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 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 ASSOCIATION OF MANUFACTURERS, THE NATIONAL FOREIGN TRADE COUNCIL, GLOBAL BUSINESS ALLIANCE, AND UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest federation of businesses and associations. It represents approximately 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.

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, the largest economic impact of any major sector, and accounts for nearly two-thirds 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 Manufacturers' Center for Legal Action—the litigation arm of the NAM—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 have consented in writing to this filing.

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

The Global Business Alliance (GBA) is the only trade association exclusively comprised of international companies with operations in the United States. GBA promotes and defends an open economy that welcomes international companies to invest in America, which leads to more jobs, growth, and benefits for American communities. Prior to the pandemic, these companies directly employed 7.4 million U.S. workers and created 62 percent of all new U.S. manufacturing jobs over the past five years.

The United States Council for International Business (USCIB) promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility, supported by international engagement and regulatory coherence. Its members include global companies and professional services firms, and as the U.S. affiliate of the International Chamber of Commerce (ICC), Business at OECD (BIAC), and the International Organization of Employers (IOE), USCIB provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

Amici have a substantial interest in the issues presented in this case. Numerous U.S. companies have been and 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. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. companies that transact business in foreign countries. 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 or to fully deter new suits. See, *e.g.*, *Estate of Alvarez* v. *Johns Hopkins*

Univ., 373 F. Supp. 3d 639 (D. Md. 2019), appeal docketed, No. 19-1530 (4th Cir. May 17, 2019) (held in abeyance pending the Court's decision in these cases).

Amici can offer a helpful perspective on the issue before the Court: whether the ATS authorizes U.S. courts to regulate worldwide conduct based on allegations of generalized corporate oversight activities involving a business's U.S. headquarters. *Amici* have participated in more than a dozen cases involving the ATS's reach before this Court and other federal courts. *E.g.*, Brief 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

This Court should answer both questions presented in the negative and provide clear instructions to lower courts that the ATS is—and always has been—a modest jurisdictional statute to resolve a limited set of international torts committed by individuals on U.S. soil, in line with this Court's precedents in *Sosa*, *Kiobel*, and *Jesner*.

Although this Court closed the door to extraterritorial ATS claims in *Kiobel*, some courts have adopted conflicting and dangerously amorphous formulations of *Kiobel*'s "touch and concern" test that have allowed ATS claims to regain a foothold in U.S. courts. In *Kiobel*, the Court held that the presumption against extraterritoriality bars an ATS claim where "all the relevant conduct took place outside the United States," applying the "focus" test of *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-271 (2010). *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). Although the Court left open the possibility that a claim may "touch and concern" U.S. territory with sufficient force to displace the presumption, the

Court emphasized that "mere corporate presence" is not enough. *Id.* at 124-125.

Notwithstanding this Court's clear instruction in *Kiobel* to exercise caution before extending U.S. jurisdiction over foreign controversies, lower courts in more than a dozen cases have misapprehended or misapplied *Kiobel* to permit ATS cases where the alleged tort occurred entirely abroad. Some—including the Ninth Circuit—have seized on the absence of bright-line rules to adopt excessively expansive views of *Kiobel*'s touch-and-concern test. Other courts have ruled that even "admittedly extraterritorial ATS claims" satisfy *Kiobel*, or that generic U.S. corporate supervision, briefings, and coordination suffice to make an ATS case "touch and concern" this country. The decision below, for example, allowed plaintiffs to plead around the touch-and-concern test through the simple expedient of claiming that defendants' U.S. conduct "aided and abetted" a tort that occurred wholly abroad. The result has been years of additional litigation over cases that should have been dismissed at the threshold.

Experience has shown that only bright-line rules can ensure the "vigilant doorkeeping" this Court mandated in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004). As the Court recognized in *Jesner*, the need for judicial restraint is paramount in cases that raise separation-of-powers and foreign policy concerns, which are "inherent in" ATS litigation. 138 S. Ct. at 1403.

