Nos. 19-416, 19-453

# In the Supreme Court of the United States

NESTLÉ USA, INC., PETITIONER,

*v.*

JOHN DOE I, ET AL.

CARGILL, INC., PETITIONER,

*v.*

JOHN DOE I, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch.[1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM's Manufacturers' Center for Legal Action advocates on behalf of manufacturers in the courts.

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Formed in 1914 by a group of American

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice and have consented in writing to this filing.

companies, NFTC and its affiliates now serve more than 200 member companies.

The Organization for International Investment (OFII) is the only trade association exclusively comprised of international companies in the United States. OFII defends and promotes an open economy that welcomes international companies to invest in America, which leads to more jobs, growth, and benefits for American communities. These companies directly employ more than 7 million U.S. workers, having created 62 percent of all new U.S. manufacturing jobs in the past five years.

*Amici* have a substantial interest in the issues presented in this case. Numerous businesses have been and may continue to be defendants in suits predicated on expansive theories of liability under the Alien Tort Statute (ATS), 28 U.S.C. §1350, based on their operations—or, more often, those of their affiliates—in developing countries. U.S. companies have been named as defendants in dozens of ATS lawsuits, many of which have been filed in the Ninth Circuit, from which these petitions arise. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. corporations that operate in foreign countries and chilling further investment. Unless certiorari is granted to address the Ninth Circuit's expansive theories of ATS liability, the stream of meritless and burdensome ATS lawsuits will continue, especially in the Ninth Circuit.

*Amici* submit this brief solely to address the legal issues before this Court. The petitions ask whether the ATS can be stretched beyond its intended scope—one that this Court repeatedly has limited—to sweep in general corporate oversight activities from a business's U.S. headquarters. *Amici* can offer a helpful perspective on these issues. They have participated in more than a dozen cases involving the ATS's reach before this Court and

other federal courts. *E.g.*, Br. for the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Neither Party, *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2806350.

## SUMMARY OF ARGUMENT

The Ninth Circuit's decision below splits with other federal courts of appeals on two legal questions, each of which is important to the U.S. business community and independently warrants this Court's review: First, whether a plaintiff can overcome the presumption against extraterritorial application of the ATS by basing jurisdiction on general corporate activity in the United States, such as operational and financial decision-making from a corporate headquarters, even though the alleged harms were perpetrated abroad by foreign actors; and second, whether U.S. corporations are subject to ATS liability following this Court's decision in *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

The panel's affirmative answers to both questions conflict with this Court's ATS precedents and create or deepen circuit splits with at least three other federal courts of appeals—points noted by eight judges below in dissent from the Ninth Circuit's refusal to rehear the case *en banc*. Nestlé Pet. App. 7a–33a. The panel's decision authorizes yet another round of litigation in this 14-year-old lawsuit, which has come before the Ninth Circuit on two separate appeals and before this Court on a previous petition for certiorari. The Court denied certiorari in 2016, but the Ninth Circuit has since taken a definitive (and outlier) position on extraterritoriality and failed to heed this Court's intervening decision in *Jesner*. The need for this Court's review is now paramount.

With respect to the presumption against extraterritoriality, the panel's holding conflicts with the law of

multiple circuits and misapplies this Court's decision in *Kiobel* v. *Royal Dutch Petroleum*, 569 U.S. 108 (2013), by permitting plaintiffs to maintain their ATS suit without alleging a tort "committed in violation of the law of nations," 28 U.S.C. §1350, that occurred in (or otherwise affects) the United States. The panel concluded that plaintiffs had overcome the extraterritoriality bar based on allegations that defendants authorized, from U.S. corporate headquarters, supplier arrangements with Ivorian farmers; that U.S. employees of defendants engaged in routine oversight visits during which they inspected operations in Côte d'Ivoire; and that the U.S. employees "report[ed] back" to offices in the United States "where these financing decisions *** originated." Nestlé Pet. App. 43a–44a. As other courts of appeals have recognized, claims of general corporate oversight in the United States, including operational and financial decision-making from a U.S. headquarters, do not "touch and concern the territory of the United States *** with sufficient force to displace the presumption against extraterritorial application" of the ATS. *Kiobel*, 569 U.S. at 124–125.

