Nos. 19-416 and 19-453

In the Supreme Court of the United States

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

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

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

BRIEF OF AMICUS CURIAE CENTER FOR GLOBAL JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Center for Global Justice ("the Center") is an academic center within the Regent University School of Law. The Center promotes the rule of law and seeks justice for the world's downtrodden – the poor, the oppressed, and the enslaved. We advocate a natural law foundation for human rights. Embedded in that advocacy, we seek to combat human trafficking and protect children, some of the most vulnerable and abused people in our world today.

The fundamental and inalienable equality of all individuals represents a core tenet of Judeo-Christian faith. We believe that God created humankind in his own image and desires that all enjoy the sacred blessings of liberty in shared community. This unifying principle served as the intellectual and moral basis of the Founding. As Americans, we embrace the words of the Declaration of Independence that all persons are self-evidently entitled to the rights extolled for centuries in the Judeo-Christian and natural law traditions.

Slavery violates the most basic of these God-given rights – freedom. It spurns human dignity and equality and "substitutes an 'I-it' relationship for the 'I-thou' relationship." Martin Luther King, Jr., Letter from a Birmingham Jail (1963). All the more violative of first principles is the execrable practice of child

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

slavery. The prophetic tradition – embodied in *Isaiah* 58:6-7 – calls us "to set the oppressed free and break every yoke . . . and not to turn away from [our] own flesh and blood." We endeavor to "break the yoke of slavery itself, that it may not serve again another time." 4 Matthew Henry, An Exposition of the Old and New Testaments 270 (George Burder & Joseph Hughes, eds., Philadelphia, Haswell, Barrington, & Haswell 1838) (1708–10); *see also* I. W. Slotki, The Soncino Books of the Bible: Isaiah 284 n.6f (1947) (noting that "[t]he right ways of observing a fast" include "the abolition of slavery and oppression").

Yet, in these consolidated cases, petitioners would have this Court turn a blind eye to American corporations' exploitative outsourcing of human slavery, the bonds of which have been cruelly imposed upon children for commercial gain. Following the examples of William Wilberforce, Frederick Douglass, Harriet Tubman, and Abraham Lincoln, and consistent with foundational Judeo-Christian principles and the words of the First Congress, we urge the Court emphatically to reject petitioners' effort to rob words chosen by Congress in 1789 of their ordinary public meaning. Nothing in law or logic counsels against granting full berth to the textual import of the Founding generation's formative legislative handiwork.

INTRODUCTION AND SUMMARY OF ARGUMENT

Reaffirming our national commitment to combatting slavery around the world, President Trump observed that "[h]uman trafficking erodes

personal dignity and destroys the moral fabric of society. It is an affront to humanity that tragically reaches all parts of the world." Proclamation No. 9975, 85 Fed. Reg. 633, 633 (Dec. 31, 2019). Three years earlier, President Obama observed that slavery's "fundamental notion [is] in direct contradiction with our founding premise that we are all created equal," Proclamation No. 9561, 82 Fed. Reg. 1159, 1159 (Dec. 28, 2016), and reminded Americans "that our freedom is bound to the freedom of others," *id.* at 1160.

In Côte d'Ivoire, thousands of children are trafficked from neighboring Mali and Burkina Faso. They are forced to work long hours wielding machetes, carrying heavy loads, and spraying dangerous pesticides on cocoa farms. Their labor is prohibited by Ivoirian law. And the international community universally condemns child slavery and the economic exploitation of children. International Labor Organization: Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, 38 I.L.M. 1207 (1999). Yet, as low cocoa prices exacerbate poverty in the region, child labor continues to thrive. *See* Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 10, 2019), https://perma.cc/U3Y6-9MRH.

Respondents are victims of trafficking and forced labor. In their complaint, respondents describe being beaten and tortured, and witnessing other children being beaten and tortured. They allege that petitioners had "firsthand knowledge" of their suppliers' slaveholding practices, J.A. 318, and that petitioners engaged in a pattern and practice of

encouraging the use of child slave labor to obtain cocoa at the lowest possible prices. J.A. 241–42.

Needless to say, American corporations cannot enslave children – or anyone else – within the territorial jurisdiction of the United States. U.S. Const. amend. XIII. But if respondents' allegations are true, then these two American companies have, in essence, outsourced their unspeakably exploitative practices to foreign shores where the rule of law is utterly mocked.