The Court need not break new ground to establish bright-line rules that provide lower courts appropriate guidance. The applicable parameters—particularly those addressing the presumption against extraterritoriality and the limited role of the judiciary in suits that raise foreign relations and separation-of-powers concerns—can already be found in *Kiobel*, *Jesner*, and *Sosa*. Considering these authorities together, the proper understanding of

the touch-and-concern test is that an ATS claim "touch[es] and concern[s]" the United States only where the wrongful conduct that occurred in the United States is itself a "tort * * * committed in violation of the law of nations." 28 U.S.C. §1350; see *Kiobel*, 569 U.S. at 126 (Alito, J., concurring). This standard best aligns with the Court's precedents and is far more administrable than the multi-factor variations on the touch-and-concern test that currently prevail in some courts.

In addition, under the reasoning of *Jesner*, domestic corporations are not proper ATS defendants. Because *Jesner* involved a foreign corporate defendant, this Court did not have occasion to consider the status of domestic corporations. But *Jesner*'s reasoning—that judges should not extend liability to a new category of defendants under the ATS when Congress has not seen fit to do so—forecloses ATS suits against all corporations, regardless of where they are headquartered. 138 S. Ct. at 1402-1403. This conclusion flows not from policy considerations, which have dominated the lower courts' analysis, but rather from the statute's text, this Court's precedents, and respect for the separation of powers.

If this Court affirms the Ninth Circuit's expansive view of ATS liability, it will lead to disruptive "practical consequences," *Sosa*, 542 U.S. at 732-733, including the continued imposition of heavy legal and reputational burdens on companies that are sued on the basis that they conducted business with foreign actors accused of committing torts abroad (as happened to petitioners here). Bright-line limiting rules are needed to ensure the prompt dismissal of meritless ATS suits and to deter the filing of new ones under ever-more-creative theories.

ARGUMENT

This case provides an opportunity for the Court to reaffirm the limits imposed by *Kiobel* and to apply the logic and reasoning of *Jesner* to domestic corporations. Doing so would provide bright-line rules for lower courts that have failed to properly cabin ATS cases in recent years.

I. Many Lower Courts Have Misapprehended And Misapplied *Kiobel*'s Touch-And-Concern Test

Perhaps no aspect of ATS jurisprudence has generated more conflict among the lower courts than *Kiobel*'s touch-and-concern test. In *Kiobel*, this Court held that plaintiffs may not bring claims under the ATS when "all the relevant conduct took place outside the United States." 569 U.S. at 124. 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.* at 124-125. The Court explained that "mere corporate presence" is not enough, *id.* at 125, but it otherwise left it to the lower courts to determine when foreign conduct sufficiently "touch[es] and concern[s]" the United States.

Because in *Kiobel* "all the relevant conduct took place outside the United States," *id.* at 124, the Court had no occasion to define the precise contours of the touch-and-concern test. Since then, however, lower courts have fractured over the proper application of the test. Most concerning are those courts that have developed ambiguous, multi-factor, I-know-it-when-I-see-it standards that provide no clarity to potential ATS litigants. Bright-line guidance is needed to ensure that lower courts apply the presumption against extraterritoriality to the ATS in a principled and consistent way.

A. Courts Have Adopted Conflicting And Amorphous Standards For The Touch-And-Concern Test

In the absence of controlling precedent on the meaning of "touch and concern," the circuits have been unable to agree on even the most basic features of the test. Some, like the Second and Fifth Circuits, have hewed closely to this Court's precedents and fashioned rules based exclusively on the ATS's "focus" on acts constituting an actionable tort in violation of international law. See *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir. 2017); *Balintulo* v. *Daimler AG*, 727 F.3d 174, 189-192 (2d Cir. 2013). Other circuits have improvised expansive, multi-factor standards satisfied by remote or tangential connections between the United States and (among other things) the parties, the alleged conduct, the alleged injuries, and even the national interests and policies implicated by the case.

