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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

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

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INTRODUCTION

Despite this Court's admonition that the Alien Tort Statute (ATS) "must be 'subject to vigilant doorkeeping,'" *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004)), this case has now been stuck in the doorway for fifteen years. The decision below wedged the door open with legal errors on two threshold issues of ATS liability that cemented two separate circuit splits: what a plaintiff must do to overcome the ATS's extraterritoriality bar, and whether a domestic corporation can be liable under the ATS. The net result is the kind of expansive view of ATS liability that this Court has rejected

again and again. Because of the confusion over these threshold issues, ATS cases often drag on for years, as this case has. This Court's review is needed now.

Plaintiffs ask this Court to hold off so they can file yet another complaint (bringing their total to four), but offer no good reason why. First, the court below held that the "narrow set of domestic conduct" Plaintiffs alleged was *sufficient* to overcome the extraterritoriality bar; it did not say Plaintiffs needed to allege more domestic conduct. Pet. App. 44a. The panel's holding departed from the standard applied by its sister circuits and from this Court's precedents—as a whopping *eight* judges explained when dissenting from the denial of en banc rehearing below. Second, the court below held that Plaintiffs could raise an ATS claim against domestic corporations like Petitioner. *Id.* at 38a-39a. This holding solidified an acknowledged circuit split and gave no weight to this Court's recent decision in *Jesner*.

As the many amici explain, these splits should be resolved now. *See, e.g.*, Br. of Amici Curiae the Chamber of Commerce of the United States of America et al. at 3. Delaying review to allow Plaintiffs to amend their complaint yet again—fifteen years into this case–would serve no purpose other than to allow these splits to linger and leave a deeply incorrect decision in place.

This Court should grant the petition.

ARGUMENT

I. THE PANEL'S LENIENT EXTRATERRITORIALITY TEST CONFLICTS WITH THE TESTS OF ITS SISTER CIRCUITS AND THIS COURT'S PRECEDENTS.

Because "the presumption against extraterritoriality applies to claims under the ATS," Plaintiffs' claims must "touch and concern the territory of the United States" with "sufficient force to displace the presumption." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). Plaintiffs' complaint involves allegations of child slavery in Côte d'Ivoire. The court below held that these allegations touch and concern the United States because of allegations that Defendants purchased cocoa from Côte d'Ivoire and "provided 'personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier'" in Côte d'Ivoire. Pet. App. 43a. The Ninth Circuit "infer[red]" that Defendants made these "financing decisions" from the United States. *Id.* at 43a-44a. Such minimal allegations are not "sufficient" to displace the presumption, as two other federal circuits have held and as this Court's precedents make plain.

1. Plaintiffs attempt to, but cannot, explain away the Fifth and Eleventh Circuit decisions that deemed allegations of general corporate oversight insufficient to overcome the presumption against extraterritoriality.

In *Adhikari*, the Fifth Circuit confronted allegations that a U.S. corporation used New York bank accounts to make "domestic payments" to a subcon-

tractor accused of human trafficking abroad and that the corporation's employees were "aware of allegations of human trafficking." *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir. 2017). Those "alleged financial transactions" did not "permit a domestic application of the ATS." *Id.* at 198. Plaintiffs see no "conflict" with *Adhikari* "given the inadequacy of the * * * allegations in that case." Opp. 15. But that inadequacy is the point. The court below found allegations of general corporate oversight from the United States *sufficient* to displace the presumption against extraterritoriality, while *Adhikari* found even financial transactions (a much greater degree of domestic activity) *insufficient*.

The Eleventh Circuit, too, has held that *more* domestic conduct than Plaintiffs alleged here could not overcome the presumption. Plaintiffs suggest that the Eleventh Circuit has said only that "mere consent to human rights abuses committed" abroad does not overcome the presumption. *Id.* at 16. But the Eleventh Circuit should be taken at its word. In *Baloco* v. *Drummond Co.*, it held that a U.S. corporation's consent obtained "in Alabama * * * to provide substantial support" for paramilitary groups and U.S. employees' attendance at meetings where extrajudicial killings were "discuss[ed]" and "money allegedly was paid" were insufficient. 767 F.3d 1229, 1236 (11th Cir. 2014). And in *Doe* v. *Drummond Co.*, it explained the proper way to read its ATS extraterritoriality precedents: "[G]eneral allegations involving U.S. defendants' domestic decision-making with regard to supporting and funding" international law violations are "insufficient to warrant displacement." 782 F.3d 576, 598 (11th Cir. 2015).