This behavior cannot be countenanced as a matter of law, morality, or natural justice. Christian – and, indeed, universal – ethics mandate its condemnation. The United States courts should not turn a blind eye to allegations of outsourced child slavery by *American* corporations. Indeed, to do so only invites more of the same.

American commercial exploitation of defenseless children languishing in at-risk, broken societies cries out for a remedy. Consistent with the fundamental values of human decency undergirding our constitutional republic, the very First Congress of the United States provided one through the Alien Tort Statute ("ATS"). Neither the ATS nor this Court's precedents prevent this case from proceeding. The law of nations speaks with clarity and consistency: slave labor – especially child slave labor – is a profoundly barbaric practice to be wholly condemned. And though foreign-policy and separation-of-powers concerns have counseled this Court's understandable restraint in prior cases, these very considerations call for the exercise of federal judicial power in the singular circumstances where,

employing their considerable command-and-control powers, American companies knowingly countenance the gross violation of fundamental international norms.

ARGUMENT

I. Both Foreign-Policy and Separation-of-Powers Concerns Shaped *Sosa*, *Kiobel*, and *Jesner*.

At its core, the ATS exists to foster international comity. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018). The First Congress passed the ATS after two attacks against foreign officials exposed the United States' "incapacity to deal with" violations of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2005). "[I]f not adequately redressed," such violations "could rise to an issue of war." *Id.* at 715. Thus, the ATS confers on United States courts jurisdiction over – and power to recognize – violations of the law of nations. *Id.* at 724.

Beginning with *Sosa*, this Court has decided three ATS cases highlighting the opposite problem: the potential for *judicial overreach* to trigger international strife. In each of these cases, this Court – before declining jurisdiction – carefully evaluated the dangers of judicial interference with foreign relations. *Id.* at 728; *Jesner*, 138 S. Ct. at 1407 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)) (warning of "serious foreign policy consequences" arising from judicial overreach).

Each case featured challenges in American courts to foreign defendants' foreign actions. This

common pattern presented common problems. Chief among them was judicial interference with the political branches' foreign-policy prerogatives. For instance, the Court noted that freely recognizing actions under the ATS "raise[s] risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 728. Further, applying the ATS to foreign actors' foreign conduct can incite "diplomatic strife" and could encourage other nations to "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States." *Kiobel*, 569 U.S. at 124. And the foreign-policy concerns implicated by foreign corporate liability guided this Court to leave the question to Congress. *Jesner*, 138 S. Ct. at 1403.

Amici participation by foreign nations in all these cases further highlights the diplomatic issues that frequently informs ATS litigation. Foreign nations filed *amicus* briefs in *Sosa*, *Kiobel*, and *Jesner*, objecting to the proposed exercise of jurisdiction. Those briefs ran the gamut from outlining "basic principles of international law," *Sosa*, 542 U.S. at 733 n.21, to asserting that such litigation would present a "grave affront" to the *amicus* nation's sovereignty. *Jesner*, 138 S. Ct. at 1407.

These foreign-policy issues implicate other concerns with respect to separation of powers in ATS litigation. In *Sosa*, the Court noted that "the possible collateral consequences of" ATS litigation call for judicial deference to Congress when it is unclear that exercising jurisdiction would be consistent with the statute's text and purpose. *See* 542 U.S. at 727 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286–287 (2001)). This issue arose once again in *Jesner*,

where the Court held that foreign corporate liability is "unnecessary to advance [the ATS's] purpose." 138 S. Ct. at 1403. Because holding *foreign* corporations liable for *foreign* actions in American courts threatens to cause diplomatic friction, the Court found it improper to exercise jurisdiction in the absence of congressional action.

Consistent with these prudential concerns, this Court carefully delineated the bounds of judicial discretion under the ATS. In order properly to lie, claims must allege violations of international norms that are "specific, universal, and obligatory." *Sosa*, 542 U.S. at 732 (quoting *In re Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)). In addition, claims must "touch and concern" United States territory "with sufficient force to displace the presumption against extraterritoriality." *Kiobel*, 569 U.S. at 124–25. And, finally, the courts have no jurisdiction over ATS claims advanced against foreign corporations. *Jesner*, 138 S. Ct. at 1407.