Exemplifying the latter approach, the Fourth Circuit refuses to "mechanically apply[] the presumption" against extraterritoriality; instead, it undertakes a "fact-based analysis" that includes a review of the citizenship of the defendant, the citizenship of the defendant's employees, congressional intent as divulged in other statutes, and the case's foreign policy consequences. *Al Shimari* v. *CACI Premier Tech., Inc.*, 758 F.3d 516, 528-531 (4th Cir. 2014). The Eleventh Circuit has adopted a similarly multi-faceted approach. Besides the location of the alleged conduct and injury, it also examines "the citizenship or corporate status of the defendants," along with any "U.S. interests implicated" by the allegations, *Doe* v. *Drummond*, 782 F.3d 576, 595-597 (11th Cir. 2015), as well as any other "policy concerns" the court might consider relevant, *Jara* v. *Núñez*, 878 F.3d 1268, 1273 (11th Cir. 2018); see *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) (suggesting "a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can

establish a sufficient connection between an ATS claim and [U.S.] territory").

District courts have taken similarly expansive approaches to the touch-and-concern test. See, *e.g.*, *Ateş* v. *Gülen*, No. 3:15-CV-2354, 2016 WL 3568190, at *15 (M.D. Pa. June 29, 2016) ("[C]ourts should also consider the case's impact on foreign matters" as part of touch-and-concern test.); *Doe* v. *Exxon Mobil Corp.*, No. 01-CV-1357, 2015 WL 5042118, at *8 (D.D.C. July 6, 2015) ("[T]he presumption may be displaced where the claims sufficiently touch and concern the United States by virtue of some combination of (1) substantial and specific domestic conduct relevant to the ATS claims, (2) United States citizenship or corporate status of the defendant, and (3) the presence of important national interests.").

B. Courts Regularly Hold That Cases Alleging Minimal Or No Domestic Activity Nonetheless "Touch And Concern" The United States

Given the proliferation of indeterminate standards, it is no surprise that courts across the country have held that torts that occurred far afield nevertheless "touch and concern" the United States—and that plaintiffs continue to file such suits.

You v. *Japan*, No. 15-CV-3257, 2015 WL 6689398 (N.D. Cal. Nov. 3, 2015), illustrates the problem. Two Korean women filed a class-action lawsuit under the ATS against Mitsui & Co. (U.S.A.), a U.S. corporation, on behalf of women forced to serve as sex slaves for the Japanese military in Japan during World War II. See *id.* at *1. The district court held that their claims touched and concerned the United States because the atrocities alleged "were part and parcel of the Japanese war effort," which had included attacks on "the territories of the United States at Pearl Harbor, Guam, Wake Island, and [the] Philippines." *Id.* The daisy-chain nature of that "nexus"

thus permitted an ATS suit to overcome the presumption against extraterritoriality on the basis that the alleged tortfeasor—*not* the defendant—engaged in wrongdoing at some point against the United States. The court openly acknowledged that *all* of the alleged abuse had occurred outside the United States yet nevertheless concluded that the "nexus between plaintiffs' claims and the territory of the United States is sufficient to satisfy the requirements of *Kiobel*." *Id.* (recognizing that "[e]ach allegation that gives rise to plaintiffs' claims against Mitsui & Co. (U.S.A.) occurred overseas" while dismissing plaintiffs' claims on non-ATS grounds).

Other examples abound. One district court held that victims of suicide bombings in Sri Lanka surmounted the ATS's presumption against extraterritoriality because they alleged that defendants had financially supported organizations inside the U.S. that had then funneled money to a Sri Lankan terrorist group. See *Krishanti* v. *Rajaratnam*, No. 09-CV-5395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014). Another court refused to dismiss an ATS suit brought by Kenyan victims of al-Qaeda's bombing of the U.S. Embassy in Nairobi. *Mwani* v. *Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013). The court held that the case "[s]urely" touched and concerned the United States because the attack targeted a U.S. embassy and because it post-dated attempted attacks inside the United States as part of an ongoing conspiracy. *Id.*; see also *Al Shimari*, 758 F.3d at 530-531 (holding touch-and-concern test satisfied for allegations of detainee abuse that occurred exclusively in Iraq based on, among other things, citizenship of the corporate defendant's employees and the court's interpretation of the congressional intent underlying a different statute).

