Nos. 19-416 and 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 PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
MELISSA N. PATTERSON
DANA L. KAERSVANG
JOSHUA M. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARIK A. STRING
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

1. Whether domestic corporations are subject to liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350.

2. Whether a cause of action for aiding and abetting a violation of international law may be implied under the ATS.

3. Whether general allegations of corporate oversight in the United States are sufficient to overcome the bar against extraterritorial claims under the ATS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Treaties and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 19-416

NESTLÉ USA, INC., PETITIONER

v.

JOHN DOE I, ET AL.

No. 19-453

CARGILL, INC., PETITIONER

v.

JOHN DOE I, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 19-453 should be granted, and the Court should add a question addressing the availability of aiding-and-abetting liability. The petition for a writ of certiorari in No. 19-416 should be held pending the Court's disposition of the petition in No. 19-453.

STATEMENT

1. The Alien Tort Statute (ATS) provides in full: "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." 28 U.S.C. 1350. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that although the "ATS is a jurisdictional statute creating no new causes of action," it was "enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Id.* at 724. Under *Sosa*, to recognize a new cause of action, courts must apply a two-step test: first, the suit must be based on an international-law norm that is "specific, universal, and obligatory," and second, the court must determine whether permitting the suit to proceed is an appropriate exercise of judicial discretion. *Id.* at 732-733 (citation omitted); see *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402-1403, 1406-1407 (2018) (elaborating on the second step of the *Sosa* test).

Respondents allege that they are former child slaves from Mali who were trafficked and forced to work cultivating cocoa beans on farms in Côte d'Ivoire in violation of international law. Second Am. Compl. (Compl.) ¶¶ 1, 80. They brought suit under the ATS, alleging that petitioners, who are domestic corporations, aided and abetted these international-law violations by, among other things, purchasing cocoa beans from farms that used child slaves and providing those farms with technical assistance. *Id.* at ¶¶ 32-69.

Petitioners moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D.

Cal. 2010). The court concluded that aiding and abetting is a cognizable theory under the ATS, *id.* at 1078-1079, but held that the complaint's allegations pleaded neither the *mens rea* nor the *actus reus* necessary to state a claim under international law, *id.* at 1098. The court further held that corporations are not amenable to suit under the ATS. *Id.* at 1124.

Following the district court's dismissal, this Court decided *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), in which it determined that the presumption against extraterritoriality applies to the ATS and nothing in the statute's text or context overcomes that presumption. *Id.* at 116, 124. Accordingly, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force" to state a domestic claim. *Id.* at 124-125. "[M]ere corporate presence" does not "suffice[]." *Id.* at 125.

On appeal of the district court's ruling, the Ninth Circuit reversed and remanded. *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013 (2014), cert. denied, 136 S. Ct. 798 (2016). It held that corporations are subject to suit under the ATS for violating the international-law prohibition on slavery, reasoning that this particular norm is categorical. *Id.* at 1022. The court further held that aiding-and-abetting liability is cognizable under the ATS, *id.* at 1023, and that respondents' allegations were sufficient to show the requisite *mens rea*. But the court remanded for repleading with respect to the *actus reus*, *id.* at 1024, 1026, as well as on the question of extraterritoriality in light of *Kiobel*, *id.* at 1027.

Petitioners sought rehearing en banc, which the court of appeals denied. *John Doe I* v. *Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015). Judge Bea, joined by seven other judges, dissented from the denial of rehearing en

banc. *Id.* at 946. In his view, respondents' allegations failed to make out the requisite *mens rea* because they showed only that petitioners intended to maximize profits. *Id.* at 947. He also disagreed that corporate liability is permissible under the ATS. *Id.* at 955.

2. On remand, the district court again dismissed respondents' claims. Pet. App. 52a-70a.[1] It noted that under *Kiobel* and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), the question whether respondents' claims are extraterritorial or domestic turns on whether "the conduct relevant to the statute's focus occurred in the United States." Pet. App. 55a (quoting *RJR Nabisco*, 136 S. Ct. at 2101). The court concluded that the "focus" in this case is petitioners' aiding-and-abetting conduct, *id.* at 58a, and characterized respondents' allegations on this point as "essentially that Defendants are U.S. corporations" that "had 'general corporate supervision' over subsidiaries in Côte d'Ivoire," *id.* at 69a (citation omitted). The court deemed those allegations insufficient. *Id.* at 60a, 66a-67a.