But this case fundamentally breaks that common pattern. This is not a situation involving foreign defendants acting on foreign soil. To the contrary, respondents allege that *American* corporations acted on both American and foreign soil to encourage and facilitate child slavery and trafficking in West Africa. As Justice Gorsuch explained in *Jesner*, the fact that petitioners are American fundamentally alters the prudential calculus:

> It is one thing for courts to assume the task of creating new causes of action to ensure *our* citizens abide by the law of

> nations and *avoid* reprisals against this country. It is altogether another thing for courts to punish *foreign* parties for conduct that could not be attributed to the United States and thereby *risk* reprisals against this country.

Id. at 1419 (Gorsuch, J., concurring) (emphases in original).

While our courts lack authority to reach into foreign territories and police foreign actors, it is decidedly within the powers of the federal judiciary to hold American actors liable for trampling on human rights in developing nations. Such use of jurisdiction is "uncontroversial" under international law. *Kiobel*, 569 U.S. at 136 (Breyer, J., concurring) (quoting Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party at 11, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491)) ("It is 'uncontroversial' that the 'United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law.' ").

II. Corporate Liability For Intentionally Facilitating Child Slavery And Trafficking Abroad Is Entirely Consistent With United States Foreign Policy.

Petitioners assert that American corporate liability for exploitative actions at home and abroad threatens to usher in a plethora of international and constitutional woes. Diplomatic relations will be

threatened, petitioners gravely warn, and separation-of-powers principles imperiled by imposing ATS liability on domestic corporations. This is all contrived.

Indeed, in the limited context of American companies encouraging and facilitating commercially exploitative child slavery, petitioners' argument is entirely fanciful. Judicial application of the ATS in this highly specific and narrow context actually fosters America's diplomatic goals. These policies are embodied both in elaborate structures within the Executive Branch and a longstanding bipartisan commitment to human rights.

A. United States Foreign Policy Emphasizes Human Rights And The Rule Of Law.

Consider first the architecture of the Department of State, which stands as a structural rebuttal to petitioners' imagined concerns. In 1975, the State Department created the position of Coordinator for Humanitarian Affairs "to bring a clear focus on human rights issues . . . [and] to assure attention at the highest level, as these issues deserve." Letter from Deputy Secretary of State Robert Ingersoll to Senator James Eastland (Apr. 18, 1975).[2] The following year, Congress amended the Foreign Assistance Act, declaring advancement of human rights around the world to be "a principal goal of the foreign policy of the United States." International Security Assistance and Arms Export

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[2] Available at https://perma.cc/YH77-ZFPN.

Control Act of 1976 § 301(a), Pub. L. No. 94-329, 90 Stat. 729, 748. In the same measure, Congress made the Coordinator for Humanitarian Affairs a Presidential appointee subject to Senate confirmation. *Id.* § 301(b), 90 Stat. at 750. Today, that position is known as the Assistant Secretary of State for Democracy, Human Rights, and Labor. 22 U.S.C. § 2651a(c)(2).

Under the purview of the Under Secretary for Civilian Security, Democracy, and Human Rights, the Assistant Secretary heads the Bureau of Democracy, Human Rights, and Labor. Consistent with Congress's declared mission of advancing human rights, the Bureau promotes "the fundamental freedoms set forth in the founding documents of the United States" and complementary principles embodied in the Universal Declaration of Human Rights.[3] The Bureau seeks to combat human trafficking and forced labor around the world.

Congress enhanced this formidable anti-slavery infrastructure by creating the Office to Monitor and Combat Trafficking in Persons (TIP Office). Victims of Trafficking and Violence Protection Act of 2000 § 105(e), 22 U.S.C. § 7103(e). The TIP Office "leads the Department's global efforts to combat modern slavery"[4] and assists in preparing the

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[3] *About Us*, U.S. Dep't St., Bureau of Democracy, Hum. Rts., & Lab. (last visited Oct. 13, 2020), https://perma.cc/UV92-6DME.

[4] *Our Mission*, U.S. Dep't St., Off. Monitor & Combat Trafficking Persons (last visited Oct. 13, 2020), https://perma.cc/4BD7-3JXA.

State Department's annual Trafficking in Persons Report ("TIP Report") mandated by Congress. 22 U.S.C. § 7107(b)(1).

The widely heralded TIP Report "signal[s] the U.S. government's resolve to fight human trafficking" and is "a standard-bearer for the principles enshrined in" domestic and international human trafficking laws. *Trafficking in Persons Report: 20th Edition* 2–3, U.S. Dep't St. (June 2020).[5] Twenty years ago, the TIP Office published its first report, "mark[ing] a pivot from indignation to positive action" in the struggle against human trafficking. *Id.* at 2. The report "serves as a roadmap for diplomatic engagement" and is used by State Department officials "to draw attention to human trafficking, discuss policy recommendations, and work toward solutions." *Id.* at 8.

