accepted the issue of domestic corporate liability twice before in *Kiobel* and *Jesner*. The Executive Branch filed *Amicus* briefs in these cases supporting corporate liability under the ATS. There are no foreign policy questions precluding corporate liability here. Moreover, corporate liability is especially appropriate here given the nature of the international prohibition on slavery, from which corporations are plainly not exempted.

The facts of this case are undisputed and troubling—child slave labor is atrocious—and the opportunity to amend is in the best interests of justice. Petitioner objects that the case has been pending for fourteen years, but it is Petitioner's repeated motions to dismiss and appellate procedures, not any actions by Respondents, that have occupied that time. Moreover, in all this time, the system of child slave labor in the Ivory Coast remains. A more fully developed factual record would substantially aid the Court's understanding of the extent of Petitioner's domestic activity as it relates to the allegations.

The petition should be denied.

## STATEMENT

### I. STATEMENT OF FACTS

Respondents are former child slaves who were trafficked from Mali and subsequently held in slavery on cocoa plantations in the Ivory Coast. Pet. App. 35a. Between the ages of twelve and fourteen, Respondents were forced to work on cocoa farms for twelve to fourteen hours per day, at least six days per week. *Id.* They were not paid for their work and were given only scraps of food to eat. ER 158-61 (No. 17-55435) (hereafter "ER").[1] Respondents were beaten with whips and tree branches when the guards felt that they were not working quickly enough. Pet. App. 35a; ER 158-61. Respondents were forced to sleep on the floor in a small, locked room with several other children. ER 158-61. Respondents knew that children who tried to flee the cocoa plantations would be severely beaten or tortured if caught. Pet. App. 35a. One Respondent, John Doe II, witnessed the guards cut open the feet of the other small children who tried to escape. *Id.*; ER 159. Another, John Doe III, witnessed small children who tried to escape being forced to drink urine by the guards when they were caught. Pet. App. 35a; ER 159.

Petitioner Nestlé USA is a large manufacturer, purchaser, processer, and retail seller of cocoa beans. Pet. App. 35a. At the time of filing Nestlé USA was headquartered in California (it since moved to

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[1] Except where otherwise indicated citations to "ER" refer to the excerpts of record in the appeal below, case No. 17-55435.

Virginia) and it sells Nestlé-brand products in the United States. Pet. App. 35a; ER 138. Every major operational decision regarding Nestlé's U.S. market, including the sourcing and supervision of its supply chain in the Ivory Coast, is made or approved in the United States. Pet. App. 35a.

Petitioner maintains an unusual degree of control over the cocoa market in the Ivory Coast because of its enormous buying power, and maintains that power by providing resources to plantations engaged in child slavery. Pet. App. 35a–36a. Petitioner knows these plantations use child slave labor yet deliberately continues to aid them in order to secure cocoa at the low cost it demands. Pet. App. 36a. Petitioner offers both financial and technical assistance to the cocoa farmers. *Id.* Petitioner controls the terms and conditions by which plantations produce and supply cocoa. ER 143. Petitioner maintains its influence on this slavery-based system in part by providing local farmers and/or farmer cooperatives with (1) ongoing financial support, including advance payments and personal spending money to maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers; (2) farming supplies, including fertilizers, tools and equipment; and (3) training and capacity building in particular growing and fermentation techniques and general farm maintenance, including labor practices. Pet. App. 36a; ER 144.

Through exclusive supplier and buyer relationships, Petitioner dictates the terms by which the plantations produce and supply cocoa, including the labor conditions under which the cocoa beans are

produced. Pet. App. 36a; ER 143. Training and quality control visits occur several times per year and require frequent and ongoing visits to the farms by Petitioner and their agents. Pet. App. 36a, 43a–44a. Petitioner disseminates this on-the-ground reporting to U.S. offices so U.S.-based decisionmakers can assess what actions take place in the Ivory Coast. ER 143. Due to these visits, Petitioner has firsthand knowledge of the child slave labor systems in the Ivory Coast. Pet. App. 36a.

