No.

In the Supreme Court of the United States

CARGILL, INCORPORATED,

Petitioner,

v.

JOHN DOE I, ET AL.,
INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. PINCUS
Counsel of Record
KEVIN S. RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTIONS PRESENTED

Petitioner Cargill, Incorporated, purchases cocoa beans grown in Côte d'Ivoire. Respondents are Malian citizens who allege that, when Respondents were under the age of fourteen, Ivorian cocoa farmers subjected them to forced labor and other abuses in violation of international law.

Respondents filed this putative class action under the Alien Tort Statute, 28 U.S.C. § 1350, claiming that Cargill aided and abetted the farmers' violations of international law by purchasing cocoa from and providing financial assistance to Ivorian cocoa farmers.

The questions presented are:

1. Whether the presumption against extraterritorial application of the Alien Tort Statute is displaced by allegations that a U.S. company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in—and the plaintiffs' suffered their injuries in—a foreign country.

2. Whether a domestic corporation is subject to liability in a private action under the Alien Tort Statute.

PARTIES TO THE PROCEEDING BELOW

Cargill, Incorporated and Nestlé USA, Inc. were defendants-appellees below. Cargill West Africa, S.A., Nestlé, S.A., and Nestle Ivory Coast, were also named as defendants-appellees below. Archer Daniels Midland Co. had been a defendant in the district court, but the claims against it were voluntarily dismissed.

John Doe I, John Doe II, John Doe III, John Doe IV, John Doe V, and John Doe VI, were plaintiffs-appellants below.

RULE 29.6 STATEMENT

Petitioner Cargill, Incorporated is a domestic corporation, the shares of which are not publicly traded. No publicly traded company owns 10% or more of its common stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the U.S. District Court for the Central District of California, and the U.S. Court of Appeals for the Ninth Circuit:

Doe v. *Nestle, S.A.*, No. CV 05-5133-SVW-MRW (C.D. Cal. Mar. 2, 2017)

Doe v. *Nestle, S.A.*, No. 17-55435 (9th Cir. July 5, 2019)

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

Nestle U.S.A., Inc. v. *Doe*, No 19-416 (Sept. 27, 2019)

Prior decisions in the same proceedings are:

Doe v. *Nestle, S.A.*, No. CV 05-5133-SVW-MRW (C.D. Cal. Sept. 8, 2010)

Doe v. *Nestle, S.A.*, No. CV 05-5133-SVW-MRW (C.D. Cal. Oct. 13, 2010)

Doe v. *Nestle USA, Inc.*, No. 10-56739 (9th Cir. Sept. 4, 2014)

Nestle U.S.A., Inc. v. *Doe*, No. 15-349 (U.S. Jan. 11, 2016)

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes, Rules and Regulations

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 28a-39a) is reported at 929 F.3d 623. The order denying rehearing and rehearing *en banc* (App., *infra*, 1a-27a) is also reported at 929 F.3d 623. The initial opinion of the court of appeals (App., *infra*, 40a-51a) is reported at 906 F.3d 1120. The district court's opinion granting the motion to dismiss (App., *infra*, 52a-70a) is unreported but available at 2017 WL 6059134.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2018 (App., *infra*, 40a), and a timely petition for rehearing was denied on July 5, 2019 (App., *infra*, 1a). This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT

This Court has repeatedly recognized that Alien Tort Statute (ATS) claims—actions brought by citizens of other nations seeking damages for violations of international law—"implicate[] serious separation-of-powers and foreign-relations concerns" and therefore "must be 'subject to vigilant doorkeeping.'" *Jesner*

v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004)).

The Ninth Circuit's holdings in this case instead throw open the federal courts to ATS claims, adopting expansive constructions of this common-law cause of action that create square conflicts with rulings by other courts of appeals and violate the principles governing ATS actions prescribed by this Court in *Jesner* and its predecessors.

First, the panel reversed the district court's determination that the claim here is extraterritorial, and therefore barred by this Court's holding in *Kiobel* v. *Royal Dutch Petroleum*, 569 U.S. 108 (2013)—even though the alleged labor abuses occurred in Côte d'Ivoire, Plaintiffs were injured in Côte d'Ivoire, and Petitioner Cargill's purchases of cocoa and other commercial activity occurred in Côte d'Ivoire.

The panel's holding rested entirely on the complaint's general allegations that Cargill's corporate headquarters is located in the United States, that its "major operational decision[s]" are made or approved in the United States; and that employees from Cargill's headquarters inspected operations in Côte d'Ivoire and "report[ed] back to the U.S. headquarters." C.A. ER 142 (complaint); see App., *infra*, 42a, 49a-50a.

But, as the eight *en banc* dissenters explained, allegations of "corporate presence and decision-making" cannot displace the presumption against extraterritoriality. App., *infra*, 22a. "[V]ague allegations of domestic" decisions "will not imbue an otherwise entirely foreign claim with the territorial connection that the ATS absolutely requires." *Id.* at 23a.

Moreover, as the *en banc* dissent also explained, the panel's conclusion squarely conflicts with rulings by the Fifth and Eleventh Circuits holding allegations of headquarters oversight and decisionmaking cannot displace the presumption against extraterritoriality. "Had Plaintiffs filed [these actions in those courts], their allegations would have been dismissed for want of adequate allegations of domestic conduct." App., *infra*, 23a-24a. The holding below also conflicts with the Second Circuit's determination that allegations of U.S. headquarters decisionmaking are insufficient to permit a claim to proceed—as the *en banc* dissenters recognized. *Id*. at 24a-25a.

The issue is extraordinarily important. The panel's holding would permit an ATS aiding-and-abetting claim against any U.S.-headquartered company that does business in a foreign nation where human rights violations allegedly occur—a category that includes many developing nations. A claim could avoid dismissal as extraterritorial as long as the complaint contained general allegations of oversight from the U.S. headquarters and visits to the country by employees from headquarters—actions commonplace in virtually every large company that engages in cross-border commerce.

Second, the panel held that—notwithstanding the principles established by this Court's decision in *Jesner*—domestic corporations are subject to ATS liability. That ruling also creates a circuit conflict and has great practical significance because corporations are defendants in virtually all ATS actions and, after *Jesner*, domestic corporations are the only potential corporate defendants.