While the case was on appeal for the second time, this Court decided *Jesner*, *supra*, holding that foreign corporations are not subject to ATS liability. The Court declined to resolve whether *Sosa*'s first step applies to the question whether a particular class of defendants is amenable to suit under the ATS, 138 S. Ct. at 1399-1400 (plurality opinion), though the plurality noted there was a "strong argument" that international law did not impose an obligatory norm of corporate liability, *id.* at 1400. At the second step, the Court reasoned that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy," "courts

---

[1] References are to the petition appendix and brief in opposition in No. 19-453.

must refrain from creating the remedy." *Id.* at 1402 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1858 (2017)). The Court found ample reason for caution in light of its refusal to recognize corporate liability under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as the disruption to U.S. foreign relations that such liability could cause. *Jesner*, 138 S. Ct. at 1403, 1406.

After *Jesner*, the Ninth Circuit again reversed and remanded. Pet. App. 28a-39a. Noting its previous holding that corporations were amenable to liability, the court determined that *Jesner* abrogated this holding as to foreign corporations but had no effect with respect to domestic corporations. *Id.* at 31a-32a. The court further held that the statutory "focus" under *RJR Nabisco* is petitioners' aiding-and-abetting conduct. *Id.* at 35a. In concluding that conduct occurred in the United States, the court homed in on respondents' allegations that petitioners provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty" and "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices," where their financing decisions "originated." *Id.* at 36a.

Petitioners argued in the alternative that respondents had failed to state a claim for aiding and abetting, but the court declined to reach that issue, instead remanding for respondents to replead and "specify whether aiding and abetting conduct that took place in the

United States is attributable to the domestic corporations in this case." Pet. App. 39a; see *id.* at 37a.[2] Finally, the court concluded that respondents "raise sufficiently specific allegations regarding Cargill's involvement in farms that rely on child slavery" to satisfy Article III's traceability requirement. *Id.* at 38a. But it deemed the allegations against Nestlé "far less clear" and remanded for repleading as to Nestlé. *Id.* at 38a-39a.

Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 3a. Judge Bennett dissented from the denial of rehearing en banc, joined in part or in full by seven other judges. *Id.* at 4a. Judge Bennett reasoned that after *Jesner*, "corporations (foreign or not) are clearly not proper ATS defendants." *Id.* at 7a. He further contended that the proper statutory "focus" for extraterritoriality purposes is "[p]laintiffs' enslavement on cocoa plantations" overseas. *Id.* at 20a.

DISCUSSION

The United States unequivocally condemns child slavery and those who aid and abet it, and is committed to fostering respect for human rights. This case, however, involves more specific issues: whether domestic corporations that are alleged to have aided and abetted slavery overseas may be held liable in an implied right of action under the ATS. And in that context, this Court has repeatedly made clear that courts "must exercise 'great caution' before recognizing new forms of liability." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692,

---

[2] The operative complaint also "names several foreign corporations" that respondents concede "must be dismissed." Pet. App. 37a.

728 (2004)). And even when the ATS does permit liability for a particular international-law violation, a plaintiff's claim must be domestic rather than extraterritorial. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). The decision of the court below is inconsistent with those principles in three different respects that warrant this Court's review.

First, the court of appeals erred in holding that domestic corporations are subject to liability under the ATS. Although the Court did not directly address that question in *Jesner*, it held that the requisite "caution" in recognizing new causes of action under the ATS "extends" to whether courts should "impose[ ] liability upon artificial entities like corporations." 138 S. Ct. at 1402-1403. And here, as in other contexts, "[w]hether corporate defendants should be subject to suit [is] 'a question for Congress.'" *Id.* at 1403 (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 72 (2001)). This Court has twice granted certiorari on this issue, which continues to divide the circuits.

Second, the court of appeals erred in recognizing aiding-and-abetting liability under the ATS. That choice is also best left to Congress, see *Jesner*, 138 S. Ct. at 1403—a point confirmed by *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164 (1994), which held that a cause of action for aiding and abetting will not lie absent clear congressional direction. The Court should add a question presented on this important issue: it is logically antecedent to the extraterritoriality question, was decided by the Ninth Circuit, and has percolated extensively in the courts of appeals.