A 2015 study conducted by Tulane University and funded by the U.S. Department of Labor found that the total number of children engaging in cocoa production, child labor, and hazardous work in cocoa-growing areas in West Africa increased more than thirty-eight percent from 2008–2009 to 2013–2014. *See* Sch. of Pub. Health and Tropical Med., Tulane Univ., *Final Report 2013/14 Survey Research on Child Labor in West African Cocoa Growing Areas*, at 44 (2015), available at https://tinyurl.com/ve8zbkg. The Ivory Coast produces seventy percent of the world's cocoa, a majority of which is imported to the United States by Petitioner and other major players. Pet. App. 34a–35a. Petitioner and the other named defendant in this litigation dominate the cocoa market by maintaining exclusive buyer-supplier relationships with Ivorian cocoa farmers engaged in child slavery. Pet. App. 36a. This is all done with the objective of securing the cheapest cocoa possible. *Id.*

Petitioner is well-aware of the endemic nature of child slavery on Ivorian cocoa plantations. Pet. App.

36a. The court of appeals held that Respondents adequately alleged that Petitioner both knew of and intended to use child slave labor to increase profits, and the actions taken by Petitioner support this conclusion. *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1025–26 (9th Cir. 2014). For example, Petitioner has actively lobbied against legislation intended to make its use of child slave labor transparent to the public. ER 155–57. In addition, Petitioner has continued to provide farmers that use child slave labor with technical and financial assistance, including unrestricted cash advances. Pet. App. 36a. Supplies provided by Petitioner include fertilizers, tools and equipment, as well as personal spending money to maintain farmers' loyalty as exclusive suppliers. *Id.*; ER 144. Defendants' employees frequently visit the farms to conduct training and quality control visits. Pet. App. 36a.

Petitioner aimed to quell the public concern over child slave labor, and misrepresent its ineffectual efforts to combat child slavery, by creating the Nestlé Cocoa Plan, purportedly "aim[ing] to improve the lives of cocoa farmers and the quality of their produce." Nestlé and International Cocoa Initiative, *Nestlé Cocoa Plan: Tackling Child Labor 2017 Report*, NESTLÉ (2017), https://tinyurl.com/u3v8rjx; ER 147–148, 157–58. Such statements were false. ER 147–48, 156.

Despite their in-depth knowledge of the use of child slave labor on cocoa farms in the Ivory Coast, Petitioner continues to facilitate the child slave labor system in a variety of other ways that contribute to

the maintenance of what amounts to chattel slavery on Ivory Coast plantations. Pet. App. 36a. Petitioner does so with the "goal of finding the cheapest sources of cocoa." Pet. App. 53a. In the United States, Petitioner published numerous statements to reassure consumers that they were monitoring and controlling their supply chains, while they did nothing to change the practices that allow child slavery to flourish. *See, e.g.*, ER 147–50. These actions were designed to mislead consumers and allow the companies to continue to reap profits from chocolate made with cocoa grown in West Africa by child slaves. ER 148, 150, 156. Child slavery in the Ivory Coast remains widespread today. *See, e.g.*, Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASHINGTON POST, June 5, 2019, available at https://www.washingtonpost.com/graphics/2019/busi ness/hershey-Nestlé-mars-chocolate-child-labor-west-africa/.

Petitioner has played, with Cargill and others, a crucial role in perpetuating and benefitting from the system that caused the Respondents' suffering.

## II. PROCEEDINGS BELOW

This case has been pending since 2006. During that time the relevant law substantially changed, requiring the parties to re-brief the issues and causing delay as the district and circuit courts considered and applied the new law to the parties' arguments. Below is a brief overview of the procedural history.

### A. Initial District Court Proceedings and Appeal

This case originated in July of 2005 when Respondents filed their initial complaint in the United States District Court for the Central District of California. After a round of briefing on Petitioner's motion to dismiss, the district court requested additional briefing on certain issues. C.A. ER 625–30 (No. 10-56739). At the end of 2006, the district court decided to stay the litigation pending the resolution, and subsequent rehearing, of a case then pending before the court of appeals, *Sarei v. Rio Tinto*, *PLC,* 550 F.3d 822 (2008). C.A. ER 499, 644 (No. 10-56739). The stay on the case was not lifted until January 2009. C.A. ER 646 (No. 10-56739).

