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

SUPPLEMENTAL BRIEF FOR PETITIONER

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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

Petitioner Nestlé USA, Inc. (Nestlé) and the United States agree that this Court should review the legal questions presented here. As the United States underscores, there is an entrenched circuit split on both questions Nestlé's petition for certiorari raises. Those questions are important and recurring, and the Court should take this opportunity to answer them.

As to the additional question the United States proposes adding, Nestlé agrees here too. The issue whether a cause of action for aiding and abetting a violation of international law may be implied under

the Alien Tort Statute (ATS) warrants the Court's review. U.S. Br. I. The Court should take that issue up.

But Nestlé disagrees with the suggestion that these three cert-worthy issues should not be answered with this case before it, alongside *Cargill, Inc.* v. *John Doe I*, No. 19-453. Both petitions for certiorari seek review of the same underlying Ninth Circuit decision, and both squarely raise the three questions presented under different facts. The United States' brief convincingly explains why the Court should grant the petition in *Cargill*, but it does not persuasively set forth why it would be disadvantageous to the Court to have the differing sets of facts in the *Nestlé* case squarely before it as well.

It is true, as the United States notes, that the Ninth Circuit gave Plaintiffs yet another chance to amend their complaint to "specifically identify the culpable conduct attributable to" Nestlé's domestic affiliates for purposes of Article III standing. Pet. App. 46a. But that ruling was inextricably bound up with the holding that the United States agrees *is* worthy of review. The Ninth Circuit held that the allegations about Nestlé's domestic conduct "touch and concern the territory of the United States * * * with sufficient force to" state a domestic ATS claim. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). At the same time, it remanded for additional standing allegations based on doubts about whether Plaintiffs' injuries were even traceable to Nestlé *at all*. Nestlé's petition thus affords the Court an opportunity to clarify that, at a minimum, "an ATS claim cannot overcome the extraterritoriality bar where—as here—plaintiffs have not even

alleged that their injuries can be traced to the domestic conduct of a defendant." Pet. 15. If, in the course of that analysis, the Court determines that after fifteen years and three separate complaints, the allegations of traceability are still so thin that they fail to satisfy even Article III, the Court can so hold. The existence of that possibility is not a vehicle problem; it is a powerful confirmation of the need for this Court's review.

This Court should therefore grant this petition and the petition for certiorari filed by Cargill. As the United States agrees, the *Cargill* petition is worthy of review. There is no need to hold this petition pending disposition of that case. And granting both petitions would aid this Court's review. The Court has often recognized that it is valuable to have a variety of fact patterns before it when it elucidates how to apply a legal standard, as resolving the extraterritoriality question here requires. Granting both petitions would allow the Court to provide more comprehensive guidance.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WARRANTS REVIEW AND A THIRD QUESTION SHOULD BE ADDED ON AIDING-AND-ABETTING LIABILITY.

Nestlé and the United States are in full agreement that the two questions presented in Nestlé's petition for certiorari warrant review. The United States also asks this Court to add a third question regarding aiding-and-abetting liability, and Nestlé joins that request.

1. The first question in Nestlé's petition is whether allegations of general corporate activity in the United States are sufficient to overcome the bar against extraterritorial claims under the ATS. Pet. 14-24. As the United States explains, the "proper extraterritoriality analysis for this and similar fact patterns represents an important, recurring issue that has divided the courts of appeals and warrants this Court's review." U.S. Br. 18. And the Ninth Circuit's "analysis was in error." *Id*. at 20. "[E]xcising petitioners' foreign conduct leaves nothing remaining except the generic functions associated with any corporate headquarters, such as oversight of foreign operations." *Id*. Such "generic functions" are not sufficient to state a claim under the ATS, even assuming aiding-and-abetting liability exists. *Id*. Further, "given the sensitive foreign-relations concerns that ATS suits implicate, the need to police extraterritoriality constraints is especially pressing." *Id*. at 20-21 (citing *Kiobel*, 569 U.S. at 117). Review of this first question is therefore warranted.

The second question in Nestlé's petition is whether domestic corporations are subject to liability under the ATS. "This important question has divided the circuits and warrants this Court's review." *Id*. at 8. The Ninth Circuit "failed to engage meaningfully with *Jesner*," and reached the wrong result. *Id*. And, contrary to Plaintiffs' suggestion, Opp. 21, "ATS suits against domestic corporations frequently involve claims of aiding and abetting misconduct abroad—which often implicate the policies and conduct of foreign states," U.S. Br. 11. In this very case, Plaintiffs have alleged that "several of the cocoa farms in Côte d'Ivoire from which Defendants source

are owned" or "protected by government officials." *Id*. (quoting Compl. ¶ 50).