The Department of State by no means stands alone in the U.S. Government's campaign against slavery and human trafficking. Through the Bureau of International Labor Affairs (ILAB)'s Office of Child Labor, Forced Labor, and Human Trafficking, the Labor Department fights modern slavery around the globe. ILAB's *2019 Findings on the Worst Forms of Child Labor* described the nettlesome problems of human trafficking and the worst forms of child labor in the Ivoirian cocoa industry, noting the insufficiency

[5] Available at https://perma.cc/RA72-UFC6.

of Ivoirian law enforcement programs to address this ongoing human tragedy.[6]

The political branches not only collaboratively erected these structures, but Congress oversees their operation through budget and oversight hearings. As one example, Congress has appropriated tens of millions of dollars over the last three years to the TIP Office's Program to End Modern Slavery (PEMS). PEMS, in turn, has awarded approximately $100 million of foreign assistance since 2017 to reduce this abhorrent practice.[7] Equally illustrative of Congress's commitment to human rights, including religious freedom, the House of Representatives established the Lantos Human Rights Commission in 2008. The bipartisan commission is charged with "[d]eveloping congressional strategies to promote, defend, and advocate internationally recognized human rights norms," including the abolition of child slavery. H.R. Res. 1451, 110th Cong. § 2(a)(1) (2008).

As these human-rights promoting structures demonstrate, the United States has been unequivocal in seeking to halt slavery and its evil companion, human trafficking. By presidential proclamation each January, the federal government observes "National

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[6] *See generally 2019 Findings on the Worst Forms of Child Labor*, U.S. Dep't Lab. (last visited Oct. 19, 2020), https://perma.cc/KDB4-TVWC.

[7] *International Programs*, U.S. DEP'T OF STATE (last visited Oct. 13, 2020), https://www.state.gov/international-programs/. The primary recipient of these funds has been the Global Fund to End Slavery, whose mission "is to end modern slavery by making it economically unprofitable." *Ibid.*

Slavery and Human Trafficking Prevention Month." Last year, President Trump's proclamation touted the roles of no fewer than five executive departments in combatting slavery at home and abroad, including the Departments of Justice, Homeland Security, State, Health and Human Services, and Transportation. Proclamation No. 9975, 85 Fed. Reg. 633, 633 (Dec. 31, 2019). In addition, President Trump praised the work of the Interagency Task Force to Monitor and Combat Trafficking, as well as the Office of Management and Budget, for their contributions to the ongoing effort to stop slavery and human trafficking.

Against this impressive governmental architecture, the enduring scourge of American-corporate utilization of overseas child slavery makes a mockery of our nation's oft-stated commitment to human dignity and freedom.

B. Failing To Hold Americans Liable For Outsourcing Child Slavery Undermines U.S. Foreign Policy And The Rule Of Law.

In this case, the diplomatic concerns that frequently arise in ATS suits are wholly absent. For the very reason that child slave labor stands universally condemned by the law of nations, no one can reasonably assert that providing a federal forum for victims of *American* corporate exploitation would somehow trigger diplomatic disapprobation.

And indeed, no one other than the self-interested petitioners has made that assertion. Though petitioners insist that ATS liability for domestic corporations "risks 'embroil[ing]' the United

States in 'international controversies,' " not one foreign state has come forward in this case to warn of potential diplomatic friction. Pet. Br. (Nestlé) 45. No state or foreign entity has yelled "stop."

Contrast this deafening silence with prior ATS cases, in which foreign states voiced strong objection to the assertion of jurisdiction. *Cf. Jesner*, 138 S. Ct. at 1407 (highlighting objections raised by *amicus* the Hashemite Kingdom of Jordan); *Kiobel*, 569 U.S. at 137 (Breyer, J., concurring) (noting the objections of *amici* the United Kingdom and the Netherlands); *Sosa*, 542 U.S. at 733 n.21 (discussing objections raised by *amici* the European Commission and South Africa); *see also* Brief of the Government of the United Mexican States as *Amicus Curiae* in Support of Petitioners, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17-1678).[8]

Nor has this Court received objections from any members of Congress or executive agencies tasked with implementing and advancing human rights policies. Neither former Senator Harkin nor

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[8] There are also myriad examples of foreign states appearing as *amici curiae* before United States Circuit Courts in ATS cases. *E.g.*, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 799 (9th Cir. 2011), *cert. granted, judgment vacated,* 569 U.S. 945 (2013) (citing the amicus brief of the Governments of the United Kingdom and the Commonwealth of Australia); Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action at 12, *Presbyterian Church of Sudan v. Talismen Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (07-0016-cv); Brief for the United States as Amicus Curiae Supporting Appellees 6–8, *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Nos. 09-2778-cv et al.) (providing objections from South African and German officials).