Respondents filed their first amended complaint ("FAC") in July of 2009 on behalf of Malian child slaves who were forced to work on cocoa farms in the Ivory Coast, which allowed Petitioner and other listed Defendants to continuously obtain a "cheap supply of cocoa by maintaining exclusive supplier/buyer relationships with local farms and/or cooperatives in Côte d'Ivoire." C.A. ER 245, 251 (No. 10-56739). The FAC specifically alleged that Petitioner is "directly involved in the purchasing and processing of cocoa beans from Côte d'Ivoire" and maintained supplier/buyer relationships with several individuals running cocoa farms in the Ivory Coast. C.A. ER 251–52 (No. 10-56739).

After briefing and supplementation, the District Court granted Petitioner's Motion to Dismiss the

Amended Complaint on September 8, 2010. *Doe I v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1145 (C.D. Cal. 2010). Respondents appealed, and in late 2013 that decision was vacated. *Doe I v. Nestlé USA, Inc.*, 738 F.3d 1048, 1049 (9th Cir. 2013). Petitioner then filed a petition for rehearing by the panel and en banc. ER 193. In September 2014, the court withdrew its previous order and issued a new opinion, again vacating the district court's decision and remanding the case for further proceedings, denying the petition as moot. *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014). The following month, Petitioner filed a petition for rehearing en banc, which was denied on May 6, 2015. *Doe I v. Nestlé USA, Inc.*, 788 F.3d 946 (9th Cir. 2015). Petitioner then filed a petition for certiorari, which was denied by this Court on January 11, 2016. *Doe I v. Nestlé USA, Inc.*, 136 S. Ct. 798 (2016).

### B. Second Dismissal by the District Court and Appeal

After certiorari was denied, Respondents filed a Second Amended Complaint in July 2016, which incorporated new factual allegations. ER 132-169. The District Court granted Petitioner's motion to dismiss in March 2017, after requesting supplemental briefing but without oral argument. ER 14.

Respondents appealed and on October 23, 2018, the court of appeals reversed the district court's dismissal, holding that the allegations may state a domestic application of an ATS claim, and that Respondents should be able to amend their complaint

in light of the change in law represented by *Jesner*. Pet. App. 60a–62a.

A month later, Petitioner again filed a petition for panel rehearing and rehearing en banc. On July 5, 2019, the court of appeals issued an order amending its most recent opinion to add that Respondents had standing to bring their claims, denying Defendants' petition for rehearing. Pet. App. 1a-46a. The court's amended opinion again reversed the district court's dismissal of Respondents' claims. *Id.*

On September 25, 2019, Petitioner filed for a writ of certiorari, asking this Court to determine whether Respondents' allegations overcome the presumption against extraterritoriality and whether corporations may be liable under the ATS. Pet. (i).

Thus, for nearly fifteen years Respondents have been precluded from moving to the discovery phase of this case because of several rounds of motion practice and appeals without any significant delays caused by Respondents' actions.

## REASONS FOR DENYING THE WRIT

### I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT OR THE CIRCUIT COURTS.

In its decision the court of appeals both adhered to this Court's precedent and to that of the circuit courts in finding the aiding and abetting allegations were sufficient to displace the presumption against extraterritoriality. Furthermore, review on this issue

is premature before Respondents are given the chance to clarify allegations against Nestlé USA to comport with this Court's holding in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

### A. In Implementing the Touch and Concern Test the Court Below Applied This Court's *RJR Nabisco*'s Two-Prong Analysis.

Petitioner argues the panel's conclusion is "irreconcilable" with this Court's precedent in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), Pet. 22, but what the court of appeals found was that the relevant conduct in this case is territorial under *Morrison*. The court of appeals used *RJR Nabisco*'s two-step framework for the presumption against extraterritoriality which, in its second step, draws in part from *Morrison*'s "focus" test. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100-01 (2016). The *RJR Nabisco* framework mandates that the court first determine whether a statute clearly indicates that it applies to foreign conduct, and if not, the court next determines "whether the case involves a domestic application of the statute." *RJR Nabisco*, 136 S. Ct. at 2101. The Court explained that this can be done by looking at the "focus" of the statute, or, put another way, the conduct Congress was concerned with regulating, and where that conduct took place. *Id.* at 2100. The panel pointed out in its analysis of this second step that the ATS will apply if the conduct that is "relevant to the statute's focus" occurred domestically, "even if other

conduct occurred abroad." Pet. App. 42a (quoting *RJR Nabisco*, 136 S. Ct. at 2101. None of this analysis conflicts with this Court's cases.