Third, even assuming domestic corporate and aiding-and-abetting liability exist, the court of appeals erred in

finding that respondents have overcome the bar on extraterritoriality. Under *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), a claim is domestic rather than extraterritorial only when its "focus" occurs in the United States, *id.* at 2101, and the focus of an aiding-and-abetting claim is the principal offense, which here occurred overseas. Even were the Court to look to the aiding-and-abetting conduct itself, respondents have alleged nothing more than generic domestic corporate activity, which is insufficient. The courts of appeals have reached differing results on similar facts in cases raising this issue.

Cargill's petition for a writ of certiorari presents a suitable vehicle for resolving all three questions. Because the court below remanded the claims against Nestlé for repleading on standing, the Court should hold that case if it grants the petition in *Cargill*.

A. The Question Whether The ATS Authorizes Liability For Domestic Corporations Warrants Review

The Ninth Circuit erred in concluding that domestic corporations are proper ATS defendants. The reasoning of this Court with respect to foreign corporations in *Jesner* forecloses liability for domestic corporations as well. This important question has divided the circuits and warrants this Court's review.

1. The court below failed to engage meaningfully with *Jesner*, instead adhering to a pre-*Jesner* precedent solely on the ground that *Jesner* did not expressly address domestic corporate liability. See Pet. App. 44a-45a. That result is untenable. Regardless of whether the Court applies both steps of the analysis under *Sosa*

or only the second, *Jesner*'s reasoning categorically precludes domestic corporate liability.[3]

a. *Jesner* declined to resolve whether corporate liability is subject to *Sosa*'s step-one requirement of an international-law norm, or instead whether such liability is solely a matter of domestic law under *Sosa*'s second step. 138 S. Ct. at 1402 (plurality opinion). But as the plurality explained, "assuming * * * that under *Sosa* corporate liability is a question of international law, there is" a "strong argument that [respondents] cannot satisfy the high bar" that *Sosa* imposes. *Id.* at 1400. This Court need not resolve the question whether corporate liability must satisfy *Sosa*'s first step, however, because *Jesner* precludes domestic corporate liability at the second step.

b. As the *Jesner* majority noted, "even in the realm of domestic law," "recent precedents cast doubt on the authority of courts to extend or create private causes of action." 138 S. Ct. at 1402 (discussing cases applying *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). This Court has "'recently and repeatedly said'" that such judgments are generally best left to the legislature, which is "'better position[ed] to consider if the public interest would be served by imposing'" legal liability in a particular case. *Ibid.* (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843,

---

[3] In *Jesner*, the United States contended that corporate liability was appropriate because corporations were traditionally liable in tort actions at common law. Gov't Amicus Br. at 8-9, *Jesner*, *supra* (No. 16-499). The Court declined to adopt that argument in *Jesner*, however, and the United States has revisited its position in light of the Court's opinion, which rejected not only the government's conclusion but also its basic framework for analysis. See *Jesner*, 138 S. Ct. at 1402-1403, 1406-1407.

1857 (2017)) (citation omitted). Accordingly, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1858). These background "separation-of-powers concerns * * * apply with particular force" to the ATS, given the "foreign-policy" considerations "inherent in ATS litigation." *Id.* at 1403. Indeed, "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS." *Ibid.*

The need to exercise "caution" in implying new rights of action "extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." *Jesner*, 138 S. Ct. at 1402-1403. The *Bivens* context is instructive. There, the Court has held that whether corporate defendants should be subject to civil suit is "a question for Congress, not [the Court], to decide." *Malesko*, 534 U.S. at 72. As *Jesner* recognized, the same logic applies under the ATS. 138 S. Ct. at 1403 (discussing *Malesko*). Extending ATS liability to corporations of any kind "absent further action from Congress" would therefore "be inappropriate." *Ibid.*

In addition, the *Jesner* plurality recognized that "[e]ven in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action." 138 S. Ct. at 1403. The "logical place to look for a statutory analogy to an ATS common-law action is the [Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73]—the only

cause of action under the ATS created by Congress rather than the courts." *Ibid.* A "key feature" of the TVPA is that it limits liability to "natural persons," and "Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case." *Id.* at 1404.