Representative Engel has appeared to suggest that ATS liability under these child slavery-infected circumstances would somehow undermine the Harkin-Engel Protocol. Far from it.

Nevertheless, the Acting Solicitor General argues that "active corporate investment" in developing nations "is an essential foundation of human rights." Gov't Br. 16, quoting *Jesner*, 138 S. Ct. at 1406. From this uncontroversial premise, the Acting Solicitor General boldly asserts that corporate liability under the ATS for aiding and abetting child slavery threatens to "undermine U.S. economic incentives" for foreign investment. *Ibid.*

This is far-fetched. The Government's argument receives not a word of support from the developing nations these policies are intended to help. The reason is self-evident: Egregious human rights abuses, and especially child slavery and trafficking, cannot possibly serve as the "foundation for human rights." The continuing need for private investment in developing nations should not provide a license to encourage and facilitate child slavery in the supply chain. The ATS does not require strict liability for American corporations whose foreign suppliers perpetrate human rights abuses. But American companies that actively enable and exploit those human rights abuses in violation of the law of nations, as petitioners are alleged to have done, fall comfortably within the scope of the ATS.

In short, the U.S. Government should not be heard to speak out of both sides of its mouth on this issue. Immunizing corporations from ATS liability diabolically incentivizes American companies to run

roughshod over obligatory international norms in search of more favorable market conditions. Failing to hold American corporations accountable under these extreme circumstances diminishes the United States' international stature, erodes American credibility in the battle against human trafficking, and, more corrosively, undermines the rule of law.

Not a single overseas institution – public or private – suggests that federal judicial intercession with respect to U.S.-countenanced child slavery exploitation will somehow inflame diplomatic tensions or dissuade private investment. Indeed, to draw from the Great Chief Justice's observation in *Marbury v. Madison*, that sort of assertion is simply too extravagant seriously to be maintained. 5 U.S. (1 Cranch) 137, 170 (1803).

III. In The Absence Of Diplomatic Concerns, Separation-Of-Powers Principles Present No Obstacle To ATS Liability In This Case.

Despite foreign-policy considerations weighing strongly *in favor of* imposing ATS liability on domestic corporations aiding and abetting child slavery and trafficking, petitioners urge this Court to deny jurisdiction. In petitioners' view, *Jesner*'s reasoning in rejecting ATS liability for *foreign* corporations should lead to the same conclusion here.

This comparison ignores a critical distinction between *Jesner* and this case, namely, the nationality of the defendants. This factual difference flips the prudential considerations that dominate ATS litigation and significantly diminishes any realistic concern over separation of powers.

In *Jesner,* Justice Gorsuch forcefully elucidated the importance of this distinction: Were the United States to reach into foreign territories and drag foreign actors into American courts, that course of conduct would likely spawn diplomatic tensions of the kind the First Congress was eager to avoid. *Jesner*, 138 S. Ct. at 1419 (Gorsuch, J., concurring). Such an aggressive exercise of federal jurisdiction would tend to defeat the purpose of the ATS and dangerously intrude into the exclusive province of the political branches.

But by holding *American* citizens accountable for egregious human rights violations – such as aiding and abetting child slavery and trafficking – *American* courts would "*avoid* reprisals against" the United States. *Ibid.* (emphasis in original). This precisely reflects the First Congress's intent.

That purposive approach to ATS liability undergirded *Jesner*'s analysis. Central to that reasoning was *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), in which this Court declined to permit *Bivens* actions against corporate defendants. To allow such cases to proceed "would have been a 'marked extension' of *Bivens* that was unnecessary to advance its purpose." *Jesner*, 138 S. Ct. at 1403 (quoting *Malesko*, 534 U.S. at 74); *see also Malesko*, 534 U.S. at 71–72 (discussing how the plaintiff's proposed remedy deviates from the "core premise" of *Bivens*). Because corporate liability was unnecessary to advance *Bivens*' purpose, this Court concluded that it was "a question for Congress." *Jesner*, 138 S. Ct. at 1403 (quoting *Malesko*, 534 U.S. at 72).