Jesner's holding is limited to foreign corporations, but, as the six judges joining the *en banc* dissent in

this case explained, "*Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS" and, under that standard, "[c]orporations are no longer viable ATS defendants." App., *infra*, 5a.

This case, like most ATS actions, involves allegations of egregious conduct—here, abusive child labor conditions in the cocoa industry in Côte d'Ivoire. But Plaintiffs "d[id] not bring this action against the slavers who kidnapped them, nor against the plantation owners who harmed them." *Doe* v. *Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir. 2015) (Bea, J., joined by seven other judges, dissenting from the denial of rehearing *en banc*). Instead, Plaintiffs sued companies "engaged in the Ivory Coast cocoa trade" alleging that their purchases of cocoa and other commercial activity "aid[ed] and abet[ted] the slavers and plantation owners." *Ibid*.

The prior *en banc* dissent in this case explained that courts adjudicating ATS cases should not "substitute[] sympathy for legal analysis" (788 F.3d at 947) (*en banc* dissent). But this case has been pending at the motion-to-dismiss stage for fourteen years. During that time:

- The district court twice dismissed the case;
- Ninth Circuit panels vacated each dismissal;
- Numerous Ninth Circuit judges dissented from the denials of rehearing *en banc*—eight judges with respect to the most recent panel opinion and nine judges with respect to the prior panel opinion; a total of thirteen different judges disagreed with one or more of the panels' holdings overturning the district court's dismissals.

And the sufficiency of the complaint remains unresolved, because the most recent Ninth Circuit panel refused to address Defendants' claim that its allegations fail to establish the *actus reus* element of an aiding-and-abetting claim. Instead, the panel directed the district court to permit Plaintiffs to file yet another amended complaint—the fourth complaint filed in this action.

Unfortunately, the lengthy history of this case is typical of ATS actions, which often linger for many years at the motion to dismiss stage. See, e.g., *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (rejecting ATS claim originally brought in 1999); see also U.S. Chamber of Commerce Amicus Br. at 30, *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499) (identifying several long-running ATS cases).

Resolving the conflict regarding the questions presented will clarify the standards to be applied by lower courts, and make it possible for these cases to be resolved much more expeditiously. Review by this Court is urgently needed.

A. Plaintiffs' Allegations.

This action was commenced in 2005. In the course of the litigation, Plaintiffs have filed multiple amended complaints. This discussion is based on the allegations in the operative second amended complaint. See C.A. ER 132-169.

Plaintiffs are Malians who allege that as children they were trafficked from Mali into Côte d'Ivoire, beaten, and forced to work on three cocoa plantations. Plaintiffs allege that they escaped no later than 2001.

Plaintiffs assert that these acts allegedly were committed by unidentified "guards" and "overseer[s]"

on "farm[s] and/or farmer cooperative[s]," none of whom was named as a defendant or employed by a defendant. C.A. ER 158-161, 135-136.

Defendants named in the operative complaint are "Nestle, S.A., Nestle U.S.A., Nestle Ivory Coast, Archer Daniels Midland Co., Cargill Incorporated Company, Cargill Cocoa, and Cargill West Africa S.A." C.A. E.R. 132. The complaint asserts a federal common law claim under the ATS for aiding and abetting forced labor in violation of international law. C.A. ER 133.

The complaint for the most part alleges conduct generally by "Defendants" without specifying which defendant engaged in which conduct. The allegations fall into several general categories:

- Cocoa purchases in Côte d'Ivoire from, and provision of financial support, farming supplies, and training to, unspecified Ivorian cocoa farms. C.A. ER 147.
- Operation of cocoa purchasing and processing facilities in Côte d'Ivoire and visits to unspecified cocoa farms by Defendants' employees or representatives. C.A. ER 144-45.
- Failure to exercise purported "economic leverage" to "control and/or limit the use of forced child labor" by Ivorian farms, some of whom are alleged to have "exclusive" business relationships with particular Defendants. C.A. ER 147.
- Statements to U.S. consumers by Defendants explaining that Defendants work with Ivorian farmers to enhance

crop yields and prevent the exploitation of children. C.A. ER 148-155.

- Lobbying by Defendants' employees of Congress and other officials, leading to the Harkin-Engel Protocol, a voluntary agreement under which the cocoa companies work to combat child labor abuses. C.A. ER 156.

With respect to Cargill, the complaint also alleges that

> Cargill [is] headquartered in and [has its] main management operations in the U.S., and every major operational decision by [the company] is made in or approved in the U.S. * * * Cargill * * * regularly had employees from [its] U.S. headquarters inspecting [its] operations in Côte d'Ivoire and reporting back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground.

C.A. ER 142.

Plaintiffs do not allege that they worked on a farm from which Cargill purchased cocoa or to which Cargill provided any form of assistance. Although Plaintiffs allege that Cargill had "supplier/buyer relationships" with six identified Ivorian cocoa farms (C.A. ER 144), Plaintiffs do not allege that they worked at any of those farms.

B. First Dismissal By The District Court.

In 2010, the district court issued a 161-page opinion dismissing the first amended complaint, which contained substantially similar allegations. 748 F.

Supp. 2d 1057 (C.D. Cal. 2010), rev'd in part, 766 F.3d 1013 (9th Cir. 2014).

The district court held: (1) corporations cannot be sued under the ATS; (2) Plaintiffs did not plead facts sufficient to establish the *mens rea* element of aiding and abetting—*i.e.*, that Cargill "act[ed] with the specific intent (*i.e.*, for the purpose) of substantially assisting the * * * crime"; and (3) Plaintiffs did not plead facts sufficient to establish the *actus reus* element of aiding and abetting—*i.e.*, that Cargill committed acts "specifically directed" to perpetrating a "certain specific crime" under international law and had "a substantial effect on the perpetration of [that] crime." 748 F. Supp. 2d at 1079, 1080, 1088, 1110, 1130.

A divided Ninth Circuit panel vacated and remanded for further proceedings. 766 F.3d at 1013. The majority held that (1) corporate liability is available under the ATS (*id.* at 1021-22); and (2) Plaintiffs' allegations supported the "inference" that Cargill acted with the requisite *mens rea*—"the purpose to facilitate child slavery"—because Cargill had a profit motive to "fail[] to stop or limit" it. *Id.* at 1024-25. The court remanded without deciding the proper legal standard for *actus reus* or extraterritoriality. *Id.* at 1026-29.

