Nos. 19-416, 19-453

In The Supreme Court of the United States

NESTLE USA, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents*.

CARGILL, INC., *Petitioner*,
v.
JOHN DOE I, ET AL., *Respondents*.

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

BRIEF OF THE COCA-COLA COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Coca-Cola Company is a United States-based corporation with substantial overseas operations. As a matter of policy and principle, the Company categorically condemns the practices alleged by Respondents. Slavery and forced labor fundamentally violate individual freedom and dignity. That is why the Company works systematically to prevent and combat human rights violations throughout its global supply chain.

Despite those efforts, the Company previously has been sued in multiple actions in United States courts under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). Although the Company is not currently a defendant in any active ATS litigation, it has first-hand experience with the serious threat such litigation—absent clear judicial limits—poses to productive efforts of responsible corporate citizens abroad. The Company thus has a strong interest in the proper interpretation of the ATS and the extent to which ATS suits like this one should be permitted to proceed.

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[1] This brief is filed with the consent of all parties. Respondents and Nestlé USA, Inc. filed with the Court letters providing blanket consent. Cargill, Inc. provided written consent. No counsel for any party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Coca-Cola Company agrees with Petitioners: ATS liability does not extend to domestic corporations, and general domestic oversight allegations (such as those asserted here) cannot overcome the bar on extraterritorial ATS claims. The Company files this brief to explain how a contrary approach undermines corporate social responsibility efforts as well as this Court's ATS jurisprudence.

I. Multinational corporations today play a vital role in improving economic, social, and labor conditions abroad. Many of those companies have a corporate presence in the United States. By way of example, The Coca-Cola Company—headquartered in Atlanta, Georgia—has long maintained a steadfast commitment to human rights. The Company not only creates economic opportunities where none would otherwise exist, but it identifies human rights risks throughout its global supply chain and dedicates itself to remedying the wrongs it finds. Because the Company recognizes that its responsibility does not end at the company gate, it regularly audits its suppliers and publishes third-party studies of its top sugar-sourcing countries. And because the Company knows it cannot do this work alone, it engages other stakeholders, including non-profit organizations and local governments. It takes a proverbial—sometimes literal—village to address the scourge of human rights violations, and The Coca-Cola Company is proud to do its part.

A ruling for Respondents, however, would undercut such efforts. Extending ATS liability to

corporations engenders the very response feared by the plurality in *Jesner*: less "global investment in developing economies, where it is most needed." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405 (2018). That is especially so where mere corporate oversight is enough to displace the presumption against extraterritoriality. Not only is that conclusion legally incorrect, but it risks deep disruptions to corporate investment abroad. Indeed, such an expansive approach allows plaintiffs to use corporate efforts to address human rights abuses *against* corporations—just as Respondents in this case used Petitioners' efforts to combat child slavery as evidence of an ATS violation. Extending ATS liability in situations like this—where the human rights violations alleged occurred outside the United States by unidentified third parties—is far more likely to deter overseas initiatives, like those of The Coca-Cola Company, than to encourage them.

II. Imposing ATS liability on corporations finds no support in either international law principles or domestic separation-of-powers principles. Doing so without global consensus or Congressional say-so raises the foreign-relations concerns at the heart of this Court's ATS jurisprudence.

To start, extending international law status to corporations—such that a corporation could be held liable under the ATS—lacks a global consensus. That fact "has significant bearing" on whether courts should impose corporate liability for human rights violations. *Jesner*, 138 S. Ct. at 1399 (plurality op.).

The international community has long been reluctant to elevate artificial entities such as

corporations to the status of international "persons" or "subjects" because, among other reasons, that status might be viewed not only as attaching international law obligations but also as granting corporations affirmative rights within another nation's borders. The latter change, potentially imbuing corporations with the power to enforce those obligations and police violations thereof, could infringe on the sovereignty of the host nation.

Even if international law leaves the question of potential corporate liability—which really goes to the scope of the international norm itself—to domestic law, then it is a question for Congress, not the courts. When international law provides that nations enforce a norm domestically, that domestic implementation is effected through the lawmaking body within each nation—normally, each nation's legislature. Within our Nation's tripartite system of government, Congress is the body charged with effecting that implementation, as expressed in its power to "define and punish . . . Offences against the Law of Nations." U.S. CONST., art. I, § 8, cl. 10.