Courts have held that claims satisfied the touch-and-concern test even in cases with "admittedly extraterritorial ATS claims." *Jane W.* v. *Thomas*, 354 F. Supp. 3d 630,

638 (E.D. Pa. 2018). Confronted with allegations that a Liberian defendant had killed Liberians in Liberia, one court held that it nonetheless had jurisdiction because (1) the Liberian defendant now resided in the United States; (2) he sought to remain here under an immigration policy intended to assist victims of the conflict; and (3) he allegedly had been involved in a later, unrelated raid on a USAID facility in Liberia. *Id.* at 639. The court never explained how those factors related to plaintiffs' claims. Another court held the touch-and-concern test satisfied merely because a foreign defendant had later taken up residence in the United States. *Ahmed* v. *Magan*, No. 10-CV-342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013), report and recommendation adopted, 2013 WL 5493032 (S.D. Ohio Oct. 2, 2013).

With courts adopting such pliable tests, it is no surprise that plaintiffs have become adept at "pleading around" *Kiobel*'s jurisdictional bar. One strategy is to bring aiding-and-abetting claims, arguing that the location of the alleged aiding and abetting—not the location of the underlying tort—is what matters for purposes of the touch-and-concern test. That maneuver contravenes the basic rule that "aiding and abetting is a theory for holding the person who aids and abets liable *for the tort itself*." *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 280 (2d Cir. 2007) (Katzmann, J., concurring) (emphasis added) (citation omitted). It also renders *Kiobel* toothless. Rather than explaining how a tort that occurred abroad "touch[es] and concern[s]" the United States, plaintiffs can simply recharacterize whatever marginal conduct occurred domestically as "aiding and abetting" the foreign tort.

This case exemplifies the problem, and it is not alone. Consider *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016). Foreign victims of Hezbollah rocket attacks in Israel filed an ATS suit against

the Lebanese Canadian Bank, based in Lebanon without any U.S. branches, offices, or employees. *Id.* at 205-206. Plaintiffs claimed that the Bank had used a New York correspondent account to facilitate wire transfers between Hezbollah's bank accounts. See *id.* at 206-208, 217. On that basis, the Second Circuit concluded that plaintiffs' claims "touched and concerned the United States * * * with sufficient force to displace the presumption against extraterritoriality," and thus made a Lebanese bank answer in U.S. courts for Hezbollah attacks against Israelis and Canadians in Israel. *Id.* at 219.

Licci is only one example of courts using aiding-and-abetting claims to expand the touch-and-concern test and thereby make defendants potentially liable for torts committed entirely abroad, usually by foreign actors against foreign victims. See, *e.g.*, *Adhikari* v. *KBR Inc.*, No. 16-CV-2478, 2017 WL 4237923, at *5-6 (S.D. Tex. Sept. 25, 2017) (holding touch-and-concern test satisfied where five Nepali men claimed a transnational human-trafficking scheme in the Middle East); *Doe* v. *Exxon Mobil Corp.*, No. 01-CV-1357, 2015 WL 5042118, at *13 (D.D.C. July 6, 2015) (holding test satisfied where Indonesian nationals claimed human rights abuses by Indonesian soldiers guarding facility in Indonesia); *Sexual Minorities Uganda* v. *Lively*, 960 F. Supp. 2d 304, 321-322 (D. Mass. 2013) (holding test satisfied at motion-to-dismiss stage where Ugandan nationals claimed Ugandan government persecuted them in Uganda); see also, *e.g.*, *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 169-170 (2d Cir. 2015) (holding that IBM's domestic development of products used in "the system of racial separation in South Africa" "appear[ed] to 'touch and concern' the United States with sufficient force to displace the presumption against extraterritoriality" although plaintiffs had failed to plausibly allege necessary *mens rea*); *Mastafa* v. *Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) (similar outcome in case involving

Saddam Hussein regime's abuses of Iraqis in Iraq); cf. *Du Daobin* v. *Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 728 (D. Md. 2014) (suggesting without deciding that Chinese plaintiffs' claims of Chinese government's human rights abuses in China "may well be distinguishable from *Kiobel*").