The panel's holding also revives a circuit split over whether corporations may be sued under the ATS—a recurring and important question that prompted this Court to grant certiorari in both *Kiobel* and *Jesner*. *Jesner* resolved this question in the negative for foreign corporations, and its reasoning forecloses domestic corporate liability as well. 138 S. Ct. 1386 at 1402–1403, 1406–1407. The panel below should have engaged with this recent and highly relevant precedent. Instead, it mechanically applied the Ninth Circuit's pre-*Jesner* case law to hold that U.S. corporations remain proper ATS defendants. This decision renews a split with the Second Circuit and gives rise to a fractured and unsustainable situation for U.S. corporations: a company sued in the Ninth Circuit is subject to sweeping ATS liability, whereas one sued in the

Second Circuit (or any court that faithfully applies the reasoning of *Jesner*) is subject to no ATS liability at all.

The Ninth Circuit's expansive view of ATS liability cannot be squared with the "vigilant doorkeeping" this Court mandated in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004). It also invites international friction, in direct conflict with the ATS's purpose, and threatens alarming practical consequences—among them deterring U.S. businesses from investing or operating in any country where human rights abuses occur.

Each of the two questions presented warrants certiorari in its own right, and the petitions provide an ideal vehicle to consider both.

## ARGUMENT

### I. The Decision Below Creates or Deepens Circuit Conflicts on Two Issues at the Heart of the ATS

The decision below conflicts with those of other circuits on two legal questions at the center of modern ATS litigation: extraterritoriality and domestic corporate liability. These splits are especially problematic for the business community because, in many cases, plaintiffs can exploit the division among the circuits by opting to bring ATS suits in the Ninth Circuit, where a great number of U.S. businesses operate. That risk is heightened by the fact that the Ninth Circuit has taken a more expansive view of ATS liability than its sister circuits on both issues, as explained below.

#### A. The Ninth Circuit's Extraterritoriality Holding Conflicts with the Decisions of Multiple Circuits, As Well As This Court's Guidance in *Kiobel*

The panel's extraterritoriality holding is dramatically out of step with those of other circuits. Other courts have uniformly held that claims arising from general corporate oversight activities within the United States do not satisfy

*Kiobel*'s "touch and concern" test. In the decision below, the Ninth Circuit reached the opposite conclusion, holding that such allegations can support a claim for "aiding and abetting" human rights abuses that occurred abroad and were perpetrated by foreign actors. Nestlé Pet. App. 42a–44a.[2] Specifically, the panel relied on two types of alleged U.S.-based activity: (1) the financing of supplier arrangements with Ivorian farmers and (2) routine oversight visits by U.S. employees, who traveled to Côte d'Ivoire and then "report[ed] back" to U.S. offices "where these financing decisions *** originated." *Id.* at 43a–44a. From there, the panel concluded that "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States." *Id.* at 44a.

That position cannot be reconciled with *Kiobel*. In *Kiobel*, this Court held that the ATS does not ordinarily supply jurisdiction when "all the relevant conduct took place outside the United States." 569 U.S. at 124–125. In order for an ATS case to proceed, the plaintiffs' claims must "touch and concern the territory of the United States *** with sufficient force to displace the presumption against extraterritorial application." *Id.* "[M]ere corporate presence" is not enough. *Id.* at 125. Rather, the question is whether a case involves a permissible "domestic application" of the statute, which depends on the location of the relevant conduct—that is, the conduct that constitutes the "focus" of Congress's concern in enacting the law. *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010). "[I]f the conduct relevant to the focus occurred in

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[2] The predicate question is, of course, whether the ATS even provides for aiding and abetting liability. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004), the Court flagged the issue but did not resolve it. Yet "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016).