The judicial role, by contrast, is much narrower. Only norms that are so universally agreed upon and well defined that they are understood to give rise to international law obligations may be imported into federal common law and enforced by domestic courts. That principle includes *who* may be subject to substantive liability for the violation. Such a limited role for the Judiciary comports not only with domestic separation-of-powers principles, but also with *Jesner*'s recognition that courts should be cautious and await specific congressional direction before imposing ATS liability—particularly on an entirely new class of

defendants. It is time for this Court to finish the job it started and foreclose judicial extension of "aiding and abetting" liability under international law to all corporations—foreign and domestic alike.

III. *Who* the defendants are is not the only problem here. So too is the *conduct* at issue—namely, mere domestic corporate oversight.

Courts cannot extend ATS liability to reach conduct beyond the territory of the United States. That is because courts operate under the presumption that, when Congress legislates, it intends those laws to apply within the United States—not outside it. Central to this presumption is the knowledge that extraterritorial application of United States law carries significant foreign-policy consequences. Congress is better positioned than courts to make appropriate foreign-policy decisions and thereby minimize the risk of adverse or unintended effects.

As The Coca-Cola Company's own experience reveals, allowing ATS suits involving entirely foreign conduct to proceed based simply on allegations of corporate oversight activity in the United States poses serious foreign-policy concerns. Chiefly, it could result in less foreign investment in the countries that need it most. And the United States relies on such investment to promote change in other countries' policies on issues relevant to American interests. In other words, allowing U.S.-based corporate oversight to overcome the extraterritoriality bar risks the same unintended consequences the presumption against extraterritoriality is meant to prevent.

ARGUMENT

I. EXTENDING ATS LIABILITY TO U.S.-BASED COMPANIES BECAUSE OF THIRD-PARTY OVERSEAS CONDUCT THREATENS THE VITAL ROLE CORPORATIONS PLAY ABROAD

Many of the world's largest corporations are headquartered in the United States. *See, e.g.*, Andrea Murphy, et al., *Global 2000: The World's Largest Public Corporations*, FORBES (May 13, 2020).[2] U.S.-based multinational corporations play a significant role in the national economy, "account[ing] for 22.0 percent of total private industry employment in the United States" and "23.3 percent of total U.S. private-industry value added" to gross domestic product. BUREAU OF ECONOMIC ANALYSIS, ACTIVITIES OF U.S. MULTINATIONAL ENTERPRISES, 2018, at 2 (Aug. 21, 2020).[3]

Those same corporations have come to play an important role in improving socioeconomic conditions abroad. They work closely with foreign nations and other constituencies to address significant global challenges, including sustainable development, labor standards, climate change, energy conservation, and resource management. Many corporations have integrated these priorities into their business operations and their interactions with international stakeholders. The Coca-Cola Company is one them.

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[2] *Available at* https://www.forbes.com/global2000/#16d2c3308335d.

[3] *Available at* https://www.bea.gov/sites/default/files/2020-08/omne0820_0.pdf.

Extending ATS liability due to U.S.-based corporate oversight, however, threatens to upend those efforts.

A. The Coca-Cola Company's Efforts Demonstrate The Beneficial Impact U.S.-Based Corporations Can Have Abroad.

The economic benefits that developing nations and the global community reap from partnership with U.S. corporations—including job creation and infrastructure upgrades—are well documented. *See, e.g.*, WORLD BANK, GLOBAL INVESTMENT COMPETITIVENESS REPORT 2017/2018: FOREIGN INVESTOR PERSPECTIVES AND POLICY IMPLICATIONS 51 (2018) ("Foreign direct investment *** [helps countries] create jobs, bring in cutting-edge knowledge and technology, connect to global value chains, and diversify and upgrade their economies' production capabilities.");[4] U.S. AGENCY FOR INT'L DEV., PRIVATE-SECTOR ENGAGEMENT POLICY 4 (similar).[5] But the positive impact of overseas corporate activity extends to conditions affecting human rights more broadly.

Although The Coca-Cola Company is by no means alone among corporations in its steadfast commitment to human rights, the Company is well-positioned to address this issue given its global stature. The Company recognizes that the social license it enjoys to

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[4] *Available at* http://documents.worldbank.org/curated/en/169531510741671962/pdf/121404-PUB-PUBLIC-PUBDATE-10-25-2017.pdf (last visited Sept. 3, 2020).