Measured against *Malesko*'s standard, foreign corporate liability under the ATS fails. ATS's overarching purpose is "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (citing the United States' *amicus* brief in that case). Foreign corporate liability is not merely unnecessary to advance this purpose – it tends to contravene it. *Id.* at 1407 (holding that foreign corporate liability creates "the very foreign-relations tensions the First Congress sought to avoid").

In stark contrast, immunizing American corporations from ATS suits might indeed "provoke foreign nations to hold the United States accountable" for American corporations' human rights violations committed abroad. Foreign plaintiffs – particularly citizens of states with a corrupt judicial system[9] – should have a remedy against American corporations that encourage and facilitate violations of specific, universal, and obligatory international standards. Failing to provide a forum to litigate such horrific allegations as child slavery undercuts both American and international efforts to combat the unspeakable evil of human trafficking. It risks encouraging further corporate exploitation of human rights abuses in

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[9] *2020 Investment Climate Statements: Côte d'Ivoire*, U.S. Dep't St. (Sept. 9, 2020) https://perma.cc/4D8P-DHXL (observing that "[c]orruption in many forms is deeply ingrained in public and private sector practices" and "has the greatest impact on judicial proceedings").

developing nations – all for the sake of lower production costs and higher profits.

Our country need not tolerate such conduct or these concomitant risks. Neither *Jesner*, *Malesko*, nor any other precedent of this Court requires such a holding. And because exercising jurisdiction here furthers the ATS's purposes, separation-of-powers concerns are severely diminished, if not completely absent.

Additionally, petitioners point to the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73, note following 28 U.S.C. § 1350, as "the most logical ATS analogue" to suggest that corporate liability under the ATS is improper. Pet. Br. (Nestlé) 43.

This argument once again sidesteps context. The TVPA provides a cause of action for torture against "individuals," a statutory term that excludes corporations. *Mohamad v. Palestinian Authority*, 566 U.S. 449, 456 (2012). Reiterating prudential concerns, the plurality in *Jesner* concluded that "Congress' decision to exclude" corporations from TVPA liability "illustrates that significant *foreign-policy implications*" counsel a restrained view of the ATS. *Jesner*, 138 S. Ct. at 1404 (emphasis added). This conclusion makes sense only in the context of suits against foreign actors, where diplomatic interests might be harmed by imposing liability.

The *Jesner* plurality decidedly did not say, as petitioners suggest, that Congress's decision to limit the TVPA to individuals reflects Congress's judgment about the appropriate scope of liability in all ATS cases. To go that far would be decidedly anti-textual.

After all, the TVPA does not merely address "individuals," but individuals acting "under actual or apparent authority, or color of law, of any foreign nation." TVPA § 2(a). To suggest that this choice reflects the proper scope of ATS liability would foreclose not only corporate liability under the ATS, but also individual liability for any activity not conducted under the authority of another sovereign – including the very cases that *Sosa* held were core to the ATS's purpose.[10]

To the extent the TVPA is a useful analogy for ATS cases, it is one that cautions against exercising jurisdiction over foreign nationals' foreign actions. Petitioners' myopic view of this analogy belies the *Jesner* plurality's expressed concerns about foreign policy. 138 S. Ct. at 1404. The same foreign-policy concerns that led Congress to restrict TVPA's scope also led this Court to reject applying ATS to foreign corporations. Those concerns are irrelevant to the question whether *domestic* corporations should be liable in *domestic* courts for violating specific, universal, and obligatory international norms against child slavery and human trafficking.

ATS's plain language excludes no class of defendants. *Argentine Republic v. Amerada Hess*

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[10] Indeed, international law prohibitions on slavery and genocide "extend liability to private persons as well as government officials," while "[t]orture and summary execution . . . appear to violate international law only when committed by or at the behest of government officials." Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l. L.J. 53, 95–96 (1981).

Shipping Corp., 488 U.S. 428, 438 (1989). Prudential concerns with respect to foreign policy have counseled in favor of judicial caution in past cases. Here, in sharp contrast, those concerns decidedly weigh in favor of exercising jurisdiction.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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