In dissent, Judge Rawlinson "strongly disagree[d]" with the panel's inference of *mens rea* from the mere allegation that Cargill had "acted with the intent to reduce the cost[s]." 766 F.3d at 1031-32. Moreover, she expressed deep skepticism that Plaintiffs' ATS claim was not extraterritorial, given "the admittedly extraterritorial child slave labor that is the basis of this case." *Id.* at 1034-35.

Over the dissent of nine judges, the Ninth Circuit denied rehearing *en banc* with respect to the panel's

mens rea, extraterritoriality, and corporate liability holdings. 788 F.3d at 946. This Court denied certiorari. 136 S. Ct. 798 (2016) (mem.).

C. Second Dismissal By The District Court.

On remand, Plaintiffs filed the second amended complaint. Defendants again moved to dismiss on the grounds that the claim is impermissibly extraterritorial and that Plaintiffs' allegations fail to satisfy the *actus reus* element of aiding-and-abetting liability.[1]

The district court dismissed the action on extraterritoriality grounds and denied leave to amend the complaint. App., *infra*, 52a-70a. It held that the "focus" test set forth in this Court's decision in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), supplies the proper standard for determining whether an ATS claim is impermissibly extraterritorial. App., *infra*, 53a-58a.

The district court held that "the 'focus' in this case is the conduct of Defendants that aided and abetted forced child labor in Côte d'Ivoire." App., *infra*, 58a. It then examined Plaintiffs' allegations regarding the conduct claimed to "touch and concern the United States with sufficient force to displace the presumption" against extraterritoriality:

> (1) U.S. based decision-making; (2) the provision of funds originating in the U.S.; (3) the U.S. companies furnishing "additional supplies" and "extensive training" to cocoa farmers in Côte d'Ivoire; (4) publishing statements in the U.S. that Defendants are against child slavery; and (5) lobbying efforts in the U.S.

---

[1] Archer Daniels Midland Co. was voluntarily dismissed from the case before this motion to dismiss was decided.

> against a bill that Plaintiffs allege "would have required Defendants' imported cocoa to be 'slave free.'"

App., *infra*, 59a. The court found that none of these actions touched and concerned the United States "with sufficient force to displace the presumption." *Ibid.*

The first three categories of conduct were simply "synonymous with the fact that Defendants are U.S. based corporations" and were "activities that ordinary international businesses engage in, and thus do not 'touch and concern' the United States with any more force than Defendants' mere citizenship status." App., *infra*, 60a. Such "ordinary business conduct" could not displace the presumption. *Ibid*. The district court held that the remaining conduct was not "relevant" to the focus inquiry because "the 'focus' of the ATS is the 'conduct that violates international law,'" and there were no allegations that Defendants' alleged publications and lobbying efforts "helped the perpetrators commit the underlying human rights abuses." App., *infra*, 63a-64a (citations omitted).

D. Ninth Circuit Proceedings.

1. The panel ruling.

The court of appeals panel reversed and remanded the district court's decision. App., *infra*, 40a-51a.

The panel first addressed the corporate liability issue in light of this Court's recent decision in *Jesner* v. *Arab Bank PLC*, 138 S. Ct. 1386 (2018). Stating that *Jesner*'s holding "did not eliminate all corporate liability under the ATS," the panel without further analysis reaffirmed its prior holding "as applied to domestic corporations." App., *infra*, 45a.

Next, the panel held Plaintiffs' allegations regarding conduct within the United States sufficient to displace the presumption against extraterritoriality.

The panel recognized that the relevant standard is the "focus" test set forth by this Court in *Morrison* and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2015). App., *infra*, 46a-47a. It held that the "focus" of an ATS aiding-and-abetting claim is neither "the location where the principal offense took place or the location where the injury occurred." *Id*. at 48a. Rather the panel looked to "the location where the alleged aiding and abetting took place." *Ibid.*

It stated that "plaintiffs have alleged that defendants funded child slavery practices in the Ivory Coast"—citing the complaint's allegation that "defendants provided 'personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier." App., *infra*, 49a. The panel "infer[red] that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that was not obtainable without employing child slave labor." *Ibid*. It did not cite any allegation of the complaint in support of that inference.

Next the panel stated that "Defendants also had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions, or 'financing arrangements,' originated." App., *infra*, 49a-50a (citation omitted). It said that "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters

in the United States" and held that "narrow set of domestic conduct is relevant to the ATS's focus." *Id.* at 50a.

The panel declined to address whether the plaintiffs had sufficiently alleged the *actus reus* element of the aiding-and-abetting claim, instead granting Plaintiffs leave to amend their pleadings to remove foreign corporations as defendants and to remedy the complaint's "problematic" use of group pleading. App., *infra*, 50a.

2. The dissents from denial of rehearing.

The Ninth Circuit denied Cargill's petition for rehearing and rehearing *en banc* over the dissent of eight judges. App., *infra*, 1a-39a (Bennett, J., joined by Bybee, Callahan, Bea, Ikuta, and R. Nelson, JJ., and in part by M. Smith and Bade, JJ.).[2]

All eight dissenters rejected the panel's extraterritoriality determination, stating that "[b]ecause all

---

[2] Cargill's rehearing petition pointed out that the panel had failed to address Cargill's argument that Plaintiffs lacked Article III standing because the operative complaint did not allege facts supporting a plausible inference that Cargill had purchased cocoa from farms on which Plaintiffs worked at the times that Plaintiffs worked on the farms—and therefore Plaintiffs' claimed injury was not "fairly traceable" to the violation alleged in the complaint. Cargill Pet. for Reh'g 20-21.

The panel amended its opinion to add a discussion of Article III standing and stated that the traceability requirement was satisfied "because [Plaintiffs] raise sufficiently specific allegations regarding Cargill's involvement in farms that rely on child slavery"(App., infra, 2a)—but the panel did not cite any portion of the complaint or explain how Plaintiffs' injuries could be traceable to Cargill's actions if Plaintiffs never worked on a farm doing business with Cargill. See App., *infra*, 21a n.4 (*en banc* dissent explaining absence of such allegations against Cargill).

relevant conduct took place abroad, we should have corrected the panel majority's decision to permit this case to proceed." App., *infra*, 19a.