Finally, in light of *Jesner*'s holding rejecting foreign corporate liability under the ATS, a contrary rule for domestic corporate liability would facially discriminate against U.S. corporations. There is no indication that Congress in enacting the ATS intended to treat U.S. businesses worse than foreign businesses engaged in exactly the same conduct. Such a rule would place U.S. corporations at a distinct disadvantage, particularly "in developing economies" where there may be "a history of alleged human-rights violations" and a correspondingly heightened potential for liability exposure. *Jesner*, 138 S. Ct. at 1406 (plurality opinion).

c. Respondents contend (Br. in Opp. 21) that *Jesner* hinged on the "foreign policy implications" in that case, which are not present in a suit against domestic corporations. But the *Jesner* majority's separation-of-powers reasoning in Part II.B.1 of the opinion was an independent basis for its decision. See 138 S. Ct. at 1403 ("[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."). In any event, ATS suits against domestic corporations frequently involve claims of aiding and abetting misconduct abroad—which often implicate the policies and conduct of foreign states. See Compl. ¶ 50 (alleging that "several of the cocoa farms in Côte d'Ivoire from which Defendants source are owned" or "protected by government officials"); see also, *e.g.*, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254,

258 (2d Cir. 2007) (per curiam), aff'd *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (alleging corporate aiding and abetting of apartheid). Respondents further argue (Br. in Opp. 21-22) that foreclosing domestic corporate liability would conflict with the ATS's "original purpose" of providing "foreign citizens redress for violations of the law of nations." Because "customary international law does not require corporate liability," however, "declining to create it under the ATS cannot give other nations just cause for complaint against the United States." *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment).

2. This Court's review is warranted. This is an important, recurring question, as evidenced by the Court's grant of certiorari on the availability of corporate liability in two previous cases. See *Kiobel*, *supra* (No. 10-1491); *Jesner*, *supra* (No. 16-499). The courts of appeals are squarely divided, and the conflict is unlikely to resolve itself. The Ninth Circuit in the decision below declined to reconsider its prior precedent in light of *Jesner*, see Pet. App. 44a-45a, and various other circuits have similarly recognized corporate liability, albeit pre-*Jesner*. See *Flomo* v. *Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017-1021 (7th Cir. 2011); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); see also *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013). In contrast, the Second Circuit has rejected corporate liability, see *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 148-149 (2010), cert. denied, 565 U.S. 881, and cert. granted, 565 U.S. 961 (2011), aff'd on other grounds, 569 U.S. 108 (2013), and

nothing in *Jesner* provides a reason for the Second Circuit to reconsider that decision.

B. The Court Should Add The Question Of Whether The ATS Imposes Aiding-And-Abetting Liability

The question whether the ATS permits aiding-and-abetting claims is logically antecedent to the question presented by petitioners concerning when such claims are extraterritorial. This threshold question was raised below, and the court of appeals erred in answering it in the affirmative. And it is a significant issue that has percolated extensively in the courts of appeals and is ripe for this Court's review.

1. A ruling that the ATS does not permit a claim for aiding and abetting would obviate the need to reach the extraterritoriality question altogether. Moreover, the extraterritoriality analysis could well depend on the basis for recognizing an aiding-and-abetting claim in the first place, as the contours of that claim could affect the determination of its "focus." See pp. 19-20, *infra* (focus may depend on whether aiding and abetting is characterized as an independent tort or simply a method of holding a secondary actor liable for the principal tort). Accordingly, this Court should add a question presented on the logically antecedent issue of whether the ATS permits aiding-and-abetting liability at all.

Although petitioners have not sought review of that question, the issue was both "pressed" and "passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioners moved to dismiss the complaint on the ground that the ATS does not authorize aiding-and-abetting liability, see D. Ct. Doc. 19, at 7-18 (Dec. 5, 2005); see also, *e.g.*, D. Ct. Doc. 90, at 7-13 (Feb. 9, 2009), and the district court rejected that argument, see *Doe I* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057,

1078 (C.D. Cal. 2010). On the first appeal, petitioners argued that the court could "affirm on the alternative ground that an aiding and abetting cause of action under the ATS is contrary to *Sosa*." Pet. C.A. Answering Br. 54 (No. 10-56739) (capitalization and emphasis omitted). The Ninth Circuit declined that invitation, citing a prior case permitting aiding-and-abetting liability, see *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1023 (2014), cert. denied, 136 S. Ct. 798 (2016) (citing *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 765-766 (9th Cir. 2011), cert. granted, judgment vacated, 569 U.S. 945 (2013)), and the fact that the issue was resolved in a previous appeal in the same litigation allows this Court to consider it here, see *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. The court of appeals recognized aiding-and-abetting liability under the ATS based solely on what it perceived to be a norm of international law. *Sarei*, 671 F.3d at 748-749; see *Nestle*, 766 F.3d at 1023 (citing *Sarei*). That analysis is untenable after *Jesner*, which makes clear that *Sosa*'s second step precludes an aiding-and-abetting claim under the ATS.