In stark contrast to the decision below, the Eleventh and Fifth Circuits have foreclosed ATS suits based on allegations that a corporation made operational and financial decisions from a U.S.-based headquarters—including, in some cases, allegations more specific than those present here. In *Doe* v. *Drummond*, 782 F.3d 576 (11th Cir. 2015), for example, the Eleventh Circuit rejected ATS claims alleging that U.S. corporations "made funding and policy decisions in the United States" to aid and abet human rights violations overseas, because "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. Likewise, in *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), the Fifth Circuit held that plaintiffs could not overcome the extraterritoriality bar by alleging that a U.S. corporation used New York bank accounts to make "domestic payments" to a subcontractor accused of human trafficking abroad, even though the corporation's U.S. employees purportedly were "aware of allegations of human trafficking." *Id.* at 197–198.

The claims here also fall short of the legal threshold in the Second Circuit, which has acknowledged 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); *see* Cargill Pet. 23–25 (discussing other Second Circuit decisions).

The Eleventh, Fifth, and Second Circuits' applications of *Kiobel* recognize that ATS jurisdiction cannot be based on ordinary business conduct in the United States

without running afoul of *Kiobel*'s declaration that "mere corporate presence" is insufficient. 569 U.S. at 125. The eight judges who dissented from the Ninth Circuit's denial of rehearing *en banc* agreed. Nestlé Pet. App. 27a ("To the extent that the complaint alleges relevant domestic conduct at all, it simply alleges corporate presence and decision-making. That cannot form the basis for an ATS/aiding-and-abetting claim."). Corporate "presence," if it means anything, encompasses the routine activities of a U.S.-based business, such as decision-making, financial oversight, and supervision of global operations.

Because no other circuit has adopted the Ninth Circuit's expansive interpretation of when conduct "touch[es] and concern[s]" the United States, the decision below gives rise to a fractured, unpredictable landscape in which a company's exposure to ATS liability could turn solely on where it is located and conducts business. But whether a company must bear the financial and reputational costs of defending against an ATS suit—often lasting more than a decade—should not depend on whether the company is located in Dallas or Sacramento. The Court should grant certiorari to correct this disparity.

### B. The Ninth Circuit's Corporate Liability Holding Splits with the Second Circuit and Misapplies This Court's Decision in *Jesner*

Certiorari is also warranted to resolve a circuit conflict regarding whether domestic corporations may be sued under the ATS. In *Jesner*, this Court held that ATS liability does not extend to foreign corporations. 138 S. Ct. 1386, 1407 (2018). Because the defendant in *Jesner* happened to be a foreign corporation, this Court had no occasion to decide the status of domestic corporate defendants, but the reasoning of *Jesner* forecloses ATS suits against corporations, wherever headquartered. Recognizing the importance of this intervening authority, six

judges dissented from the Ninth Circuit's decision not to order *en banc* rehearing of this issue.

The panel's decision is yet another instance in which the Ninth Circuit has taken the ATS's textual brevity and lack of express restrictions as an invitation to allow ATS claims to proceed. Rather than engaging in the "vigilant doorkeeping" over ATS claims this Court mandated in *Sosa*, the Ninth Circuit has thrown open the door to any ATS claims this Court has not expressly foreclosed.

The panel below not only declined to revisit circuit precedent in light of this Court's intervening decision in *Jesner*, but it refused to meaningfully engage with that decision's reasoning, leading to a flawed analysis that failed to take this Court's most recent guidance on corporate liability into account. Before *Jesner*—which held that foreign corporations, as a category, are not subject to ATS liability, 138 S. Ct. at 1407—the Ninth Circuit had ruled that "there is no categorical rule of corporate immunity or liability" under the ATS; rather, such "analysis proceeds norm-by-norm." *Doe I* v. *Nestle USA, Inc. (Nestle I)*, 766 F.3d 1013, 1022 (9th Cir. 2014) (citing *Sarei* v. *Rio Tinto PLC*, 671 F.3d 736, 747–748 (9th Cir. 2011) (*en banc*), vacated on other grounds, 569 U.S. 945 (2013)). Notwithstanding the clear impact of *Jesner* on the validity of *Nestle I*, the panel below disposed of the corporate liability question in a single sentence, holding that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." Nestlé Pet. App. 39a. This conclusory analysis now constitutes the law of the Ninth Circuit.