[5] *Available at* https://www.usaid.gov/sites/default/files/documents/1865/usaid_psepolicy_final.pdf (last visited Sept. 3, 2020).

operate throughout the world "is grounded in [its] ability to understand and mitigate social and environmental risks within the Company and the Coca-Cola system." THE COCA-COLA COMPANY, HUMAN RIGHTS REPORT 2016-2017, at 3 ("HUMAN RIGHTS REPORT").[6] Indeed, "[a]cross everything [it] do[es] as a system, one inalienable right [the Company] *** work[s] to instill in every associate is respecting and protecting human rights." *Id.*

In recent years, The Coca-Cola Company has been "focused on identifying the most severe actual and potential impacts on human rights associated with [its] activities and business relationships—[its] salient human rights risks." THE COCA-COLA COMPANY, ADDRESSING GLOBAL ISSUES.[7] Where the Company has "identified adverse human rights impacts resulting from or caused by [its] business activities," it has "committed to providing for or cooperating in remediation." *Id.*

In 2017, seeking feedback as well as dialogue with the global community, The Coca-Cola Company outlined its efforts in its Human Rights Report. As the Report shows, the Company realizes that its responsibility to human rights does not "end at the company gate." HUMAN RIGHTS REPORT 12. The Company expects all participants in its supply chain

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[6] *Available at* https://www.coca-colacompany.com/content/dam/journey/us/en/responsible-business/better-shared-business-landing/human-rights-report-2016-2017-tccc.pdf (last visited Sept. 3, 2020).

[7] *Available at* https://www.coca-colacompany.com/policies-and-practices/addressing-global-issues (last visited Sept. 3, 2020).

to respect human rights fully. That is why the Company closely monitors its suppliers through thousands of human rights and workplace audits. *Id.* at 13. The Company's hands-on approach also directly provides its suppliers "training programs and guidance." *Id.* at 14. In 2019 alone, the Company "provided 36 training programs to bottlers, suppliers and auditors across the world." THE COCA-COLA COMPANY, 2019 BUSINESS & SUSTAINABILITY REPORT 40 (Apr. 22, 2020).[8]

As for child labor, The Coca-Cola Company takes every step to prevent and eradicate the practice in its operations. HUMAN RIGHTS REPORT 25-26. Even so, it is "aware there are risks of child labor deep within [its] supply chains, such as at the farm level." *Id.* Instead of shrugging off what it cannot guarantee, the Company works with industry groups, public-interest organizations, and local stakeholders (among others) in collaborative efforts across the world. *Id.*; *see also id.* at 4, 14, 25, 27, 29 (explaining that the Company works with other companies in a group called AIM-PROGRESS "to promote responsible sourcing practices"; "deliver[s] supplier training focused on ethical recruitment" as an "active member of The Consumer Goods Forum"; and works with the Leadership Group for Responsible Recruitment to "promot[e] ethical recruitment and combat[] the exploitation of migrant workers in global supply chains across industries"). It also publishes third-party studies of its top sugar-sourcing countries; that

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[8] *Available at* https://www.coca-colacompany.com/content/dam/journey/us/en/reports/coca-cola-business-and-sustainability-report-2019.pdf.

information allows the Company to "engage with industry, government and NGOs to mitigate human rights impacts," including within its supply chain. *Id.* at 26.

The Coca-Cola Company remains aware that any encouraging findings do not negate the risks associated with child labor practices in certain countries. The Company has made it clear that it will not "stop closely following possible child labor in sugarcane production in these countries." HUMAN RIGHTS REPORT 26. Since 2013, the Company has "published 21 country-specific studies focused on child labor, forced labor and land rights that have helped [it] better understand risks and overall systemic challenges and opportunities." 2019 BUSINESS & SUSTAINABILITY REPORT 40. Those efforts continue today.

B. Imposing ATS Liability For Corporate Oversight Would Deter Proactive Efforts.

The Coca-Cola Company's comprehensive approach to expanding economic opportunities and combatting human rights violations is one that many, if not all, multinational companies can adopt. But expanding the reach and scope of ATS liability would jeopardize the future of many such efforts by discouraging companies from acting in the same socially responsible way as The Coca-Cola Company.

This case confirms the *Jesner* plurality's fear that extending ATS liability to corporations "subject[s] 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." 138 S. Ct. at 1405. Although the plurality was referring to the risk that foreign countries would "hale" American companies "into their courts for alleged violations of the law of nations," *id.*, the same logic applies here. Indeed, haling American companies into American courts is even more likely, as "the ATS already goes further than any other statute in the world in granting aliens the right to sue civilly for violations of international law." *Id.* at 1411 (Alito, J., concurring in part and concurring in the judgment).