The dissent first found improper the panel's reliance on payments of "personal spending money" and inspections of operations in Côte d'Ivoire, stating that they "relate solely to foreign conduct." It explained that "[e]ven if payments to cocoa farmers could be properly characterized as 'kickbacks' (though they were never described in the complaint as such), the payments, like the slavery all took place in Africa. *** Alleged 'inspections' of cocoa farms likewise took place in Africa." App., *infra*, 21a.[3]

Turning to the alleged supervision from and decision-making in the United States, the dissent stated that "corporate presence and decision-making" could not displace the presumption against extraterritoriality. App., *infra*, 22a. It concluded that "vague allegations of domestic" decisions "will not imbue an otherwise entirely foreign claim with the territorial connection that the ATS absolutely requires." *Id*. at 23a.

---

[3] The *en banc* dissent strongly criticized the panel's characterization of the spending money payments as "kickbacks," stating that "the complaint itself, which never uses the word 'kickback,' is devoid of any allegation that the provision of 'spending money' was improper or illegal. *** Plaintiffs could not plausibly make such an assertion." App., *infra*, 25a. Rather, "*the factual* allegations in the complaint show only that Defendants sought to stabilize their supply lines and minimize costs by entering into exclusive-dealing arrangements. We have recognized that such arrangements 'provide "well-recognized economic benefits."'" *Id*. at 25a-26a (citation omitted). "Because the complaint lacks an allegation that Defendants provided anything to the farmers for an illegal purpose, the panel majority was flatly wrong to 'infer' 'kickbacks' from the facts alleged." *Id*. at 26a.

Pointing to decisions by the Fifth and Eleventh Circuits holding such allegations insufficient, the dissent concluded that "[h]ad Plaintiffs filed [in those courts], their allegations would have been dismissed for want of adequate allegations of domestic conduct." App., *infra*, 23a-24a.

Concluding that the complaint's allegations are "clear that all the relevant misconduct took place in Côte d'Ivoire, not the United States," the dissenters stated that the panel's contrary determination "essentially eliminates the presumption against extraterritoriality." App., *infra*, 26a.

Six judges dissented from the denial of rehearing regarding the panel's corporate liability holding, stating that "*Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS"; "[c]orporations are no longer viable ATS defendants"; and "[i]t was error for the panel majority to hold otherwise." App., *infra*, 5a. Pointing to passages in the *Jesner* plurality opinion and the separate concurring opinions by Justices Alito and Gorsuch, the dissenters stated that "five Justices signaled in *Jesner* that they would hold that corporations are not subject to the ATS." *Id*. at 11a.

The dissent explained that the question of corporate liability should be analyzed in a "two-step process." App., *infra*, 7a. First, a court should determine whether the particular international-law norm at issue is "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Ibid.* (quoting *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting) (internal quotation marks omitted)). If that requirement is met, the court must proceed to step two and consider "whether allowing a particular case to proceed is an

appropriate exercise of judicial discretion." App., *infra*, 7a (quoting *Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting) (internal quotation marks omitted)).

With respect to the first step, the dissent "agree[d] with Justice Kennedy's plurality opinion in *Jesner*, Judge Cabranes's opinion for the Second Circuit in *Kiobel I* [621 F.3d 111 (2d Cir. 2010)] and then-Judge Kavanaugh's dissent in *Exxon Mobil* [*Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011)] that allowing an ATS claim against a corporation does not 'rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' on which the ATS was based." App., *infra*, 13a (citations omitted). And "[t]hat conclusion is dispositive—in the absence of a clearly defined, universal norm of corporate liability under customary international law, the remaining domestic corporate defendants are entitled to dismissal." *Id.* at 14a.

Turning to the second inquiry, the dissent found that "the panel majority has failed to exercise the caution that the Supreme Court demands in ATS case." App., *infra*, 17a. To begin with, the Torture Victim Protection Act (TVPA), "the *only* ATS cause of action created by Congress—expressly limits liability to individuals. As the *Jesner* plurality explained, the fact that corporations cannot be sued under the TVPA 'reflects Congress' considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.'" *Ibid.* (citations omitted). The dissent also cited this Court's rejection of corporate liability in *Bivens* actions in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001)—and the *Jesner* plurality's reliance on *Malesko*. App., *infra*, 17a-18a.

It concluded: "Under *Malesko* and *Jesner*, ATS liability does not attach to corporate defendants and we should have corrected the panel majority's opposite conclusion en banc." App., *infra*, 18a-19a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Extraterritoriality Ruling Warrants This Court's Review.

Kiobel held that the ATS does not apply extraterritorially. 569 U.S. at 124. Therefore, an ATS action is permissible only if the claims "touch and concern the territory of the United States" with "sufficient force to displace the presumption" against extraterritoriality. *Id*. at 124-25.

Of course, "it is a rare case * * * that lacks *all* contact with the territory of the United States," and "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. Correctly identifying impermissible extraterritorial claims is therefore critical to ensuring that ATS claims are permitted to proceed only when they are sufficiently related to the United States.

The panel majority here effectively neutered the presumption against extraterritoriality by holding that even if all of the acts violating international law occur outside the United States, an ATS aiding-and-abetting claim nonetheless is not extraterritorial whenever the defendant's corporate headquarters is located in the United States and the plaintiff alleges that headquarters personnel had oversight of the company's operational and financial activities in foreign nations. Because those general allegations can be made with respect to any company headquartered in

the United States, the panel's holding means ATS claims may be asserted against U.S. businesses for aiding and abetting international law violations anywhere in the world—"essentially eliminat[ing] the presumption against extraterritoriality" with respect to claims against U.S. companies. App., *infra*, 26a (*en banc* dissent).

That determination conflicts with holdings of three other circuits and with this Court's precedent. Review is plainly warranted.

A proposed application of a statute is extraterritorial in two situations: (1) when "all of the conduct "relevant" to the plaintiff's claims took place outside the United States; and (2) when "the conduct relevant to the [statute's] focus occurred in a foreign country, * * * regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101.

The "focus" of the ATS is the conduct violating international law that gives rise to liability. *Kiobel*, 569 U.S. at 127 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations").