Plaintiffs claim that there is no split because they alleged more than domestic decision-making here, providing a list of "corporate involvement." Opp. 16.[1] The court below did not rely on this conduct to find the presumption displaced. Nor could it have, because the additional conduct Plaintiffs point to occurred *abroad*, and thus is not *domestic* conduct that can overcome the presumption. Plaintiffs' further suggestion that the presumption can be displaced if a U.S. corporation receives a "benefit" from foreign conduct amounts to an argument that mere domestic presence is enough to overcome the presumption. *Id.* This Court has already rejected that argument. *See Kiobel*, 569 U.S. at 125 ("[I]t would reach too far to say that mere corporate presence suffices.").

The Fourth Circuit's decision in *Al Shimari* v. *CACI Premier Technology, Inc.*, 758 F.3d 516, 520 (2014), only confirms the insufficiency of Plaintiffs' allegations. The Fourth Circuit relied on far more extensive allegations of domestic conduct: that the defendant's employees who carried out the alleged torture were U.S. citizens, that the contract that led to the defendant's involvement was "issued in the United States" by a U.S. agency, and that the defendant's "managers in the United States * * * attempted to 'cover up' the misconduct." *Id.* at 530-531. Together, this "relevant conduct in the United States" overcame the presumption against extraterritoriality, *id.* at 529, though the issue was a close one, *id.* at 528 (describing the issue as one that could

[1] Plaintiffs provide no citations to their Second Amended Complaint.

not be "easily resolved"). If anything, then, *Al Shimari* suggests that the Fourth Circuit would, like the Fifth and Eleventh Circuits, find that allegations of general corporate oversight in the United States cannot displace the presumption against extraterritoriality.

Plaintiffs also assert that the "decision below is consistent with the Second Circuit's extraterritoriality analysis." Opp. 14. Petitioner already explained why this is incorrect. In *Mastafa* v. *Chevron Corp.*, the Second Circuit held that a "particular combination of conduct in the United States" involving "multiple domestic purchases and financing transactions" or "payments and 'financing arrangements' conducted exclusively through a New York bank account" amounted to "non-conclusory conduct" that overcame the presumption. 770 F.3d 170, 191 (2d Cir. 2014). It took similar allegations to overcome the presumption in *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217 (2d Cir. 2016) (relying on allegations that the defendant "carried out the specific banking services which harmed the plaintiffs and their decedents in and through the State of New York" (alterations and internal quotation marks omitted)). The Second Circuit expressly referred to allegations of general corporate decisionmaking—what Plaintiffs rely on here—as the kind of conclusory allegations that are *not* enough. *See Mastafa*, 770 F.3d at 190 (discussing allegations that because the corporation "was headquartered in the United States, much of the decisionmaking to participate in the * * * scheme was necessarily made in the United States" (internal quotation marks omitted)). Plaintiffs have no response.

2. The decision below did not just create a clear circuit split; it also defied this Court's precedents. When asking whether the extraterritoriality bar has been overcome, the question turns on "the statute's 'focus.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Unless "the conduct relevant to the statute's focus occurred in the United States, * * * the case involves an impermissible extraterritorial application." *Id.* When it comes to the ATS, the "focus" of the ATS is conduct that violates specific and universal norms of international law. Pet. App. 25a (Bennett, J., dissenting). Here, Plaintiffs allege human rights abuses that occurred in Côte d'Ivoire, not the United States. The "focus" of the relevant conduct is thus extraterritorial. At the very least, it should be beyond dispute that, where a plaintiff's injury is not traceable to a defendant's domestic conduct, the "focus" test is not met. Pet. 23-24.