The court below applied the two-step framework to find that Petitioner's relevant conduct may be territorial. Pet. App. 41a–44a. The panel disagreed with Petitioner's contention that the "focus" of the ATS should be narrowed to the location where the injury occurred, rather than encompassing the conduct of the Petitioner. Pet. App. 41a. Instead, the panel determined that "[t]he focus of the ATS is not limited to principal offenses . . . [and] aiding and abetting comes within the ATS's focus." *Id.* at 42a. Nothing in this analysis conflicts with this Court's cases.

The panel proceeded to analyze whether there may be a domestic application of the statute here and looked for guidance to cases similar to this matter that were decided by other circuits. Pet. App. 42a–44a. The panel focused its analysis mainly on Second Circuit cases. Pet. App. 42a–44a*; see generally Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016) (finding the use of a domestic bank account to facilitate payments to a terrorist organization was sufficient to overcome the extraterritoriality bar for aiding and abetting claims under the ATS); *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) (finding the use of a domestic bank account and financial arrangements, coupled with the purchase and delivery of oil, was sufficient domestic activity to satisfy the extraterritoriality requirement). These cases hold that acts of aiding and abetting that occur

in the United States are international law violations within the Alien Tort Statute's focus, and are thus a domestic application of the statute.

The court of appeals' acknowledgement that aiding and abetting within the United States might allow a permissible application of the ATS is consistent with this Court's precedent, and that of the circuits. Additionally, review is premature before Respondents have had an opportunity to amend their complaint to establish the aiding and abetting conduct for which Petitioner is responsible.

### B. Review is not Justified by a Conflict Among the Circuit Courts.

Contrary to Petitioner's assertion, thus far, courts of appeals have consistently held claims concerning corporations aiding and abetting violations of the law of nations occurring on U.S. soil are cognizable under the ATS in the handful of cases in which this issue has arisen, including in those cases cited by Petitioner. *See, e.g. Doe v. Drummond Co.*, 782 F.3d 576, 597-98 (11th Cir. 2015). These courts have reached a consensus that claims brought under the ATS alleging aiding and abetting may proceed if the aiding and abetting occurred on U.S. soil even if the injury occurred on foreign soil.

The Second Circuit has found that a defendant may be held liable for aiding and abetting a violation of international law "when the defendant provides practical assistance to the principal which has a substantial effect on the perpetration of the crime and does so with the purpose of facilitating the

commission of that crime." *Mastafa*, 770 F.3d at 193. To determine whether the ATS applies, it held "a district court must isolate the 'relevant conduct' in a complaint." *Id.* at 185. In *Mastafa*, the Second Circuit held the plaintiffs had alleged domestic conduct in the complaint that touched and concerned the United States, but ultimately determined the ATS could not form a basis for jurisdiction because the complaint failed to plead the required mens rea. *Id.* at 195–96. In *Licci*, the Second Circuit used the same analysis to find claims of a bank aiding and abetting a terrorist group's violation of the law of nations touched and concerned the United States with sufficient force to displace the presumption against extraterritoriality. *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 219 (2d Cir. 2016). The decision below is consistent with the Second Circuit's extraterritoriality analysis.

The Fourth Circuit held the Court's 'touch and concern' language implies that "courts should not assume the presumption categorically bars cases that manifest a close connection" to the United States. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014). In *Al Shimari*, the court held claims that a corporation's managers in the United States aided and abetted their employees to commit acts of torture by providing tacit approval for the misconduct and then attempting to cover it up touched and concerned the territory of the United States with sufficient force to displace the presumption against extraterritoriality. *Id.* at 530–31.

The decision in. *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 198 (5th Cir. 2017) is not to the contrary. In *Adhikari*, the plaintiffs alleged Kellogg Brown Root ("KBR"), a subcontractor of the U.S.-military, transferred payments to Daoud & Partners ("Daoud") in order to facilitate human trafficking in Nepal. *Adhikari*, 845 F.3d at 198. The Fifth Circuit held the presumption against extraterritoriality could not be overcome because the plaintiffs failed to introduce evidence demonstrating KBR's U.S.-based employees "understood the circumstances surrounding Daoud's 'recruitment' and 'supply' of third-country nationals like [p]laintiffs" or "worked to prevent those circumstances from being discontinued." *Id.* at 198. The Fifth Circuit found the plaintiffs in *Adhikari* failed to clearly demonstrate that the domestic activity at issue aided and abetted the claimed violations occurring on a U.S. military base in Iraq. *Id.* The decision below is not in conflict with this given the inadequacy of the Plaintiffs' allegations in that case.