There is no dispute that Côte d'Ivoire was the site of the claimed international law violations. That is where Plaintiffs allegedly were subjected to forced labor by Ivorian farmers; and it is where Cargill is claimed to have engaged in the acts alleged to constitute aiding and abetting: providing money, supplies,

and training to cocoa farmers in Côte d'Ivoire and purchasing cocoa from farmers with knowledge that abusive labor practices occur in that industry.

The panel majority pointed to three types of alleged conduct that, in its view, were sufficient to displace the presumption against extraterritoriality.

First, the panel referenced the complaint's allegation that "Defendants" provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier." App., *infra*, 49a (internal quotation marks omitted). The majority construed this allegation to mean that the "spending money" was "outside the ordinary business contract" and constituted "kickbacks" to maintain "relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor." *Ibid*.

Even if the panel majority's construction of the complaint were correct—and it is not[4]—the critical fact for purposes of extraterritoriality analysis is that the alleged payments were made in Côte d'Ivoire to Ivorian farmers, and therefore cannot qualify as conduct within the United States permitting application of the ATS.

Second, the panel majority pointed to alleged inspections of operations in Côte d'Ivoire. But, as the *en banc* dissent explained, "[a]lleged 'inspections of cocoa farms * * * took place in Africa." App., *infra*, 21a.

---

[4] As explained above (at page 13), the en banc dissent demonstrated that the complaint "is devoid of any allegation that the provision of 'spending money' was improper or illegal." App., *infra*, 27a.

Third, the panel stated that Cargill "had employees from [its] United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices." App., *infra*, 49a-50a. And it asserted that the "financing decisions, or 'financing arrangements,'" relating to the "spending money" payments "originated" in the United States. *Id.* at 50a.

The complaint does not include any allegation that the "spending money" payments originated in the United States or were directed from the United States. The only conceivable basis in the complaint for the panel's statements regarding financing and inspections is the complaint's general allegation relating to the presence of Cargill's headquarters within the United States:

> Cargill [is] headquartered in and [has its] main management operations in the U.S., and every major operational decision by [the company] is made in or approved in the U.S. * * * Cargill * * * regularly had employees from [its] U.S. headquarters inspecting [its] operations in Côte d'Ivoire and reporting back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground.

C.A. ER 142.

Thus, as the *en banc* dissenters explained, "[t]o the extent that the complaint alleges relevant domestic conduct at all, it simply alleges corporate presence and decision-making." App., *infra*, 22a.

The issue squarely presented by this case, therefore, is whether the presence of a company's headquarters within the United States, together with gen-

eral allegations about headquarters personnel's oversight of foreign operations, are sufficient by themselves to render a claim not extraterritorial—even when all of the other relevant conduct occurred outside the United States.

The panel's determination that such an ATS claim is not extraterritorial, and therefore permissible, squarely conflicts with the holdings of three other circuits and is inconsistent with this Court's precedent—as the eight *en banc* dissenters explained in detail. Permitting the Ninth Circuit's holding to stand, moreover, would have very significant practical consequences, subjecting every U.S-based company to ATS aiding-and-abetting claims based entirely on foreign conduct. This Court's review is urgently needed.

A. The Decision Below Creates A Square Conflict With Rulings Of Three Courts Of Appeals.

Three circuits have squarely rejected the contention that general allegations regarding headquarters decisionmaking are sufficient to render an ATS aiding-and-abetting claim not extraterritorial. Indeed, the *en banc* dissenters expressly recognized that the panel's decision creates a circuit conflict. App., *infra*, 23a-24a.

First, the Eleventh Circuit has several times upheld the dismissal of an ATS claim as extraterritorial despite allegations that the defendants "made funding and policy decisions in the United States." *Doe* v. *Drummond Co.*, 782 F.3d 576, 598 (11th Cir. 2015).

The *Doe* plaintiffs claimed that the defendants "provided substantial financial and material support" to certain Colombian paramilitary groups, who in

turn committed war crimes. *Id.* at 580, 598. The plaintiffs argued that the claim was not extraterritorial because the defendants were U.S. corporations and citizens and "key conduct occurred in the United States, including Defendants' decisions to conspire with and aid and abet the [paramilitary groups'] commission of extrajudicial killings and war crimes" and the "agreement to fund" the paramilitary groups. *Id.* at 594.

The Eleventh Circuit determined that the vast majority of the relevant activity (including the "actual funding" of the paramilitary groups) occurred on foreign soil. 782 F.3d at 594. It held that "the domestic location of the decision-making alleged in general terms here does not outweigh the extraterritorial location of the rest of Plaintiffs' claims." *Id.* at 598. The Eleventh Circuit therefore upheld the district court's dismissal of the ATS action. It reached the same conclusion in *Baloco* v. *Drummond Co.*, 767 F.3d 1229, 1236 (11th Cir. 2014) (holding that domestic decision-making, including the decision to provide funding to paramilitary groups, did not displace the presumption against extraterritoriality).

Those holdings accord with a prior Eleventh Circuit decision barring an ATS claim on extraterritoriality grounds—even though the complaint alleged that the defendants "reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations *from their offices in the United States*"—because "[a]ll the relevant conduct * * * took place outside the United States." *Cardona* v. *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014); see *id.* at 1192 (Martin, J., dissenting) (criticizing majority for ordering dismissal in the face of allegations that the defendants had—in the United

States—reviewed, approved, and concealed payments to terrorist organizations).

Second, the Fifth Circuit has also held allegations regarding general U.S. headquarters activity insufficient to preclude dismissal on extraterritoriality grounds. The plaintiffs in *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), alleged that the defendants—including a U.S.-based military contractor—engaged in unlawful human trafficking in Iraq. As in the present case, "all the conduct comprising the alleged international law violations occurred in a foreign country." *Id.* at 197. Nevertheless, the plaintiffs argued that their claims were not extraterritorial because the U.S.-based defendant "transferred payments to [its subcontractor] from the United States, using New York banks," and its "U.S.-based employees may have known about 'allegations' of human rights abuse by [the subcontractor or the company] overseas." *Id.* at 198. The Fifth Circuit rejected these arguments and held that the claims were extraterritorial. *Id.* at 198-200; see also App., *infra*, 23a-24a (*en banc* dissent recognizing conflict with Fifth Circuit).[5]

Third, the Second Circuit agrees that "[a]llegations of general corporate supervision are insufficient to rebut the presumption against [extra]territoriality." *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 168 (2d Cir. 2015).