In response, Plaintiffs repeat the error in the decision below. They argue that so long as *some* activity that aids and abets an international law violation committed abroad occurs inside the United States, the "focus" requirement is met. Opp. 12. Plaintiffs' rule would revive the "corporate presence" test *Kiobel* rejected. And allowing generalized domestic conduct to open the door to suits that would regulate only foreign conduct would harm the interests that the presumption against extraterritoriality protects. *See Jesner*, 138 S. Ct. at 1407 (describing how the presumption protects against serious foreign policy consequences (citing *Kiobel*, 569 U.S. at 124)); *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in judgment) (explaining that the presumption exists "to ensure that ATS litigation does

not undermine the very harmony that it was intended to promote").

The Ninth Circuit did not just sow confusion in the law; it adopted a rule that will have perverse consequences. A rule that permits ATS liability based on corporate oversight alone tells corporations that the safest course is to do *less* to attempt to address serious human rights issues, not more. "Sticking one's (corporate) head in the sand will become the safer course." Br. of Amicus Curiae Coca-Cola Company at 10-11.

3. Plaintiffs' last-ditch suggestion that this issue is unripe because they "have not had the opportunity to amend their complaint," Opp. 19, is simply wrong. For one thing, it is untrue; Plaintiffs have amended their complaint twice already, including after *Kiobel*. Pet. 9-10. In any event, the amendment authorized by the panel majority (Pet. App. 44a-45a) was premised on its conclusion that Plaintiffs had *already* displaced the presumption but needed to clarify which domestic entity was involved in which conduct. But as the en banc dissent explained, Plaintiffs have never identified "any domestic conduct alleged in the complaint that is connected to the alleged international law violations" (*id.* at 26a-27a (alterations and internal quotation marks omitted)), by *any* entity, and "the total unallocated domestic conduct alleged * * * is clearly insufficient." *Id.* at 32a n.9. Plaintiffs offer no reason to think that, after three tries and fifteen years, they will be able to come up with anything new and material.

II. COURTS ARE SPLIT ON WHETHER A PLAINTIFF MAY RAISE AN ATS CLAIM AGAINST A DOMESTIC CORPORATION.

1. Plaintiffs rightly do not deny that the question whether a domestic corporation can be liable under the ATS has split the federal circuits. Opp. 24. The Second Circuit correctly recognizes that the ATS does not permit corporate liability. Pet. 25. The decision below confirmed that the Ninth Circuit disagrees, along with the District of Columbia, Seventh, and Eleventh Circuits. *Id.*

The result is a doctrinal "landscape that is fragmented, contradictory, and unfair." Br. of Amici Curiae the Chamber of Commerce of the United States of America et al. at 10. This split threatens more than run-of-the-mill forum shopping. ATS cases often drag on for years before a higher court can address dispositive issues such as corporate liability. *See id.* Addressing this issue now would thus "resolve a high percentage of ATS cases at the threshold" and avoid these costs. Br. of Amicus Curiae Chevron Corp. at 4.

Plaintiffs note that some Second Circuit panels have questioned *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Opp. 25. The speculative possibility that a circuit may overrule itself is not a reason to delay review. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015) ("*Kiobel I* is and remains the law of this Circuit * * *."), *aff'd sub nom. Jesner*, 138 S. Ct. 1386. Nor is there any reason to think that this Court's opinion in *Jesner* would make the Second Circuit question its position, given that "all five Justices in the *Jesner* majority advanced compelling

reasons why jurisdiction under the ATS should not extend to *any* corporate defendants." Pet. 27; *see also Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), *vacated on other grounds by Doe VIII* v. *Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013).

Plaintiffs' suggestion that "the split is not so fully developed as to merit review" because the Ninth Circuit granted them leave to amend their Second Amended Complaint is irrelevant. Opp. 26. Nestlé USA is a domestic corporation. The ATS does not permit suits against domestic corporations. No additional allegations by Plaintiffs will change that.

2. Plaintiffs focus their efforts on defending domestic corporate liability under the ATS. Their focus on the merits is misplaced at this stage. And their arguments are incorrect, reinforcing the case for review.