Permitting ATS claims against corporations despite a tenuous connection to U.S. conduct only makes matters worse. This Court explained in *Kiobel v. Royal Dutch Petroleum Co.* that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." 569 U.S. 108, 124-125 (2013). And under that test, "it would reach too far to say that mere corporate presence suffices." *Id.* at 125. Yet, the only *domestic* conduct alleged by Respondents involved general corporate activity—"normal business conduct." Pet. App. 30a; *see id.* at 27a ("To the extent that the complaint alleges relevant domestic conduct at all, it simply alleges corporate presence and decision-making."). [9] Under Respondents' logic, it does not matter whether the alleged violations occurred in another country. Or that the company did not commit the abuses. Or even that the company took steps to avert the alleged abuses. If, despite their best efforts, companies are held liable for actions of third parties

[9] All "App." citations are to the Appendix to Nestlé's petition in case no. 19-416.

they cannot entirely control, global investment will inevitably falter, especially in countries where it is most needed—namely, "developing economies where the host government might have a history of alleged human-rights violations." *Jesner*, 138 S. Ct. at 1406 (plurality op.).

If anything, extending ATS liability to corporations for the wholly overseas actions of third parties deters companies with international operations from taking steps to address human rights issues. As this case shows, such efforts can and will be used against corporations. For example, Respondents here referenced Petitioners' efforts to address human rights abuses as evidence of their alleged "aiding and abetting" of those same abuses. Nestlé Br. 7; Cargill Br. 5-6. By just "identifying the human rights risks connected with their business"—something that experts call a "critical first step" for companies and the "key [to] unlock[ing] the potential for transformative positive change in people's lives," Human Rights Report 7—corporations will risk "massive liability," *Jesner*, 138 S. Ct at 1405 (plurality op.), and lawsuits that last decades, App. 32a n.9 (noting that the present case has been pending for "almost fifteen years"). The responsible actions of corporate actors should not be used against them as the basis of punishment. And sticking one's (corporate) head in the sand, which would be the safer course, should not be encouraged.

II. NEITHER INTERNATIONAL LAW PRINCIPLES, NOR DOMESTIC SEPARATION-OF-POWER PRINCIPLES, PERMIT COURTS TO RECOGNIZE CORPORATE LIABILITY UNDER THE ATS

The question of *who* is subject to international norms is one of international law, and international law offers no global consensus that would permit corporate liability. But assuming it were a question of domestic law, it is one Congress, not the courts, should answer.

A. The Lack Of Consensus For Extending International Law Status To Corporations Stems In Part From Concerns That Doing So Will Compromise The Sovereignty Of Nations.

Numerous opinions, including the plurality in *Jesner*, 138 S. Ct. at 1399-1401, document the lack of consensus among nations for an extension of international law status to corporations. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126-127 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013); *id.* at 186 (Leval, J., concurring); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 82-85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). As these jurists and others have explained, international law precedents for subjecting artificial entities such as corporations to the strictures of international law are virtually nonexistent. Of all the relevant international law sources—including the Nuremberg trials, the ad hoc tribunals for the former Yugoslavia

and Rwanda, and the Rome Statute—not a single one extends the international law obligations expressed therein to corporations, nor is there any other evidence of a consensus among nations that such an extension would be appropriate.

It is important to understand *why* there is no uniform global approach to corporate liability. Some of the reasons stem from disagreements over whether corporations can form criminal intent or what forms of artificial entities are even recognized—issues that have been described elsewhere.[10] This section focuses on an additional concern: According corporations the status of international law "subjects" not only imposes obligations but also implies the power to enforce those obligations. Such a power could undermine the host nation's sovereign prerogatives—particularly its domestic enforcement and police powers.

1. "Subjects" of International Law Typically Possess Powers As Well as Obligations.