2. The United States recommends that a third question should be added: "Whether a cause of action for aiding and abetting a violation of international law may be implied under the ATS." *Id.* at I. That "is a significant issue that has percolated extensively in the courts of appeals and is ripe for this Court's review." *Id*. at 13. And, though not raised in Nestlé's petition for certiorari, it was pressed and passed upon below. *Id*. at 13-14.

The Ninth Circuit resolved the question incorrectly. "Just as *Jesner* declined to extend liability beyond individual perpetrators to foreign corporations, so too this Court should decline to extend liability beyond primary violators to aiders and abettors." *Id*. at 15; *see also* Br. for the United States as Amicus Curiae in Support of Petitioners 8, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389; *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 87 (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). That is the inescapable upshot of *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). There, the Court explained that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id*. at 182. Rather, to hold that civil statutes impliedly give rise to aiding-and-abetting liability would be a "vast expansion of federal law," and courts should decline

such a rule in the absence of "congressional direction to do so." *Id*. at 183. This baseline principle of congressional primacy is all the more vital in this case, because "[a]iding-and-abetting liability * * * risks disruption to U.S. foreign policy." U.S. Br. 16.

Nestlé thus agrees that the Court should add the aiding-and-abetting question proposed by the United States, which furnishes yet another ground for reversal of the Ninth Circuit's misguided decision.

II. THE COURT SHOULD GRANT BOTH PETITIONS.

Nestlé and the United States part ways on only one point: The United States recommends that the Court grant only the petition for certiorari in *Cargill, Inc.* v. *John Doe I*, No. 19-453, and hold Nestlé's petition in abeyance. In Nestlé's view, both petitions should be granted so that this Court can consider the full range of allegations Plaintiffs have made in this case when resolving the extraterritoriality question.

As a preliminary matter, Nestlé agrees that the *Cargill* petition is a "suitable vehicle" for the Court to resolve the three legal questions before it. U.S. Br. 22. If the Court grants only that petition and reverses the judgment of the Ninth Circuit, it would be appropriate for the Court to grant Nestlé's petition, vacate the judgment of the Ninth Circuit, and remand for further proceedings. Nestlé would necessarily prevail on remand: The claims against Nestlé could not survive because any amendment would be futile in light of this Court's decision.

But the Court would benefit from having both petitions before it. The Court has often recognized, explicitly or implicitly, that considering a variety of

fact patterns can sharpen the legal questions presented and aid this Court's ability to provide comprehensive guidance to lower courts. For instance, the Court granted certiorari in both *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), "so that this Court could address the constitutionality of the consideration of race in university admissions in a wider range of circumstances," *id*. at 260. Similarly, in *Riley* v. *California*, 573 U.S. 373 (2014), this Court granted and consolidated two cases, one involving a "smart" phone and one involving a "flip" phone, to determine the applicability of the search-incident-to-arrest doctrine. This sort of joint grant and consolidation is routine. *See, e.g.*, *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Court*, No. 19-368; *Chiafalo* v. *Washington*, No. 19-465; *Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Aurelius Inv., LLC*, No. 18-1334; *Epic Sys. Corp.* v. *Lewis*, No. 16-285; *Bank of Am. Corp.* v. *City of Miami*, No. 15-1111. The Court has granted and consolidated multiple petitions over the United States' recommendation to grant one and hold the other. *See, e.g.*, *United States* v. *Stitt*, 139 S. Ct. 399 (2018); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Here, the allegations regarding Nestlé are different than the allegations regarding Cargill, and so granting both petitions would furnish the Court a greater variety of factual material to consult when delimiting the outer bounds of the ATS. To take one example, Nestlé is the subsidiary of a foreign corporation, unlike Cargill, which is a purely domestic corporation. That fact could be relevant both to whether the claims are impermissibly extraterritorial and to whether it makes sense to draw a distinction be-

tween domestic and foreign corporations after *Jesner*. The majority opinion in *Kiobel*, for instance, noted that the defendants there were foreign, 569 U.S. at 111-112, and Justice Breyer's concurrence highlighted the fact that the "defendants [we]re two foreign corporations" as a factor informing why "jurisdiction d[id] not lie," *id*. at 139 (Breyer, J., concurring in the judgment).