The *en banc* dissent observed that the panel majority had avoided the issue of whether corporations can ever be proper ATS defendants "by relying on discredited circuit precedent." *Id.* at 10a. The dissenting judges explained:

"The panel majority's application of *Nestle I* to the corporate defendants here, post-*Jesner*, was at best incomplete and at worst simply wrong." *Id.* at 12a. The dissent correctly recognized that *Jesner* provides the controlling framework for questions of both domestic and foreign corporate liability under the ATS. *Id.* at 8a ("*Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS.").

The Ninth Circuit's holding on corporate liability squarely conflicts with the longstanding precedent of the Second Circuit, which holds that *no* corporation—whether foreign or domestic—may be sued under the ATS. *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 121 (2d Cir. 2010), aff'd on other grounds, 569 U.S. 108 (2013). In that decision, the Second Circuit concluded after an exhaustive analysis that "the ATS *** simply does not confer jurisdiction over suits against corporations." *Id.* The decision fully accords with *Jesner* and continues to bar suits against both domestic and foreign corporations in the Second Circuit.

The result for U.S. businesses is a landscape that is fragmented, contradictory, and unfair. Because a domestic corporation can be sued in San Francisco but not New York, exposure to ATS liability could turn solely on the region in which the corporation does business. But the problem does not end there. In circuits where the court of appeals has not yet addressed the issue of domestic corporate liability post-*Jesner*, the district courts will be left to reach divergent results, and some ATS suits against U.S. businesses undoubtedly will proceed for years before a higher court clarifies that the federal judiciary lacks jurisdiction over the claims. Moreover, in cases involving global corporations, plaintiffs may be able to circumvent the bar on foreign corporate liability simply by suing the corporations' U.S. subsidiaries. The Court should grant

certiorari to resolve the conflict between the circuits on this important issue.[3]

## II. The Decision Below Ignores This Court's Mandate of Judicial Restraint and Invites International Friction

Either of the Ninth Circuit's errors is sufficient to warrant the Court's plenary review in light of the existing circuit conflicts and the importance of the issues at stake. Reversal on either of the questions presented also would lead to the immediate dismissal of this ATS case that has languished at the motion-to-dismiss stage for 14 years (which is regrettably typical for ATS litigation, *see infra* Part III).

But the cumulative effect of the decision below is greater than the effect of its independent errors. Collectively, the Ninth Circuit's errors compound the harm by layering one expansive ATS theory atop another. The upshot is that in the Ninth Circuit, ATS lawsuits can proceed against an American company based on allegedly tortious acts committed outside the United States by foreign individuals, foreign governments, or other actors with whom the company does business, so long as the plaintiff raises bare allegations of corporate decision-making in the United States.

This approach runs afoul of this Court's mandate of judicial restraint and threatens to exacerbate international friction, contrary to the purpose of the ATS. The multiple conflicts between the panel's decision and the law of other circuits only confirm that the Ninth Circuit's ATS jurisprudence has gone awry.

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[3] This Court received full briefing and heard argument on the issue of corporate liability in both *Kiobel* and *Jesner*, and *amici* will not repeat those arguments here.

### A. The Ninth Circuit Did Not Proceed with "Great Caution" in Vastly Expanding the ATS's Scope

This Court repeatedly has emphasized the ATS's narrow scope and the need to tread carefully in recognizing new forms of ATS liability. In *Sosa*, the Court limited the types of claims that can be recognized under the ATS to those based on violations of "specific, universal, and obligatory" norms under customary international law. 542 U.S. at 732. The Court explained that ATS claims give rise to significant separation-of-powers and foreign relations concerns and thus require courts to exercise "great caution" in recognizing causes of action. *Id.* at 727–729. In *Kiobel*, the Court barred suits that involve an extraterritorial application of the ATS unless the claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritoriality. 569 U.S. at 124–125. And in *Jesner*, the Court's most recent statement on the scope of ATS liability, this Court held that foreign corporations are not proper defendants in ATS suits. 138 S. Ct. at 1407.