a. Under *Jesner*, it is an open question whether the availability of aiding-and-abetting liability—which, like corporate liability, speaks to the issue of *who* can be held liable for a particular international-law violation, see p. 19, *infra*—is "governed by international law" pursuant to *Sosa*'s first step. *Jesner*, 138 S. Ct. at 1402 (plurality opinion). Several sources of international law recognize at least some form of criminal liability for aiders and abettors, see, *e.g.*, Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 6, U.N. Doc. S/RES/955 (Nov. 8, 1994); Charter of the International Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1545,

82 U.N.T.S. 282, though these authorities reach divergent conclusions as to the requisite *mens rea* and *actus reus*, see *Nestle*, 748 F. Supp. 2d at 1080-1087. Ultimately, however, the Court need not resolve whether the step-one inquiry applies or whether these sources establish a "specific, universal, and obligatory" norm under *Sosa*, 542 U.S. at 732-733 (citation omitted), as respondents' claims plainly fail at step two.

b. There are numerous "sound reasons to think Congress might doubt the efficacy or necessity" of aiding-and-abetting liability. *Jesner*, 138 S. Ct. at 1402 (quoting *Abbasi*, 137 S. Ct. at 1858). Just as *Jesner* declined to extend liability beyond individual perpetrators to foreign corporations, so too this Court should decline to extend liability beyond primary violators to aiders and abettors. Consistent with fundamental separation-of-powers principles, whether aiders and abettors "should be subject to suit [is] 'a question for Congress, not [this Court], to decide.'" *Id.* at 1403 (quoting *Malesko*, 534 U.S. at 72).

Central Bank, *supra*, confirms the point. There, the Court held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." 511 U.S. at 182. The Court observed that recognizing aiding-and-abetting liability in cases of statutory silence would work a "vast expansion of federal law" and should not be undertaken in the absence of "congressional direction." *Id.* at 183. The need to respect Congress's role in determining the availability of aiding-and-abetting liability is only "magnified" where, as here, "the question

is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116.

Central Bank also recognized that "the rules for determining aiding and abetting liability are unclear." 511 U.S. at 188. In private suits asserting aiding-and-abetting claims—including this one—"[t]he issues [are] hazy, their litigation protracted, and their resolution unreliable." *Id.* at 189 (citation omitted). And in the civil arena, private plaintiffs are able to leverage vague standards "without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727; see *Central Bank*, 511 U.S. at 188. Given the immense economic and reputational costs at stake in ATS litigation, this is "an area that demands certainty and predictability." *Central Bank*, 511 U.S. at 188 (citation omitted).

Congressional action provides further reason to abstain from implying a cause of action for aiding and abetting. The TVPA does not provide for aiding-and-abetting liability, see 28 U.S.C. 1350 note, and "[a]bsent a compelling justification, courts should not deviate from that model." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). Although Congress authorized a form of secondary liability in the Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101 *et seq.*, see 18 U.S.C. 1595(a), that merely illustrates "that there are two reasonable choices" and that "Congress, not the Judiciary, must decide whether to expand the scope of liability." *Jesner*, 138 S. Ct. at 1405 (plurality opinion).

Aiding-and-abetting liability also risks disruption to U.S. foreign policy. *Jesner*, 138 S. Ct. at 1406. Plaintiffs have repeatedly sued private parties alleged to have aided and abetted a foreign state's international-law violations. See, *e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 15-16 (involving the Indonesian military); *Khulumani*, 504

F.3d at 260 (involving apartheid in South Africa). These cases are likely to provoke—and, indeed, have provoked—"the very foreign-relations tensions the First Congress sought to avoid." *Jesner*, 138 S. Ct. at 1407; see, *e.g.*, *Sosa*, 542 U.S. at 733 n.21.

3. The aiding-and-abetting question warrants this Court's review. In addition to its logical connection to the extraterritoriality issue, the question carries substantial practical importance. Aiding-and-abetting suits account for a large proportion of existing ATS litigation and, as discussed, plaintiffs have repeatedly sought to hold defendants liable for aiding and abetting foreign misconduct (including misconduct by foreign states), which has implications for U.S. foreign policy.