The Eleventh Circuit's cases use a similar analysis. *See Drummond*, 782 F.3d at 597. ATS claims "will only displace the presumption against extraterritoriality if enough of the relevant conduct occurs domestically and if the allegations of domestic conduct are supported by a minimum factual predicate." *Drummond*, 782 F.3d at 598; *see also Baloco v. Drummond Co., Inc.,* 767 F.3d 1229, 1238-39 (11th Cir. 2014). In both *Baloco* and *Drummond*, the Eleventh Circuit held the alleged and aiding and abetting that occurred in the United States exhibited

no more than mere consent to human rights abuses committed by Colombian paramilitaries. *See Baloco*, 767 F.3d at 1236; *Drummond*, 782 F.3d at 599. This case does not conflict with those cases, as the advance, unrestricted payments sent to the slave-owners, the direct benefit from the forced labor, the equipment voluntarily provided to the farms, and the guaranteed market for slave-harvested goods through the use of exclusive supplier contracts all made the corporate involvement in the crimes much greater than the involvement in *Baloco* or *Drummond*.

In *Drummond*, the Eleventh Circuit suggested actions "directed at" the underlying violation or indicating "an express quid pro quo understanding" that defendants would aid and abet the perpetrators in exchange for conduct violating the law of nations would amount to more than mere consent for behavior abroad. *Drummond*, 782 F.3d at 591 (discussing *Baloco*). In *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), the plaintiffs alleged the defendant "review[ed], approv[ed], and conceal[ed] a scheme of payments and weapons shipments to Colombian terrorist organizations," but the majority never explicitly discussed aiding and abetting. *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1194 (11th Cir. 2014). The court's analysis focused on whether the claim fell within the law of nations, holding that because the complaint did not comport with Blackstone's three narrowly defined categories of the norms of state relationships (violation of safe conducts, infringement of the rights of ambassadors, and piracy), there was no jurisdiction under the ATS.

*Id.* at 1190. *Cardona* should also be considered an outlier given its the Eleventh Circuit's subsequent treatment of it. *See Drummond*, 782 F.3d at 589–92 (11th Cir. 2015) (addressing *Cardona* and acknowledging relevant consideration for extraterritoriality is whether the facts had been established "with regard to the alleged aiding and abetting conduct within the United States.")

In accordance with the holdings of its sister circuits, the court below held "aiding and abetting comes within the ATS's focus on 'tort[s]...committed in violation of the law of nations.'" Pet. App. 42a (quoting 28 U.S.C. § 1350). The court compared this case to *Mastafa* and *Licci* in holding the allegations "paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States" and the conduct alleged "is both specific and domestic." Pet. App. 44a. The fatal flaw in *Mastafa* was that the plaintiffs did not demonstrate the payments were intentional. *See Mastafa*, 770 F.3d at 194. Here, plaintiffs have alleged Nestlé provided Ivoirian farmers with financial assistance with the expectation cocoa prices would be kept low regardless of whether child slavery was the only way to sustain such low prices. Unlike *Adhikari*, where the court found the allegations insufficient to demonstrate that the corporation knew about the human trafficking, *Adhikari*, 845 F.3d at 198, Respondents have alleged Nestlé's frequent site visits to Ivorian farms indicate they were fully aware of the use of child slavery to produce cocoa. Pet. App. 36a. As *Licci* and *Al Shimari* indicate, the allegations of aiding and abetting child

slavery through means of financial assistance and tacit approval to their exclusive suppliers are enough to overcome the presumption against extraterritoriality.

The court of appeals did not embrace a "lenient standard under which a plaintiff may overcome the extraterritoriality bar so long as it alleges corporate oversight from a company's United States headquarters" as Petitioner suggests. Pet. 18. The Court's decision is directly in line with the holdings of the Second, Fourth, Fifth, and Eleventh Circuits, which all agree aiding and abetting is cognizable under the ATS so long as the allegations indicate a clear relationship to the violation of the law of nations abroad. Moreover, the court of appeals remanded so that what conduct each Defendant engaged in from the United States could be determined. Pet. App. 46a. Review is unwarranted before Respondents have had a chance to do so.