The Court has vigorously reaffirmed the importance of judicial caution and restraint in all of its ATS cases, including its recent decision in *Jesner*. There, the Court explained that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 138 S. Ct. at 1402 (quoting *Sosa*, 542 U.S. at 727). This principle applies with particular force in cases that raise separation-of-powers and foreign policy concerns, which are "inherent in" ATS litigation. *Id.* at 1403. Indeed, in the ATS context, "foreign-policy and separation-of-powers concerns" are so pronounced that "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing new causes of action under the ATS." *Id.*

Unfortunately, the Ninth Circuit has repeatedly disregarded this Court's mandate, allowing ATS claims to

proceed that would be rejected in any other circuit. This Court has thrice overturned ATS decisions originating from the Ninth Circuit. *See Sosa*, 542 U.S. 692; *Rio Tinto* v. *Sarei*, 569 U.S. 945 (2013) (granting, vacating, and remanding in light *Kiobel*); *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014) (reversing broad theory of personal jurisdiction in ATS case). The third time apparently was not the charm, and this Court should grant certiorari once again to rein in the Ninth Circuit's expansive interpretation of the ATS.

### B. The Decision Below Threatens to Increase International Friction

Beyond the tension between the decision below and this Court's instruction that the federal judiciary must exercise caution and restraint in ATS cases, the Ninth Circuit's approval of sweeping ATS jurisdiction threatens to exacerbate international tensions, rather than avoid them as the drafters of the ATS intended.

This Court in *Kiobel* recognized that the concerns underpinning the presumption against extraterritoriality—namely "unintended clashes between our laws and those of other nations" and the "danger of unwanted judicial interference in the conduct of foreign policy"—are "magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." 569 U.S. at 116 (citation omitted). To drive the point home, the Court's opinion in *Kiobel* referred ten times to Congress's intent in the ATS to minimize international discord and avoid "serious foreign policy consequences." *Id.* at 115–124.

In *Jesner*, the Court elaborated on these themes, explaining that both the presumption against extraterritoriality and the general principle of judicial caution recognized in *Sosa* operate to effectuate the ATS's purpose of "promot[ing] harmony in international relations." 138 S.

Ct. at 1406–1407. Each principle "guards against our courts triggering *** serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Id.* at 1407 (quoting *Kiobel*, 569 U.S. at 124). In *Jesner*, "the cautionary language of *Sosa*" led the Court to hold that only Congress, not the judiciary, can decide to "impos[e] liability on foreign corporations via ATS suits." *Id.* Needless to say, these principles require the courts of appeals *themselves* to exercise restraint and deference in matters of first impression in their circuits, rather than treating all ATS issues on which this Court has not ruled as fair game for an expansive view of ATS liability.

International friction in the ATS context generally stems from two distinct, but often overlapping, aspects of modern ATS litigation.

First, the extraterritorial application of the ATS disrupts the ability and responsibility of other sovereigns to redress wrongful acts committed on their own territory. For instance, El Salvador, South Africa, and Colombia have all objected to ATS suits as an infringement of their rights to resolve disputes arising within their borders. *See also* Br. of the Netherlands and the United Kingdom at 6, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491), 2012 WL 2312825 (extraterritorial ATS jurisdiction "interfere[s] with and complicate[s] efforts within the territorial State to remedy human rights abuses that may have occurred within its own territory").

The allegedly wrongful conduct in this case took place in Côte d'Ivoire, which has the prerogative and responsibility to redress wrongdoing that occurs in its territory. Indeed, in the case of cocoa production within its borders, Côte d'Ivoire is already exercising that mandate. Recent news reports confirm that in 2019, the government launched a new strategy to combat the risk of forced labor

in cocoa farming and other sectors. *See* Nellie Peyton, *Cocoa-growing Ivory Coast draws up new plan to stop child labor*, Reuters (June 26, 2019), *available at* https://tinyurl.com/yxc4scfe. These developments reflect that Côte d'Ivoire is taking steps to address issues relating to cocoa production in its own territory. Yet the precedent set by the decision below will encourage similar suits that require U.S. courts to assume jurisdiction over the actions of U.S. corporations in connection with the territory of other sovereigns, inviting future diplomatic protests.