The issue is ripe for review: it has percolated thoroughly in the courts of appeals, which have unanimously, but erroneously, recognized aiding-and-abetting liability. See *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 395-396 (4th Cir. 2011); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009), cert. denied, 562 U.S. 946 (2010); *Khulumani*, 504 F.3d at 260; *Drummond Co.*, 552 F.3d at 1315; see also *Exxon Mobil Corp.*, 654 F.3d at 28-32. The absence of a conflict is not alone sufficient to counsel against certiorari on this question, given its logical connection to the extraterritoriality issue, its practical importance, and the numerous judges who have dissented from, or criticized, holdings recognizing aiding-and-abetting liability. See, *e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 87 (Kavanaugh, J., dissenting in part); *Khulumani*, 504 F.3d at 333 (Korman, J., concurring in part and dissenting in part); see also Pet. App. 6a n.1 (Bennett, J., dissenting from denial of rehearing en banc); *John Doe I* v. *Nestle USA, Inc.*, 788 F.3d 946, 956 n.22 (9th Cir. 2015) (Bea, J., dissenting

from denial of rehearing en banc); *Sarei*, 671 F.3d at 833-834 (Ikuta, J., dissenting).

C. The Question Whether Respondents' Claims Are Impermissibly Extraterritorial Warrants Review

Even assuming aiding-and-abetting suits against domestic corporations are cognizable under the ATS, the court of appeals erred in holding (Pet. App. 36a-37a) that respondents' generic allegations of domestic corporate oversight are sufficient to avoid the bar on extraterritoriality. The proper extraterritoriality analysis for this and similar fact patterns represents an important, recurring issue that has divided the courts of appeals and warrants this Court's review.

1. In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS" and nothing in the statute overcomes that presumption. 569 U.S. at 124. Because the ATS does not apply extraterritorially, respondents' allegations must "touch and concern the territory of the United States * * * with sufficient force to" state a domestic claim. *Id.* at 124-125. In *RJR Nabisco*, 136 S. Ct. at 2101, the Court clarified that this test is satisfied only if the conduct that forms "the statute's 'focus'"—that is, the conduct that is the "object[] of the statute's solicitude," *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 267 (2010)—occurred in the United States. *RJR Nabisco*, 136 S. Ct. at 2101 (discussing *Kiobel*); see *Morrison*, 561 U.S. at 266 (concluding that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities").

As discussed, the United States is of the view that aiding and abetting is not cognizable under the ATS. The absence of any viable cause of action renders it dif-

ficult to discern that cause of action's "focus." Nevertheless, the "focus" of existing aiding-and-abetting claims in other contexts is the underlying principal offense. The completion of the principal offense is generally a necessary element of aiding-and-abetting liability. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(c), at 498 (3d ed. 2017). Moreover, aiding and abetting "does not constitute a discrete criminal offense but only serves as a more particularized way of identifying persons involved" in the underlying offense. *Khulumani*, 504 F.3d at 280-281 (Katzmann, J., concurring) (quoting *United States* v. *Smith*, 198 F.3d 377, 383 (2d Cir. 1999), cert. denied, 531 U.S. 864 (2000)); see 18 U.S.C. 2(a). The limited civil sources available also suggest that aiding and abetting is not a "separate tort," as opposed to "a basis for imposing tort liability." *Eastern Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623-624 (7th Cir. 2000), amended on denial of reh'g (Nov. 29, 2000); see Restatement (Second) of Torts § 876 (1979); *Halberstam* v. *Welch,* 705 F.2d 472, 479 (D.C. Cir. 1983). And various international authorities have similarly taken the view that "aiding and abetting is a theory of liability for acts committed by a third party." *Khulumani*, 504 F.3d at 280 (Katzmann, J., concurring); see *id.* at 280-281 (canvassing sources); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) (plurality opinion). Because the principal offense here occurred overseas, see Compl. ¶ 13, respondents' claims are impermissibly extraterritorial.

Even if the proper "focus" of an aiding-and-abetting claim were the defendant's own conduct (rather than the primary conduct that the defendant allegedly aided), respondents' claims still would fail. In concluding other-

wise, the court below emphasized respondents' allegation that petitioners provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier," characterizing these payments as "'kickbacks.'" Pet. App. 36a (citation omitted). The court also pointed to allegations that petitioners "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 * * * originated." *Ibid.*