### C. This Case is Not Ripe for Review

The panel below remanded the complaint in order to let Petitioners parse out the claims against each Defendant under *Jesner*. Pet. App. 44a–46a. The appellate panel held that Respondents should have a final opportunity to replead and "specifically identify the culpable conduct attributable to individual domestic defendants." Pet. App. 46a.

Certiorari at this stage to determine the scope of extraterritoriality makes little sense when the decision below found Petitioner's conduct at issue for that analysis might be clarified, and that it must be

on amendment. Similarly, there is no need to review to address standing or tracing harms prior to the allegations against specific defendants.

Certiorari should not be granted because Respondents have not had the opportunity to amend their complaint. Any claim about Article III standing, or the relevance of particular conduct at this point in time would be premature.

## II. THE COURT OF APPEALS' CORPORATE LIABILITY HOLDING IS CONSISTENT WITH THIS COURT'S PRECEDENT AND DOES NOT CREATE A CIRCUIT SPLIT.

### A. The Ruling is Consistent With this Court's Decisions.

The question of whether the ATS applies to corporations has twice been before this Court: first, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) and more recently in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). On both occasions, this Court declined to create a categorical rule barring all forms of corporate liability. *See Kiobel*, 569 U.S. at 114; *Jesner*, 138 S. Ct. at 1402. Still, Petitioner insists the decision below conflicts with this Court's decision in *Jesner*.

Petitioner argues that although the *Jesner* Court "ultimately confined its holding to foreign corporations," this Court's guidance on the question of corporate liability nonetheless closed the door to any form of corporate liability absent congressional action. Pet. 25. Petitioner argues that because this Court

questioned whether there was an international norm around corporate liability at the time *Jesner* was decided, corporations, whether domestic or foreign, can never be liable under the ATS. However, this Court explicitly did *not* reach the issue of domestic corporate liability in *Jesner* and did not decide whether the law of nations provides corporate liability at least in some contexts such as international norms prohibiting child slave labor.

In *Jesner*, this Court relied on *Sosa v. Alvarez-Machain*'s two-step framework for evaluating ATS claims, which considers the following: (1) whether the alleged violation is "of a norm that is specific, universal, and obligatory" and (2) whether allowing the case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. *Jesner*, 138 S. Ct. at 1399 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

The plurality and concurring opinions focused on the foreign relations and separation of powers concerns counselling against judicial discretion. *See, e.g. Jesner*, 138 S. Ct. at 1407; *id.* at 1403. Critically, the claims in *Jesner* were based on allegations that a Jordanian bank, through transactions at its New York branch, served as the "paymaster" for Hamas. Brief for Petitioners at 3–6, *Jesner*, 138 S. Ct. 1386 (No. 16–499), 2017 WL 2687507, at *7. These allegations had significant implications for foreign governments and international relations. Aside from the ongoing threat to diplomatic relations with Jordan resulting from the

litigation, allegations involving Hamas necessarily implicated the Palestinian government because Hamas is a governing organization that controls portions of Palestine. *See Jesner*, 138 S. Ct. at 1406. Arab Bank had also provided financial services to an organization connected to the Saudi Arabian government. Brief for Petitioners at 9, *Jesner*, 138 S. Ct. 1386 (No. 16–499), 2017 WL 2687507 at *7. This Court declined to extend corporate liability to foreign corporations, noting the policy implications.

This case presents no relevant foreign policy implications. Defendants are U.S. corporations. *See Jesner*, 138 S. Ct. at 1408, 1410 (Alito, J., concurring). Here, Respondents allege that a U.S.-based corporation, from its U.S. headquarters, aided and abetted private cocoa producers who engaged—and continue to engage—in endemic child slavery in the Ivory Coast. Respondents allege that Petitioner engaged in decision-making in the United States that established, facilitated, maintained, and protected Petitioner's use of child slavery. *See* Pet. App. 35a–36a. Respondents further allege that Petitioner directed employees from their U.S. headquarters to provide trainings to the farmers, and those employees reported back to U.S. headquarters with information helping to "perpetuate to a system built on child slavery to depress labor costs." Pet. App. 35a–36a. There are no allegations about the government of the Ivory Coast in Respondent's complaint. Respondents' allegations against a private corporation assisting in private wrongs do not entangle foreign governments at all, let alone to the extent as was the case in *Jesner*.