Second, ATS suits frequently impugn the actions of foreign sovereigns by accusing private actors of aiding and abetting the wrongful acts of a foreign government. Following this Court's decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that the ATS does not provide jurisdiction over foreign states, ATS plaintiffs have targeted "corporations as proxies for what are essentially attacks on [foreign] government policy[.]" Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 102, 107.

Such attempts to indirectly condemn a foreign government's sovereign acts within its own territory have prompted vigorous objections from other countries. *See Kiobel*, 569 U.S. at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). In light of these and other diplomatic protests, the United States in 2008 asked this Court to end ATS suits that "challeng[e] the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments." Br. for the United States as *Amicus Curiae* in Support of Petitioners at 5, *American Isuzu*

*Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389. "Such lawsuits," the government explained, "inevitably create tension between the United States and foreign nations." *Id.*

Even when plaintiffs do not allege direct involvement by a foreign government, the nature of the claim implies, at least, that the defendant was allowed to commit or aid horrific acts with impunity on a foreign sovereign's soil. Thus, these lawsuits—though nominally brought against U.S. corporations—require U.S. courts to consider the action or inaction of foreign governments and potentially brand them as complicit in human rights abuses. *See Jesner*, 138 S. Ct. at 1404 (plurality op.) (explaining that "even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments"). Past ATS lawsuits against U.S. companies have required, or would have required, U.S. courts to review the actions of Israel, China, South Africa, Indonesia, and Nigeria, among others.[4]

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[4] *See, e.g., Doe I* v. *Exxon Mobil Corp.*, No. 01-cv-1357, 2019 WL 2343014, at *1–2 (D.D.C. June 3, 2019) (alleging torture, sexual assault, killing, and other abuse by members of the Indonesian military who worked as security personnel for Exxon); *Doe I* v. *Cisco Systems, Inc.*, 66 F. Supp. 3d 1239, 1241–1242 (N.D. Cal. 2014) (bringing claims against Cisco for human rights abuses in China at the hands of the Chinese Communist Party and Public Security officers); *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116, 1120 (9th Cir. 2010) (seeking to hold Chevron liable after Nigerian Government Security Forces allegedly shot protestors on an oil platform operated by Chevron's Nigerian subsidiary); *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007) (alleging that Israeli Defense Forces used bulldozers manufactured by Caterpillar to demolish homes in the Palestinian territories, causing deaths and injury); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542, 548 (S.D.N.Y. 2004) (seeking to hold "a slew of multinational corporations that did

The decision below authorizes U.S. courts to pass judgment on the acts of foreigners committed in the territory of another sovereign, so long as plaintiffs allege that general corporate oversight activities in the United States aided and abetted the foreign acts. The Court should grant certiorari to prevent this end-run around its decisions in *Sosa*, *Kiobel*, and *Jesner*.

### III. ATS Lawsuits Discourage U.S. Business Operations and Investment in Developing Countries that the U.S. Government Seeks to Promote

These concerns are not abstract. In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations in a wide range of industry sectors for business activities in more than sixty countries. John B. Bellinger, III & R. Reeves Anderson, *Whither to "Touch and Concern": The Battle to Construe the Supreme Court's Holding in* Kiobel v. Royal Dutch Petroleum, *in Federal Cases From Foreign Places* 23 (U.S. Chamber Institute for Legal Reform 2014); *see also* Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 713 (2012). Dozens of major U.S. corporations have been targeted, particularly with respect to their activities in developing and post-conflict countries.

Courts have struggled to resolve these cases, and threshold questions often take a decade or more to resolve. For example, the *Bauman* case against Daimler

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business in apartheid South Africa" liable for "forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination" that occurred under the apartheid regime) (subsequent history omitted); *Doe* v. *Unocal Corp.*, 27 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998) (suing corporate and individual defendants, including U.S. corporation Unocal, for alleged human rights abuses "in furtherance of" a gas pipeline project between the corporate defendants and a state-owned energy company in Burma), aff'd and adopted, 248 F.3d 915 (9th Cir. 2001).