---

[5] *Adhikari* involved allegations of direct liability rather than aiding and abetting. But the Fifth Circuit's opinion made clear that the facts alleged would not have supported an aiding-and-abetting theory. 845 F.3d at 199-200 (holding that amendment to advance an aiding-and-abetting theory "would bring Plaintiffs no closer" to overcoming extraterritoriality).

The rule in the Second Circuit is that "the 'relevant' conduct" violating the "law of nations" must "sufficiently 'touch[] and concern'" U.S. territory. *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 186 (2d Cir. 2014) (quoting *Kiobel*, 569 U.S. at 124-25); see also *Licci by Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217-18 (2d Cir. 2016). In other words, the alleged U.S.-based conduct standing alone must be sufficient to establish the elements of the aiding and abetting claim. *Mastafa*, 770 F.3d at 186; see also *Licci*, 834 F.3d at 217.

That is why—as the *en banc* dissenters explained in detail (App., *infra*, 24a-25a)—*Mastafa* and *Licci* serve only to confirm the conflict between the holding below and Second Circuit precedent.

The *Mastafa* plaintiffs had alleged that the defendants "illicitly diverted money to the Saddam Hussein regime * * * in violation of customary international law," and that these payments "financed the torture and other atrocities inflicted on them or their husbands." 770 F.3d at 176 (internal quotation marks omitted). The plaintiffs had specifically alleged that the defendants' illicit financial dealings were "financed" within the United States and that "profits rendered from the transactions w[ere] recouped in the United States." *Id.* at 190 (internal quotation marks omitted). The court held that it was "[t]his particular combination of conduct in the United States"—including "multiple domestic purchases and financing transactions" and "numerous New York-based payments and 'financing arrangements' conducted exclusively through a New York bank account"—that was "both specific and domestic" enough to displace the presumption against extraterritoriality. *Ibid.*

Importantly, the *Mastafa* court expressly rejected the notion "that, because [a defendant] [i]s headquartered in the United States," it can be inferred that "much of the decisionmaking * * * was necessarily made in the United States." *Id.* at 190 (internal quotation marks omitted). That statement confirms that the allegations here would not be sufficient to permit the claim to proceed in the Second Circuit.

Nor would the allegations here be sufficient under the Second Circuit's decision in *Licci*. The plaintiffs in *Licci* alleged that the defendants had aided and abetted Hezbollah terrorist attacks by using domestic banks to make illegal payments to Hezbollah—a violation of "terrorist financing and money laundering laws." 834 F.3d at 215. The *Licci* plaintiffs specifically alleged that the wire transfers were carried out via a New York bank account. *Id.* at 217 ("Like the *Mastafa* plaintiffs' allegations against the French bank, Plaintiffs [in *Licci*] assert that LCB, a Lebanese Bank, used a correspondent banking account at a New York bank to facilitate wire transfers between Hezbollah's bank accounts in the months leading up to the rocket attacks.").

The *Licci* court relied on that allegation in upholding the claim, emphasizing that plaintiffs "specifically allege[d] that LCB carried out the specific 'banking services which harmed the plaintiffs and their decedents . . . *in and through the State of New York*." 834 F.3d at 217. For that reason it found the allegations "both specific and domestic" enough to displace the presumption against extraterritoriality. *Ibid.*

Here, by contrast, there is no allegation of specific financial transactions within the United States—and only the allegations regarding generalized headquar-

ters decisionmaking that *Mastafa* expressly found insufficient. See also App., *infra*, 24a (*en banc* dissent) ("*Mastafa* supports dismissal of the claims here, as the Second Circuit found the plaintiffs' allegations that 'much of the decisionmaking to participate in the . . . scheme' took place in the United States, 'conclusory' and inadequate") (citation omitted).

In sum, this case would have been dismissed if it had been brought in the Eleventh, Fifth, or Second Circuits. Each of those courts has expressly determined that the presumption against extraterritoriality is not displaced by general allegations about headquarters supervision identical to—and in some cases more specific than—the allegations here. This Court should grant review to resolve this square conflict.

B. The Issue Is Tremendously Important.

The panel's holding will have very significant adverse practical consequences if it is permitted to stand.

Virtually all ATS actions brought against businesses are framed as aiding-and-abetting or similar vicarious-liability claims. See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 466 (2011).

That is because plaintiffs almost never can allege plausibly that a legitimate business itself engaged in the horrific conduct prescribed by international law standards—genocide, piracy, extrajudicial killings, forced labor, and the like. Plaintiffs therefore must assert that the company's actions somehow aided the party that actually engaged in conduct violating international law.

The panel's holding effectively eliminates the extraterritoriality bar as a limitation on aiding-and-abetting claims against U.S.-based companies—which will produce multiple adverse consequences.

First, the ruling expands widely the availability of ATS aiding-and-abetting actions based almost entirely on acts occurring outside the United States. Indeed, the panel's holding would permit an ATS aiding-and-abetting claim against any U.S.-headquartered company that does business in a foreign nation where human rights violations allegedly occur—a category that includes many developing nations that engage in cross-border commerce in raw materials, agricultural products, and manufactured goods. World Trade Organization, *World Trade Statistical Review 2019* 5 (2019), https://tinyurl.com/y2ja42p7 (noting that "[d]eveloping economies are playing an increasingly important role in world trade, with significant increases in their rankings among the world's leading exporters and importers"); see also *id.* at 12-15, 57-65.

The aiding-and-abetting claim would avoid dismissal as extraterritorial as long as the complaint contained general allegations of oversight from the U.S. headquarters and visits to the country by employees from headquarters. Those general allegations can be made with respect to virtually every large company that engages in cross-border commerce.