Additionally, Petitioner's claim that *Jesner* forecloses domestic corporate liability conflicts with the ATS' original purpose. As this Court explained, under the Articles of Confederation, there was no central authority that gave foreign citizens redress for violations of the law of nations. *See Jesner*, 138 S. Ct. at 1396. The Framers were concerned with tensions in international relations derived from the new government's inability to prosecute such violations. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004)). A particular concern was violations of international law committed by American citizens – at the passage of the ATS "[i]f a nation failed to redress injuries by its citizens upon the citizens of another nation" it would be perceived as "just cause for reprisals or war." Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 476 (2011). The ATS was, as Justice Kennedy explained, enacted "to 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. A blanket ban on corporate liability conflicts with these purposes.

There is no reason to create a per se rule here barring domestic corporate liability under the ATS where there are no foreign policy considerations at issue. Indeed, remanding this case for amendment is consistent with *Jesner's* view of ATS liability.

Moreover, the Executive Branch in *Kiobel* and *Jesner* expressly supported the availability of

corporate liability under the ATS because of the well-established existence of corporate liability in the common law. *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *Jesner*, 138 S. Ct. 1386 (No. 16-499) (hereafter "*Jesner* Amicus Brief"); Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel* 569 U.S. 108 (No. 10-1491) (hereafter "*Kiobel* Amicus Brief").

In both *Kiobel* and *Jesner*, the United States' amicus briefs emphasize that while causes of action brought under the ATS are premised on international law, they are ultimately questions of federal common law and that corporate liability is a well-established basic background principle of federal common law. *See Jesner* Amicus Brief at 9; *Kiobel* Amicus Brief at 7, 14. "It has long been 'unquestionable' under domestic law that corporations are 'deemed persons' for 'civil purposes' and can be held civilly liable." *Jesner* Amicus Brief at 10 (quoting *United States v. Amedy*, 24 U.S. (1 Wheat.) 392, 412 (1826)).

The United States' briefs recognize that the ability to violate international law norms is not limited to natural persons—corporations are capable of violating these norms as well. *Kiobel* Amicus Brief at 7. This acknowledgement is reflected in international law reaching back decades. *See, e.g.*, G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, art. 1 (Oct. 10. 1984); G.A. Res. 260 A (III) Convention on the Prevention and Punishment of the Crime of Genocide, art. II (Dec. 9, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3,

Aug. 12, 1949, 75 U.N.T.S. 135. A categorical bar on corporate liability under the ATS would thus bring American law out of step with international law.

### B. All Circuits to Address the Issue But One Hold that Domestic Corporations May Be Held Liable.

Petitioners contend that there is a split in the circuits over the existence of corporate liability under the ATS. However, as Petitioners acknowledge, except for the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum, Co.*, 621 F. 3d 111, 145 (2d Cir. 2010), every circuit that has directly addressed the issue of corporate liability has held that corporations may be sued under the ATS. *See Flomo v. Firestone Nat. Rubber Co.,* 643 F.3d 1013, 1021 (7th Cir. 2011) ("Having satisfied ourselves that [C]orporate liability is possible under the Alien Tort Statute. . ."); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) ("[W]e join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Sarei v Rio Tinto, PLC*, 671 F.3d 736, 748, 759–61, 764–65 (9th Cir. 2011) (en banc) (concluding that the prohibition against genocide extends to corporations), *vacated on other grounds*, *sub nom. Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013); *Romero v. Drummond Co.,* 552 F.3d 1303, 1315 (11th Cir. 2008) ("the law of this Circuit is that [the Alien Tort Statute] grants

jurisdiction from complaints of torture against corporate defendants").[2]

Petitioner's claim there is a "division in the lower courts" by citing one outlying decision, already reviewed by this Court: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Several Second Circuit decisions questioned the continuing binding nature of the Circuit's *Kiobel* decision prior to *Jesner*. In *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F. 3d 161, 174 (2d Cir. 2013), a Second Circuit panel specifically questioned the binding nature of the Circuit's *Kiobel* decision after this Court's decision in that case and remanded the issue