More broadly, *Kiobel* explained that the "presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id*. at 116. Targeting U.S. subsidiaries of foreign multinationals for almost entirely foreign conduct risks raising the same foreign policy consequences. *Cf.* Br. of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party 17-18, *Kiobel*, 569 U.S. 108 (No. 10-1491), 2012 WL 2312825 (arguing that the "presence of a U.S. corporate affiliate is not a sufficient basis to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S."). The Court in *Kiobel* was also concerned that "accepting [plaintiffs'] view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." 569 U.S. at 124. This case raises an analogous concern: that other nations might hale a foreign subsidiary of a U.S. corporation into a foreign court for injuries suffered in some third nation.

Similarly, a suit against a domestic subsidiary carries many of the same foreign policy concerns that motivated this Court's decision in *Jesner* as a suit against the foreign parent itself. *See Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402-03 (2018) (majority op.); *id*. at 1405-06, 1407-08 (plurality op.); *id.* at 1410-12 (Alito, J., concurring in part and concurring in the judgment); *id*. at 1418-19 (Gorsuch, J., concurring in part and concurring in the judgment). For instance, the *Jesner* plurality was concerned that, if the suit were allowed in that case, it "could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts." *Id*. at 1405 (plurality op.). If U.S. courts may impose liability on U.S. subsidiaries of foreign corporate families for U.S.-based conduct only tangentially related to foreign injuries, that would invite foreign nations to do the same thing to foreign subsidiaries of U.S.-based multinationals. That could "establish a precedent that discourages American corporations from investing abroad." *Id*. at 1406 (plurality op.). In short, then, it would benefit the Court to have the particular circumstances of the *Nestlé* case before it as it answers the questions presented.

The United States contends that holding this case is appropriate because "[t]he court of appeals declined to find standing on the current pleadings as to Nestlé and remanded for repleading." U.S. Br. 22. "[T]he potential absence of jurisdiction on the current pleadings as to Nestlé," according to the United States, "could prevent the Court from reaching the merits in th[is] case." *Id*. at 23. That somewhat

tenuous vehicle problem might conceivably be an argument against certiorari if this were the only petition before the Court. But it is not a compelling argument against certiorari if the Court is already going to examine these ATS issues in Cargill's petition. And, if anything, the existence of this traceability issue only highlights the need for this Court's review of Nestlé's petition. The pertinent facts are squarely before the Court right now and ripe for adjudication.[1]

That there is even still a question related to standing after so many years of litigation is a powerful indication of how far off course the Ninth Circuit veered in its opinion. The Ninth Circuit has already definitively ruled that Plaintiffs had displaced the presumption against extraterritorial application based on the paper-thin allegations in the complaint, so the extraterritoriality issue is ripe for review. Pet. Reply 8. The fact that the Ninth Circuit *simultaneously* expressed concern that those same allegations fall short of alleging an injury traceable to Nestlé's conduct just gives the Court a chance to clarify that, at a minimum, "an ATS claim cannot overcome the extraterritoriality bar where—as here—plaintiffs have not even alleged that their injuries can be

[1] There is also no difference in the volume of briefs. Nestlé is a respondent in the *Cargill* case under Supreme Court Rule 12.6. If this Court grants only the *Cargill* petition, that status allows Nestlé to file an opening brief and reply brief in support of Cargill. *See* Sup. Ct. R. 25.1 ("Any respondent * * * who supports the petitioner * * * shall meet the petitioner's * * * schedule for filing documents."); Sup. Ct. R. 25.3 ("Any respondent * * * supporting the petitioner * * * may file a reply brief."); *see, e.g.*, *California* v. *Texas*, No. 19-840.

traced to the domestic conduct of a defendant." Pet. 15. If it is doubtful that Plaintiffs' injuries are even traceable to Nestlé, it is *a fortiori* the case that no conduct relevant to the ATS's focus occurred in the United States. *See RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). This should be a relatively easy case and will allow the Court to draw a clear and useful line for what is *not* sufficient for an ATS claim. The existence of a traceability question, then, is a feature and not a bug of this petition.

If, in assessing extraterritoriality, the Court determines that the allegations against Nestlé do not even satisfy Article III's traceability requirement, it can so hold. The Court could add a question related to Plaintiffs' standing if it wants specific briefing on that issue. But the fundamental point is that the facts, as pled now three separate times by Plaintiffs, do not come close to the sort of conduct that federal courts should deem sufficient to support an ATS claim. Having this fact pattern before the Court can only help the Court resolve these issues, far better than a set of hypotheticals, when it also has the separate set of facts in *Cargill* before it.

CONCLUSION

The petition for a writ of certiorari should be granted. Otherwise, the petition should be held, and disposed of as appropriate in light of the Court's disposition of the *Cargill* petition.

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