Moreover, the consequences of the panel's rule would not be limited to claims involving purchases of goods from private parties in foreign nations. A company doing business with a foreign government could be subject to an aiding-and-abetting claim based on alleged human rights violations by the government or its officials—even if the alleged violations and aiding and abetting occurred entirely in the foreign nation

and the complaint's allegations of conduct within the United States asserted only general headquarters oversight.[6]

Second, faced with the risk of an ATS lawsuit branding the defendant company as a "human rights violator" complicit in child labor or other abusive conduct, companies may decide not to engage in business in a foreign market. That result impermissibly converts the ATS into "a vehicle for private parties to impose embargos or international sanctions." *Presbyterian Church of Sudan* v. *Talisman*, 582 F.3d 244, 264 (2d Cir. 2009).

The panel's rule thus "establish[es] a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations," deterring "the active corpo-

---

[6] This expansive approach to the ATS is particularly troubling in light of the ruling by the prior Ninth Circuit panel majority that the *mens rea* standard for aiding-and-abetting liability is met whenever plaintiffs allege that a defendant acted with (1) the purpose of maximizing profit and (2) the knowledge that third parties may engage in human-rights violations that could increase profits. 766 F.3d at 1026. As the prior *en banc* dissent on behalf of eight judges explained, the panel majority relied on "[Defendants'] purchase of cocoa and their conduct of 'commercial activities [such] as resource development.'" 788 F.3d at 947. The dissenters stated: "By [that] metric, buyers of Soviet gold had the purpose of facilitating gulag prison slavery. * * * The panel majority's conclusion is wrong. Even the plaintiffs admit defendants intended only to maximize profits, not harm children through slavery." *Ibid.*; see also 766 F.3d at 1031 (Rawlinson, J., dissenting from panel opinion) ("strongly disagree[ing]" with the majority's conclusion that the complaint's allegations "satisfy" the "proper *mens rea* standard of purpose, or specific intent").

rate investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (plurality).

Indeed, that adverse consequence is made more likely by the fact that Plaintiffs here have consistently asserted that Cargill's efforts to combat abusive labor practices somehow support their claim that Cargill aided and abetted the very practices that it opposes. C.A. ER 151-155. If a business's commercial engagement in a developing economy combined with efforts to improve commercial practices there provides grounds for an aiding-and-abetting claim, no company will be willing to do business in such markets or with such countries.

This outcome would undermine U.S. foreign policy, which strongly favors trade and investment in developing nations generally and in Côte d'Ivoire in particular. As the State Department has stated, "U.S.-Ivoirian relations have traditionally been friendly and close" and that "[t]he U.S. Government's overriding interests in Côte d'Ivoire have long been to help restore peace, encourage disarmament and reunification of the country, and support a democratic government whose legitimacy can be accepted by all the citizens of Côte d'Ivoire." U.S. Dep't of State, Bureau of African Affairs, *U.S. Relations with Côte d'Ivoire: Bilateral Relations Fact Sheet* (Dec. 4, 2018), https://tinyurl.com/yy43kzmy . As part of these efforts, Côte d'Ivoire is "eligible for preferential trade benefits" under certain U.S. legislation, and the two countries have signed a five-year, $524.7 million agreement "to facilitate the transportation of goods and people into and out of Abidjan and improve technical and vocational education." *Ibid.*

Third, the holding below undermines one of the critical purposes of the presumption against extraterritoriality: "'to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Kiobel*, 569 U.S. at 115 (quoting *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)).

The *Jesner* plurality explained that aiding and abetting claims can make "corporations * * * surrogate defendants to challenge the conduct of foreign governments." 138 S. Ct. at 1404. That can occur when the claim is that the company somehow facilitated wrongdoing by a foreign government or, as here, for example, the complaint alleges misconduct by Ivorian officials. C.A. ER 147 (alleging that "several of the cocoa farms in Côte d'Ivoire from which Defendants source are owned by government officials, whether directly or indirectly, or are otherwise protected by government officials").

If U.S. courts are permitted to assert jurisdiction over claims in which all of the relevant conduct occurred outside the United States, and the only domestic link is alleged headquarters supervision, courts will increasingly be asked to pass judgment on events taking place on foreign soil, producing the very "unwarranted judicial interference in the conduct of foreign policy" that this Court has held impermissible. *Kiobel*, 569 U.S. at 116.

C. The Ninth Circuit's Ruling Is Wrong.

This Court's precedents make clear that allegations of general headquarters oversight do not displace the presumption against extraterritoriality—particularly when, as here, all of the other relevant conduct occurred outside the United States.

The critical question is whether "the conduct relevant to the [statute's] focus occurred in a foreign country, * * * regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101.

The alleged forced labor and other abuses were committed by farmers in Côte d'Ivoire. That is where Plaintiffs suffered their injuries, and where the forced labor and other international law violations occurred. And Cargill's alleged "substantial assistance" all occurred on the ground in Côte d'Ivoire—the financial support to Ivorian farmers as well as the "training and capacity building" and provision of farming supplies. C.A. ER 144, 147, 164-7.

As the *en banc* dissent explained, "'[t]he ATS's focus is * * * conduct that violates international law,'" and "[h]ere, that conduct—Plaintiffs' enslavement on cocoa plantations—took place abroad." App., *infra*, 20a (*en banc* dissent) (citation omitted).

That conclusion is confirmed by this Court's extraterritoriality holding in *Morrison*. One of the elements of the plaintiffs' security fraud claim in that case was the making of a false statement in connection with the sale of a security, and that statement was made in the United States. But this Court held that U.S. conduct insufficient to displace the presumption against extraterritoriality—even though it was "significant" and "material" to the success of the underlying claim. *Morrison,* 561 U.S. at 270-273. The vague allegations of domestic conduct here therefore cannot possibly render the claim permissible.

Indeed, the Second Circuit—interpreting *Kiobel*—has held that the extraterritoriality presumption is displaced only if the alleged domestic conduct by itself would be sufficient to state a violation of the relevant

international law norm. *Licci*, 834 F.3d at 215; *Mastafa*, 770 F.3d at 187. The allegations of U.S-based general oversight here do not come close to satisfying that standard.

The panel majority inferred that because Cargill's corporate headquarters is in the United States, it must have made decisions there regarding the acts in Côte d'Ivoire alleged to support the aiding-and-abetting claim. That determination confirms the fatal flaw in the panel's analysis—permitting any ATS claim based simply on the defendant's corporate presence—and thereby transforming the presumption against extraterritoriality into the "'craven watchdog'" that this Court rejected in *Kiobel*, 569 U.S. at 126 (Alito, J., concurring) (quoting *Morrison*, 561 U.S. at 266).