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[2] The Fourth Circuit also has a pending case regarding the involvement of corporations in medical experimentation on unwitting subjects, namely infecting 774 Guatemalan nationals (including vulnerable children in an orphanage) with syphilis without their knowledge during the 1940s and 1950s. *See Estate of Alvarez v. Johns Hopkins Univ. et al.*, 373 F.Supp.3d 639, 647 (D. Md. 2019); *Estate of Alvarez v. Johns Hopkins Univ.*, 205 F. Supp. 3d 681, 684 (D. Md. 2016) (detailing facts and noting that donations of malaria medications were used to gain access to the orphanage). The district court opined that allowing domestic corporate liability would further the purposes of the ATS, "by affording a remedy in U.S. courts to foreign nationals for violations of international law by a U.S. corporation." *Estate of Alvarez*, 373 F. Supp. 3d at 648. The district court subsequently certified an interlocutory appeal on the issue. *Estate of Alvarez v. Johns Hopkins Univ.*, 2019 WL 1779339 (D. Md. Apr. 23, 2019), and the case is now pending before the Fourth Circuit. *Estate of Alvarez*, No. 19-1530 (4th Cir. filed May 17, 2019).

to the district court rather than dismiss the case based on the Circuit's *Kiobel* precedent.[3]

The Second Circuit itself has been reluctant to adopt a bar to corporate liability following *Kiobel*. *See Mastafa,* 770 F.3d at 179 n.5 (explicitly noting that panel had "no need" to address corporate liability even though the claims were against a corporate defendant); *Sikhs for Justice, Inc. v. Nath,* 596 F. App'x 7, 10 (2d Cir. 2014) (same). The decision vacated and then affirmed in *Jesner* was the first case to apply the Second Circuit's *Kiobel* decision as the law of the Circuit, and noted that the 2011 *Kiobel* decision "appears to swim alone against the tide" of its sister circuits. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015), *as amended* (Dec. 17, 2015). The Second Circuit has yet to address the effect, if any, of the *Jesner* decision on its circuit's case law. Given the current status of the case law in the circuit courts, the split is not so fully developed as to merit review in a case where Respondents have been given leave to specify additional allegations about the underlying conduct.

## III. THERE ARE NO PRUDENTIAL OR SEPARATION OF POWERS CONCERNS NECESSITATING REVIEW

Even if *Jesner* did, as Defendants insist, urge courts to restrict cases to those satisfying *Sosa*, Pet.

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[3] The case was ultimately dismissed on other grounds.

26, this case fits within that rubric. Both domestic and international courts agree that slavery is a crime that can be committed by corporations. The Ninth Circuit held that there was corporate liability for slavery under international law particularly given the nature of the norm, a profit motive could provide the requisite intent to commit slavery. *Doe I v. Nestlé USA*, 766 F.3d at 1025. Nothing in international law precludes corporate liability for child slavery and forced labor offenses. As the Ninth Circuit indicated "it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition to conclude that incorporation leads to legal absolution for acts of enslavement." *Nestlé*, 766 F.3d 1022.

The court of appeals already found that Respondents sufficiently alleged that Nestlé and Cargill acted purposefully to avail themselves of slavery and forced child labor and therefore maximize profits. Pet. App. 36a; *Nestlé*, 766 F.3d at 1026. The questions presented on review are preliminary legal rulings at the motion to dismiss stage in line with the vast majority of circuit courts. This Court should deny review and allow Respondents to amend their complaint with additional facts about the domestic corporations' behavior in this case.

This case involves a universally agreed upon norm against child slavery. Despite what Defendants imply is an overriding interest in increased production, the United States Government has consistently made its opposition to slavery clear. *See* 19 U.S.C.A. § 1307 (prohibiting entry into the United States of any

foreign goods produced through forced or indentured labor); Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, §910, 130 Stat. 122, 239–40 (requiring annual reports to both the Senate and House regarding monitoring and compliance with this prohibition). No interest in cocoa production overrides these policies. No separation of powers concern arises when courts ac in concert with established U.S. policies. Nor has the Ivory Coast filed any objection or statement of interest that might indicate opposition to this lawsuit against private parties. These are precisely the "narrow circumstances" referred to in *Jesner* where universally condemned behavior is at issue and no third party or country is opposing the suit. *Jesner*, 138 S. Ct. at 1389.

## CONCLUSION

For all of the above reasons, the petition should be denied.

Respectfully submitted,

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