"An international person is one who possesses legal personality in international law, meaning one who is a subject of international law so as itself to enjoy rights, duties or powers established in international law." 1 OPPENHEIM'S INTERNATIONAL LAW § 33, at 119 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (footnotes omitted). Once a group or entity is deemed an "international person" or

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[10] *See, e.g.*, Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2011); *Doe v. Nestlé, S.A.*, 748 F. Supp. 2d 1057, 1140 n.69 (C.D. Cal. 2010), *rev'd in part*, 766 F.3d 1013 (9th Cir. 2014).

a "subject" of international law, it normally acquires not only international law obligations, but the power and rights historically associated with nations. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57-58 (7th ed. 2008) (a "subject" of international law is an "entity capable of possessing" both "rights and duties and having the capacity to maintain its rights by bringing international claims") (citing Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11)); *see also* CHRIS N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 19 (1974) (essential attributes of a "subject[]" of international law include both rights and duties akin to those accorded to sovereigns); Mala Tabory, *The Legal Personality of the Palestinian Autonomy*, *in* NEW POLITICAL ENTITIES IN PUBLIC AND PRIVATE INTERNATIONAL LAW: WITH SPECIAL REFERENCE TO THE PALESTINE ENTITY 139 (Amos Shapira & Mala Tabory eds., 1999) ("When an entity is a legal personality in the context of international law, it is a subject of international law. Thereby it has capacity (a) to enter into legal relations; and (b) to have legal rights and duties.").

One attribute that attends status as a "subject" of international law is the power to carry out international law obligations. Historically, the law of nations applied solely to nations. *See* Marek St. Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533, 536 (1956). Under this "classic" model, only states possess legal personality, so only states have powers and

obligations under international law; and only states incur legal responsibility for breaching those obligations. Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 932-933 (2005). International law thus imposes obligations upon states, including duties to establish mechanisms for ensuring compliance with international law strictures by their nationals or others within their territories. The states, in turn, implement those mechanisms domestically through their legislative or executive powers. In other words, a nation may be obliged to enforce international norms within its territory, and may do so within its own governmental structure and without threat to its own sovereignty.

Extension of international law status to non-sovereign entities threatens to upset that balance. A prevalent concern is that extending international law status, including obligations, to such entities implies imbuing them with political rights normally reserved for nations—such as rights to participate in shaping treaties and other international law instruments. *See*, *e.g.*, Sigmund Timberg, *International Combines and National Sovereigns: A Study in Conflict of Laws and Mechanisms*, 95 U. PA. L. REV. 575, 611 (1947) ("In addition to imposing obligations, norms, and negative restrictions on corporations, the grant of a charter could also serve to confer on the [multinational corporation] legal standing and specific positive rights under international law."); *see also* Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,* 6 NW. U. J. INT'L HUM. RTS. 222, 257 (2008) (a logical component of legal

personality for corporations is the "endowment of substantive rights and procedural capacity to bring claims before international organs"; in other words, "there is a 'rights' element to the equation"); Patrick Macklem, *Corporate Accountability Under International Law: The Misguided Quest for Universal Jurisdiction,* 7 INT'L L. FORUM DU DROIT INT'L 281, 288 (2005) ("[W]ith international corporate obligations come international corporate rights."); LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 421 (4th ed. 2001) (if corporations are "generally subject to obligations" of international law, then, like states, they also would "enjoy rights under international law").

2. Recognizing Corporations As "Subjects" Of International Law Is Perceived To Compromise State Sovereignty.

Those concerns have fueled a reluctance within the international community to extend international law status to corporations—precisely because such an extension has the potential to undermine the sovereign prerogative of nations in the international arena. In particular, it might be seen as shifting some global power from "nation-states" to multinational corporations in ways that states "consider to be undesirable." Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 753, 773 (1983). Indeed, "[a]s regards transnational enterprises," states "have almost universally agreed that their status should not be upgraded." Donna E. Arzt & Igor I. Lukashuk, *Participants in International Legal Relations, in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 155, 167-68 (Charlotte Ku & Paul F. Diehl

eds., 1998); *see also* Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1159 (1962) (describing concern over "any strengthening of the role of the private corporation in public or 'quasi-public' international legal processes").

Not surprisingly, concerns about state sovereignty are even more acute when the perceived threat is to a nation's sovereign power within its own territory. The imposition of international legal obligations directly on corporations has been viewed as "disempower[ing] states by removing the power they currently enjoy to control their citizens' compliance with international law." Vázquez, *supra,* at 958.

ATS claims, including those in this case, illustrate why. Some ATS plaintiffs have sought to premise liability on the theory that corporate defendants failed to take steps to ensure that host governments and local residents and entities were complying with international law norms, while others have charged corporations with "aiding and abetting" violations of international law allegedly committed by police or military forces called on to address a security situation affecting the corporation.[11] In this case, for

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[11] *See, e.g.*, *Exxon Mobil*, 654 F.3d at 40-41 (claims by villagers of extrajudicial killing, torture, and crimes against humanity arising from actions of the Indonesian military in securing the area around Exxon Mobil's natural gas facility in Aceh, Indonesia); *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005), *aff'g in part* 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (claims of torture, arbitrary detention, crimes against humanity, and cruel, inhumane, and degrading

example, Respondents' theory is that Petitioner corporations "aid[ed] and abett[ed]" private suppliers that allegedly violated international labor conventions. Pet. App. 51a.