was pending for 10 years before this Court reversed the Ninth Circuit's expansive jurisdictional holding; Chevron defended an ATS case for 13 years; a case against Cisco has been pending for eight years and is now awaiting this Court's disposition of the present petitions; and Rio Tinto had to litigate for 13 years before securing dismissal. All of these ATS cases originated in the Ninth Circuit and either remain pending or were dismissed on Rule 12 grounds after years of litigation. The present case, which has been pending at the pleading stage for 14 years, is typical of the Ninth Circuit's practice. All the while, ATS suits threaten substantial reputational harm and require considerable resources to defend. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290–291 (2009). They also impose massive settlement pressure on companies that bear no culpability for the alleged conduct. *See Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (describing the South Africa apartheid litigation as "a vehicle to coerce a settlement").

This Court's limiting instructions in *Sosa*, *Kiobel*, and *Jesner* helped stem the tide but regrettably failed to ensure the swift dismissal of some long-running ATS suits, as this case illustrates. The decision below—which effectively eliminates the extraterritoriality bar for companies that maintain a U.S. headquarters and engage in overseas business operations in countries where human rights abuses occur—threatens to open the floodgates to a new wave of Ninth Circuit ATS litigation against U.S.-based companies. Plenary review of the questions presented in this case is necessary to avoid a reversion to the expansive ATS liability landscape that preceded *Kiobel*.

In the absence of this Court's review, the panel's decision could lead to alarming practical consequences for

U.S. businesses operating around the globe. *See Sosa*, 542 U.S. at 732–733 (requiring courts to consider the "practical consequences" of expanding ATS jurisdiction). The panel's holding that routine U.S.-based business decisions clear the hurdle of "sufficiently force[ful]" domestic conduct leaves no room for U.S. defendants to safely invoke the extraterritorial bar. Indeed, according to the panel below, even corporate oversight measures such as inspections of overseas operations could be deemed "aiding and abetting" of alleged wrongdoing abroad. Nestlé Pet. App. 43a (citing allegations 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"). That is an alarming and counterproductive message to send to the U.S. business community.

Among other consequences, allowing ATS claims to proceed in cases like this one "could establish 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, or where judicial systems might lack the safeguards of United States courts." *Jesner*, 138 S. Ct. at 1406 (plurality op.). The political branches, not the courts, are responsible for regulating the foreign commerce of U.S. corporations. Congress has chosen to regulate only certain foreign activities of U.S. companies—for example, by enacting the Foreign Corrupt Practices Act. *See* 15 U.S.C. §78dd-1 *et seq*. And the State Department has encouraged commercial interaction with still-developing nations, in the hope of promoting economic development, the rule of law, and change from within the system.[5]

[5] For example, when the United States suspended sanctions against Burma in May 2012 to encourage further democratic reform, the Secretary of State declared, "today, we say to American

Decisions that stretch ATS liability beyond the statute's purpose put the judiciary at odds with these policies. For the reasons discussed in Part II, the courts should not deter foreign activities of U.S. companies that Congress has allowed and the State Department has promoted.

Moreover, without clear direction from this Court, ATS plaintiffs can be expected to "plead around" the territorial limits of the statute by alleging some form of U.S.-based conduct (or failure to act), such as a parent company's authorization or failure to supervise the actions of a foreign subsidiary. The Court in *Sosa* rejected a similar attempt to "repackage[]" foreign conduct as a U.S.-based claim in suits arising under the Federal Tort Claims Act, 542 U.S. at 702, and the Court should grant certiorari to affirm that the same rule applies to the ATS. As the Court explained in *Morrison*, "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." 561 U.S. at 266.

The petitions present an ideal vehicle to articulate clear and easily administrable rules needed to limit the "judicial creativity" that has continued unabated in the Ninth Circuit, notwithstanding this Court's mandates in *Sosa*, *Kiobel*, and *Jesner*.

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business: Invest in Burma," notwithstanding prior ATS suits against corporations that operated in that country. Hillary Rodham Clinton, Sec'y of State, Remarks with Foreign Minister of Burma (May 17, 2012), https://tinyurl.com/yykgt2po.

## CONCLUSION

The Court should grant the petitions for a writ of certiorari.

Respectfully submitted.

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