This analysis was in error. Much of the supposedly relevant conduct cited by the court of appeals—such as inspecting farms in Côte d'Ivoire—occurred overseas. But the question is whether petitioners' *domestic* conduct suffices to satisfy the *actus reus* and *mens rea* for an aiding-and-abetting claim. See *RJR Nabisco*, 136 S. Ct. at 2101 ("[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."). Here, excising petitioners' foreign conduct leaves nothing remaining except the generic functions associated with any corporate headquarters, such as oversight of foreign operations. See Pet. App. 36a. On any plausible understanding of the elements of a hypothetical aiding-and-abetting claim, see, *e.g.*, *Nestle*, 766 F.3d at 1023, 1026 (at a minimum, aiding and abetting requires knowing, "substantial" assistance), such vague allegations are insufficient to state a claim. See *Kiobel*, 569 U.S. at 125 ("mere corporate presence" insufficient to overcome bar on extraterritoriality).

2. This Court's review is warranted. Virtually all ATS cases involve overseas misconduct. And given the

sensitive foreign-relations concerns that ATS suits implicate, the need to police extraterritoriality constraints is especially pressing. See *Kiobel*, 569 U.S. at 117.

The courts of appeals have reached differing results on similar facts, confirming the need for this Court's guidance. In *Doe* v. *Drummond Co.*, 782 F.3d 576 (2015), cert. denied, 136 S. Ct. 1168 (2016), the Eleventh Circuit rejected as impermissibly extraterritorial a claim that defendants aided and abetted extrajudicial killings abroad by "making decisions to engage with" a terrorist organization and "agreeing to fund" the organization from the United States. *Id.* at 598. The Fifth Circuit similarly concluded that a human-trafficking claim was barred despite allegations that U.S.-based employees "were 'aware of allegations of human trafficking at [defendant's] worksites'" and made "domestic payments" to those directly involved. *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197-198, cert. denied, 138 S. Ct. 134 (2017). The *Adhikari* court also denied as futile plaintiffs' motion to amend their complaint to add an aiding-and-abetting claim. *Id.* at 199-200.

The Second Circuit, in contrast, has concluded that financial transactions in the United States could support aiding-and-abetting liability. See *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 190-191 (2d Cir. 2014). But the allegations in that case were more "specific" than here, see *id.* at 191 (describing "multiple domestic purchases" and "financing arrangements"), and the court rejected as inadequate plaintiffs' allegations that defendant "is headquartered in the United States, which means that many decisions related to the alleged violations * * * were 'necessarily made by the top stake holders * * *

in the United States.'" *Id.* at 189-190. The Second Circuit thus may well have reached a different result than the court below on these facts.

D. The Petition in *Cargill* Is A Suitable Vehicle For Review Of All Three Questions

The *Cargill* petition is a suitable vehicle for this Court to resolve each of the three questions. Although the Ninth Circuit remanded for limited repleading, Pet. App. 37a, that fact poses no obstacle to review. Contra Br. in Opp. 18. The Ninth Circuit has already definitively resolved, on the basis of the *existing* allegations, each of the questions at issue here: that corporate liability and aiding and abetting are cognizable under the ATS, and that respondents have pleaded sufficient domestic conduct to avoid the bar on extraterritoriality. See Pet. App. 32a, 36a-37a; *Nestle*, 766 F.3d at 1023. The first two questions are pure questions of law that do not depend on the facts in this case. As to the third, the court of appeals remanded for respondents "to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case." Pet. App. 39a. But the legal error in the decision below was that the "*total* unallocated domestic conduct alleged * * * is clearly insufficient." *Id.* at 27a n.9 (Bennett, J., dissenting from the denial of rehearing en banc) (emphasis added). More precise attribution to particular defendants will not remedy this flaw.

In the event the Court grants certiorari in *Cargill*, it should hold the *Nestlé* petition. The court of appeals declined to find standing on the current pleadings as to Nestlé and remanded for repleading. Pet. App. 38a-39a. Unlike the remand in *Cargill*, which would have no ef-

fect on the Court's ability to resolve the questions presented, the potential absence of jurisdiction on the current pleadings as to Nestlé could prevent the Court from reaching the merits in that case. And the decision to remand is not independently worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari in No. 19-453 should be granted, and the Court should add a question presented on aiding and abetting. The petition for a writ of certiorari in No. 19-416 should be held pending the Court's disposition of the petition in No. 19-453.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEFFREY B. WALL
Deputy Solicitor General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General
MELISSA N. PATTERSON
DANA L. KAERSVANG
JOSHUA M. KOPPEL
Attorneys

MARIK A. STRING
Acting Legal Adviser
Department of State

MAY 2020