Imposing such liability on corporations necessarily would require—and thus empower—those entities to "exercise control over such sovereigns or otherwise suffer the consequences." Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 134 (2007). The concern has been that requiring corporations to monitor and prevent abuses by police or military forces or private parties within the host nation would "fail[] to recognize national sovereignty and the state's ultimate responsibility for actions occurring within its borders." *Id.* It "would designate transnational corporations as the guarantors of the human rights credentials of their sovereign hosts," thereby

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treatment or punishment arising from abduction of union officials by paramilitaries at a banana plantation operated by Bandegua, a wholly owned subsidiary of Del Monte, in Morales, Guatemala); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated en banc,* 403 F.3d 708 (9th Cir. 2005) (mem.) (claims by villagers alleging international law violations by Myanmar military who were securing the area in Myanmar in which a gas pipeline in which Unocal was an indirect investor was being constructed); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000) (claims by political activists alleging imprisonment, torture, and execution by the Nigerian government allegedly at the instigation of Royal Dutch Petroleum Company, Shell Transport and Trading Company, and their wholly owned subsidiary Shell Petroleum Development Company of Nigeria).

diminishing the state's own sovereign authority to control its military and police forces. *Id.*

For those reasons, states are "widely believed to be reluctant to share their privileged position with, or yield some of their sovereign powers to, corporations at the international level." Duruigbo, *supra,* at 255. This concern is especially acute among socialist countries and developing countries. As one scholar described:

> Socialist countries are politically opposed to [multinational corporations] and the majority of developing States are suspicious of their power; both groups would never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control—of course, to the extent that this is possible.

ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 103 (1986); *see also* Arzt & Lukashuk, *supra*, at 168-169, 173 (noting that "almost all relevant parties have opposed international personality for transnational enterprises" and that "most states, developing countries in particular, are likely to view such a development as over-empowering" corporations). In sum, the imposition of direct international legal obligations on private corporations is seen to "represent a significant disempowering of states," and as such, would be a "fundamental change that states are likely to resist strongly." Vázquez, *supra,* at 950.

3. Acceptance Of Corporations As International Law Subjects Does Not Follow From The Fact That Some International Law Norms Have Been Deemed To Bind Individuals.

That individual persons may be criminally liable under international law in some circumstances—a longstanding exception to the "classic" model—is not inconsistent with the concerns about according international law status to corporations.

Over time, and particularly in the context of the Nuremberg trials, international norms were recognized to authorize criminal liability for certain individuals exercising state power and, in some narrow instances, for non-state individuals. *See* Robert H. Jackson, *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial, reprinted in* 20 TEMP. L.Q. 338, 342 (1946); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792 (D.C. Cir. 1984) (Edwards, J., concurring) (individuals have been subjects of international law where the "states are the actors," and the individuals are "officials acting under color of state law"). These extensions of international law into the area of personal responsibility, however, are not viewed as potentially undermining national sovereign interests in the same way as are proposals to extend international law status to corporations. Many of the precedents for individual liability involve cases where the individual, in some fashion, was exercising sovereign power, including powers triggered by the laws of war; these cases can be viewed as an extension of sovereign responsibility under even the "classic" international law model. Jackson, *supra,* at 342.

The few categories of non-state individual liability in international law, moreover, arise largely in contexts where no state's sovereignty is implicated. Piracy and terrorism are the paradigmatic examples. *See* David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT'L L. 121, 137-138 (2010) ("Under th[e] 'classical' view of international law, individuals do not hold direct rights or duties. *** The majority of *** exceptions [to this rule] applied to conduct occurring on the high seas, which is considered the shared territory of all nations."); *The Malek Adhel*, 43 U.S. 210, 232 (1844) (describing pirates as "*hostis humani generis*" because they act "without *** any pretence of public authority").