II. The Court Should Decide Whether Domestic Corporations Are Subject To ATS Liability.

The *Jesner* Court limited its holding of non-liability to foreign corporations, but its rationale extends to domestic corporations—as the six *en banc* dissenters explained in detail. App., *infra*, 6a-13a. Because *Jesner* did not resolve the pre-existing conflict among the lower courts regarding the liability of domestic corporations, and lower court decisions since *Jesner* reach opposite conclusions, this Court should grant review to ensure that a corporation's ATS liability is not dependent on the place where it is sued.

A. There Is A Square Conflict Regarding This Frequently Recurring, Important Issue.

The Second Circuit applies an across-the-board rule barring corporate liability. *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 121 (2d Cir. 2011), *aff'd on other grounds*, 569 U.S. 108 (2013) ("[T]he

ATS * * * simply does not confer jurisdiction over suits against corporations"); see also *Licci*, 834 F.3d at 212, 219-20. Because the Court's *Jesner* analysis supports that conclusion, there is no reason that the Second Circuit would retreat from its position that no corporation, domestic or foreign, may be sued under the ATS.

The holding below conflicts with that determination—although the six dissenting judges reached a different conclusion based on *Jesner*'s analysis. App., *infra*, 6a-13a.

The issue of domestic corporate liability necessarily arises in every ATS case against a corporate defendant pending in the district courts—and those courts are reaching conflicting conclusions. The United States District Court for the District of Columbia applied the two-step *Sosa* test and "decline[d] to recognize domestic corporate liability under the ATS" in light of the reasoning of *Jesner*. See *Doe* v. *Exxon Mobil Corp.*, 2019 WL 2343014, at *7-14 (D.D.C. June 3, 2019).

On the other hand, a federal district court in Maryland recently held that *Jesner* "did not preclude the possibility" of liability for domestic corporations. *Estate of Alvarez* v. *Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 646 (D. Md. 2019). That court subsequently certified an interlocutory appeal on the question (*Estate of Alvarez* v. *Johns Hopkins Univ.*, 2019 WL 1779339 (Apr. 23, 2019)), and the case is now pending before the Fourth Circuit.

These cases will exacerbate the conflict, no matter how they are decided. Only this Court's intervention

can conclusively resolve this issue—and that is particularly true because the question before the lower courts is how to interpret *Jesner*, which only this Court can resolve definitely. Review is urgently needed.

B. *Jesner*'s Reasoning Precludes ATS Liability For Domestic Corporations.

Jesner holds that courts must apply a two-step framework for considering the question of corporate liability. At the first step, a court must consider "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific, universal, and obligatory.'" 138 S. Ct. at 1399 (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004)). And then

> [e]ven assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.

Ibid.

The *Jesner* plurality concluded that "[t]he international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Id*. at 1401; accord, *Doe* v. *Exxon Mobil Corp*., 654 F.3d 11, 81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("claims under the ATS are defined and limited by customary international law, and customary

international law does not extend liability to corporations"), vacated, 527 F. App'x 7 (D.C. Cir. 2013).

The *en banc* dissenters correctly found "[t]hat conclusion is dispositive—in the absence of a clearly defined, universal norm of corporate liability under customary international law, the remaining domestic corporate defendants are entitled to dismissal." App., *infra*, at 14a.

At the second step, the *Jesner* plurality held that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations." *Jesner,* 138 S. Ct. at 1403. It found "all but dispositive" Congress's decision to exclude corporations from liability under the Torture Victims Protection Act (TVPA). *Id.* at 1404. That statute, the plurality stated, "reflects Congress' considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model." *Id*. at 1403.

The plurality also pointed to the Court's holding in *Malesko* that corporations are not liable under the implied cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Jesner*, 138 S. Ct. at 1390. The plurality stated that "[a]llowing corporate liability would have been a 'marked extension' of *Bivens* that was unnecessary to advance its purpose"—and that "[w]hether corporate defendants should be subject to suit [under the ATS] was 'a question for Congress, not us, to decide.'" 138 S. Ct. at 1403 (quoting *Malesko*, 534 U.S. at 72).

Again, the same conclusion applies with respect to the liability of domestic corporations, as the *en banc* dissenters recognized. App., *infra*, 17a ("[f]ollowing

the Court's lead in *Jesner*, we should have held that corporate ATS liability fails * * * step two for two reasons: the Congressional enactment of the [TVPA], and the Court's *Bivens* jurisprudence").

Finally, a portion of the *Jesner* opinion joined by five Justices emphasized the Court's reluctance to create or extend judicially-created causes of action, explaining that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS." 138 S. Ct. at 1403. That separation-of-powers concern applies with full force here, where the Court would be imposing liability on entities that Congress expressly exempted from liability in a closely-analogous context.

Justices Alito and Gorsuch took an even narrower view than the plurality of courts' ability to expand ATS liability. Justice Alito stated that the result in *Jesner* was compelled "not only by 'judicial caution' * * * but also by the separation of powers." 138 S. Ct. at 1408. Emphasizing the overarching purpose of the ATS—to "avoid diplomatic friction"—he concluded that unless liability "would actively *decrease* diplomatic disputes," the courts "have no authority to act." *Id*. at 1410-11. Because aiding-and-abetting claims against corporations typically use "corporations as surrogate defendants to challenge the conduct of foreign governments" (*id*. at 1404 (plurality)), permitting claims against domestic corporations will plainly increase diplomatic friction.

Justice Gorsuch stated that the Court should "end ATS exceptionalism" and "refuse invitations to create new forms of legal liability," because "the job of creating new causes of action and navigating foreign policy disputes belongs to the political branches." 138 S. Ct. at 1412. This Court has not previously held domestic

corporations liable under the ATS, and Justice Gorsuch's approach therefore requires rejection of the Ninth Circuit's holding.

In sum, *Jesner*'s rationale precludes ATS liability for domestic corporations. This Court should grant review and address the issue so that defendants, and plaintiffs as well, will not devote substantial resources to burdensome litigation that suffers from a fundamental legal flaw and is likely—at some point—to be dismissed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
KEVIN R. RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

OCTOBER 2019