To start, Plaintiffs are wrong to say that their "case presents no relevant foreign policy implications." *Id.* at 21. Their argument appears to be that only suits against foreign corporate defendants can implicate foreign policy. But the threat of ATS liability against domestic corporations, no less than threats against foreign corporations, "discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations." *Jesner*, 138 S. Ct. at 1406 (plurality op.). The decision below raises the risk of litigation "against any American company doing business in a foreign market where forced labor exists." Br. for Amici Curiae the National Confectioners Association et al. at 9. This litigation risk "will necessarily discourage American

companies from investing in economic development and * * * achieving needed labor reforms abroad." *Id.*

As this case shows, ATS suits against domestic corporations do implicate the interests of foreign sovereigns. Here, "Côte d'Ivoire is taking steps to address issues relating to cocoa production in its own territory." Br. of Amici Curiae the Chamber of Commerce of the United States of America et al. at 15. Yet Plaintiffs seek to impose their own form of regulation-by-litigation. *See id.* at 14 (explaining that ATS suits "disrupt[] the ability and responsibility of other sovereigns to redress wrongful acts").

As for Plaintiffs' argument that foreclosing domestic corporate liability would "conflict[]" with the purpose of the ATS, Plaintiffs have it backwards. Opp. 22. The ATS was intended to ensure redress for ambassadors "injured in the United States," not to provide redress for any and all alleged international law claims. *Kiobel*, 569 U.S. at 123-124. What is more, the ATS was meant as a failsafe where the absence of a cause of action would lead to "complaint[s] against the United States." *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in judgment). Because "customary international law does not require corporate liability, * * * declining to create" such liability under the ATS risks no complaints. *Id.* Recognizing that the ATS does not permit domestic corporate liability thus furthers, rather than conflicts with, the purpose of the ATS.

That leaves only Plaintiffs' reliance on the position the United States took before this Court's decision in *Jesner*. That decision discussed, and cast doubt on,

each argument Plaintiffs pluck out. The question of corporate liability under *domestic* law is not dispositive (or relevant). Opp. 23. What matters is what customary international law has to say. *See Sosa*, 542 U.S. at 732 & n. 20. And corporate liability is not an established principle of international law. *See Jesner*, 138 S. Ct. at 1401 (plurality op.) ("[T]he sources petitioners rely on to support their contention that liability for corporations is well established as a matter of international law lend weak support to their position."); *id.* at 1410 (Alito, J., concurring in part and concurring in judgment). And *even if* a corporation could "violate international law norms," corporate liability under the ATS would not be required. Opp. 23-24. The question under the ATS is whether the United States would itself transgress international law by not permitting corporate liability under the ATS. The answer is no. *See Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in judgment).

III. THE SEPARATION OF POWERS CONCERNS INHERENT IN EVERY ATS CASE LOOM LARGE HERE.

Plaintiffs end by suggesting that Nestlé USA does not understand what is at stake here. Opp. 27. That is incorrect. Nestlé USA "unequivocally condemns child slavery in Côte d'Ivoire and slave labor anywhere in the world." Pet. 3. The issue is not whether child slavery should be eradicated—it should. The issue is whether this action is the proper vehicle to do so. It is not. Plaintiffs have never asserted that Nestlé USA or any of the other Defendants perpetrated child slavery. In fact, they conceded that they have not. *Doe I* v. *Nestle USA, Inc.*, 788 F.3d 946,

948 (9th Cir. 2015) (Bea, J. dissenting from denial of rehearing en banc) ("Plaintiffs candidly admit they cannot in good faith allege defendants acted with the specific intent to promote slavery and thus harm children."). They want to use the ATS to regulate conduct carried out by foreign actors, in foreign nations, using allegations of generalized corporate activity in the United States as a hook for their claims. Their suit raises exactly the kinds of "foreign-policy and separation-of-powers concerns" that are "inherent in ATS litigation." *Jesner*, 138 S. Ct. at 1403. The Court should step in because of those concerns.

CONCLUSION

The petition for a writ of certiorari should be granted.

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