B. The Lack Of International Law Consensus Regarding Corporate Liability Forecloses Such Liability Under The ATS.

The Coca-Cola Company agrees with the *Jesner* plurality that the lack of international consensus "has significant bearing" on whether courts should impose corporate liability for human rights violations. *Jesner*, 138 S. Ct. at 1399; *see also Kiobel*, 621 F.3d at 130 ("[W]e are required to look to international law to determine whether corporate liability for a 'violation of the [international] law *** ' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS[.]"); *Exxon Mobil*, 654 F.3d at 81 (Kavanaugh, J., dissenting) ("[C]laims under the ATS are defined and limited by customary international law, and customary international law does not extend liability

to corporations."). The dearth of any global consensus should be the end of the matter.

In fact, this Court's reasoning in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), makes the lack of international consensus dispositive. *Sosa* describes a narrow class of norms that may be recognized through a judicially created cause of action without Congressional guidance. It requires that such norms be agreed upon with a high level of definiteness, certainty, and universality among civilized nations—*i.e.*, that they already be fully formed as a matter of international law. *Id.* at 732. A logical and necessary part of whether conduct violates such a norm is whether the norm even extends to the particular type or category of defendant at issue—that is, in international law parlance, whether that defendant is a "subject" of the norm in question, as described above. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra*, at 120 ("The concept of international person is . . . derived from international law."); *The Nurnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Trib. 1946) ("[I]nternational law imposes duties and liabilities upon individuals as well as upon states."). Indeed, the scope of liability is always a substantive issue—not a question of remedy. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005) ("The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." (quoting D. DOBBS, THE LAW OF REMEDIES § 1.2, at 3 (1973)).

Ultimately, given the majority's holding that "serious separation-of-powers and foreign-relations

concerns" cautioned against permitting ATS liability against *foreign* corporations, *Jesner* had no need to resolve the more categorical issue under international law. 138 S. Ct. at 1398; *see id.* at 1402 (plurality op.) ("In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations."). But as six of the eight dissenting Ninth Circuit judges agreed in this case, "[p]roperly understood, *Sosa* *** requires that courts evaluate the potential liability under international law for certain classes of defendants." App. 16a-17a. Without a global consensus on corporate liability for violations of international law, ATS suits against corporations should be dead on arrival.

C. To The Extent That Corporate Liability Poses A Domestic Law Question, It Is One That Congress Must Answer.

Even if international law did leave it to individual nations to extend liability to new classes of defendants, it would be up to Congress, not courts, to do so. Generally, when international law creates a norm, and even when it *mandates* that nations enforce the norm domestically, the domestic implementation is effected through the lawmaking body within each nation—*i.e.*, each nation's legislature. *See, e.g.,* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 88 (2003) (states typically respond to complementarity "by adopting implementing legislation" to permit domestic punishment of international law crimes); Convention on the Prevention and Punishment of the Crime of

Genocide, art. V, Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045 ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

Within our Nation's tripartite system of government, the Constitution vests Congress with effectuating domestic implementation of an international law norm as part of its power to "define and punish . . . Offences against the Law of Nations." U.S. CONST., art. I, § 8, cl. 10. Thus, as this Court recognized in *Sosa* and stressed in *Jesner*, normally it is Congress that is called upon to perform that implementation. *Sosa*, 542 U.S. at 725; *Jesner*, 138 S. Ct. at 1402-1403. This is particularly true in the post-*Erie* framework, in which the lawmaking function at the federal level has shifted significantly toward the legislative branch—a point that figured prominently in *Sosa*'s five reasons for caution in "adapting the law of nations to private rights." 542 U.S. at 725-728; *see also Jesner*, 138 S. Ct. at 1402 ("[E]ven in the realm of domestic law, *** this Court has 'recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'").

By contrast, the role of courts is significantly narrower. When considering "whether courts may recognize new, enforceable international norms," *Sosa* expressly cabined courts' lawmaking ability. *See Jesner*, 138 S. Ct. at 1398. Without legislative say-so, courts may recognize common law actions only for the

narrow class of norms *already* recognized at international law with such a high level of definiteness, certainty, and universality among nations such that the United States would be viewed as remiss in *not* recognizing such claims and providing civil redress. *See Sosa*, 542 U.S. at 728. After all, the ATS was enacted to fulfill our nation's obligations under international law because "a private remedy was thought necessary for diplomatic offenses under the law of nations." *Id.* at 724. This Court therefore concluded that the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations *with a potential for personal liability at the time*"—*i.e.*, those with the same international law expectation of civil redress that applied to diplomatic offenses. *Id.* (emphasis added); *see also id.* at 715 (intended scope included violations "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs").

This narrow conception of ATS liability was confirmed in *Jesner's* recognition "that ATS litigation implicates serious separation-of-powers and foreign-relations concerns." 138 S. Ct. at 1398. Starting from the baseline presumption that the creation of "a private right of action is one better left to legislative judgment in the great majority of cases," this Court emphasized that "[t]his caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." *Id.* at 1402-1403. And "[n]either the language of the ATS nor the precedents interpreting it support an

exception to th[is] general principle[] in th[e] context" of creating corporate liability under international law. *Id.* at 1403.

Just the opposite: "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS" because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner*, 138 S. Ct. at 1403. *Jesner*'s conclusion rings true here as well: unlike the political branches, "courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one." *Id.* at 1407.

Absent international consensus, and particularly "absent further action from Congress," *Jesner*, 138 S. Ct. at 1403, this Court should hold unequivocally that *courts* cannot recognize new rules imposing ATS liability upon corporations—foreign or domestic. *See id.* at 1411-1412 (Alito, J., concurring in part and concurring in the judgment) (courts "have neither the luxury nor the right to make such policy decisions [them]selves").

III. DOMESTIC CORPORATE OVERSIGHT OF OVERSEAS ACTIVITIES CANNOT OVERCOME THE EXTRATERRITORIALITY BAR

The ATS does not allow claims "seeking relief for violations of the law of nations occurring outside the United States." *Kiobel*, 569 U.S. at 124. The sort of generic allegations of U.S. "corporate oversight" that Respondents have mustered here are not enough to evade that limitation.

The "longstanding" presumption against extraterritoriality provides that legislation ordinarily "is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (internal quotation marks omitted). Because Congress typically legislates with respect to domestic matters, "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, *** it has none." *Id.* (internal quotation marks omitted). That principle "reflects the 'presumption that United States law governs domestically but does not rule the world.'" *Kiobel*, 569 U.S. at 115 (quoting *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007)).

Chief among the presumption's salutary purposes is avoiding "international discord." *Kiobel*, 569 U.S. at 115 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). Only Congress "has the facilities necessary" to evaluate whether U.S. law can apply abroad, "where the possibilities of international discord are so evident and retaliative action so certain." *Id.* at 116 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). Without the presumption against extraterritorial application of U.S. law, the Judiciary runs the risk of "erroneously adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.*

For its part, The Coca-Cola Company has had to expend time and resources (successfully) defending ATS suits involving conduct occurring almost entirely outside the United States. For example, the Company,

along with dozens of other U.S.-based multinational corporations, was forced to defend a suit that spanned years even though "plaintiffs *** failed to allege that any relevant conduct occurred in the United States." *Balintulo v. Daimler AG*, 727 F.3d 174, 189 (2d Cir. 2013); *see id.* at 180 n.1 (listing The Coca-Cola Co. as one of the original defendants named in the suit). In that case, as here, applying the ATS to predominantly overseas conduct "risk[ed] potentially serious adverse consequences for significant interests of the United States." *Id.* at 188 (quoting U.S. government's statement of interest in the case). The federal government warned then that "[t]he United States relies, in significant part, on economic ties and investment to encourage and promote change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty." *Id.* Yet "the prospect of costly litigation and potential liability in U.S. courts" for operating in those countries "will discourage U.S. (and other foreign) corporations from investment in many areas of the developing world." *Id.*; *see also Jesner*, 138 S. Ct. at 1405 (plurality) (recognizing the same risk with corporate liability under the ATS: less "global investment in developing economies, where it is most needed").

Speaking from experience, The Coca-Cola Company can confidently say that allowing an ATS claim to overcome the extraterritoriality bar based on the general domestic activities alleged here—*i.e.*, run-of-the-mill, U.S.-based "normal business conduct," Pet. App. 30a—only "discourage[s]" foreign investment and thus harms "important foreign policy interests." *Balintulo*, 727 F.3d at 188. That is why this Court

should make clear that, just like "mere corporate presence," *Kiobel*, 569 U.S. at 125, ATS claims involving mere corporate *oversight* cannot overcome the extraterritoriality bar, either. To hold otherwise in the absence of clear congressional direction would risk "unintended clashes between our laws and those of other nations which could result in international discord"—*i.e.*, precisely what the presumption against extraterritoriality is supposed to prevent. *Id.* at 115 (quoting *Arabian American Oil Co.*, 499 U.S. at 248).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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**Licensed to practice in Virginia only and under the direct supervision of a partner of Akin Gump who is an enrolled, active member of the D.C. Bar; application for admission to the D.C. Bar pending.*

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