Without clear direction from this Court, plaintiffs can be expected to continue pleading around the territorial limits of the ATS by alleging tangential U.S.-based conduct or even a parent company's authorization of or failure to supervise the actions of a foreign subsidiary. Only last week, a Chinese plaintiff filed an ATS suit in the Ninth Circuit against the successors-in-interest to Yahoo!, claiming that the company aided and abetted torture from its headquarters in California because it provided information on internet users to the Chinese government in China. See Complaint, *Ning* v. *Oath Holdings, Inc.*, No. 20-CV-6185 (N.D. Cal. Sept. 2, 2020).

The Court in *Sosa* rejected a similar attempt to "repackage[]" foreign conduct as U.S.-based in a claim under the Federal Tort Claims Act. 542 U.S. at 702. This Court should hold that the same rule applies to the ATS. As the Court explained in *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010), "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."

II. This Court's Precedents Provide Appropriate Bright-Line Rules For Both The Touch-And-Concern Test And Domestic Corporate Liability

In cases like this one, where plaintiffs allege generalized corporate oversight by a U.S. defendant as the basis for jurisdiction over alleged torts that indisputably occurred abroad, clear guidance is required to ensure courts exercise the caution this Court has mandated. The Court did not have occasion to provide such particularized

guidance in *Kiobel*, which involved wholly foreign conduct, or *Jesner*, which involved a foreign corporate defendant. This case presents an opportunity to provide additional direction on how to apply the tests underlying both questions presented.

Experience has shown that bright-line rules help ensure the necessary judicial restraint, especially in cases that can have significant effects on political matters, like those filed under the ATS. "[I]t is vital in such circumstances that [courts] act only in accord with especially clear standards." *Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2498 (2019). Otherwise, operating under "uncertain limits, intervening courts—even when proceeding with best intentions— * * * risk assuming political, not legal, responsibility." *Vieth* v. *Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment).

Bright-line rules also have the virtue of administrability, which is particularly important for a jurisdictional statute like the ATS. This Court has underscored that "[i]t is of first importance to have a [rule] * * * [that] will not invite extensive threshold litigation over jurisdiction." *Navarro Sav. Ass'n* v. *Lee*, 464 U.S. 458, 465 n.13 (1980) (citation omitted). Bright-line rules achieve that purpose; complex standards do not. "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate"; they also "produce appeals and reversals, encourage gamesmanship, and * * * diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Simple rules, by contrast, "promote greater predictability," which this Court has recognized is especially "valuable to corporations making business and investment decisions." *Id.*

Experience with ATS suits demonstrates why only bright-line rules can ensure the necessary judicial

restraint. In particular, courts are in need of (1) an administrable standard for the touch-and-concern test that can be readily applied to assess the sufficiency of pleadings and (2) a definitive statement that ATS liability does not extend to domestic corporations, consistent with the logic of this Court's decision in *Jesner*.

A. Bright-Line Rules Will Effectuate The Judicial Restraint Warranted In ATS Cases

The Court has vigorously reaffirmed the importance of judicial caution and restraint in all of its ATS cases. Most recently, in *Jesner*, 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 "foreign-policy and separation-of-powers concerns," which are "inherent in" ATS litigation. *Id.* at 1403. The Court explained that both the presumption against extraterritoriality and the general principle of judicial caution recognized in *Sosa* effectuate the ATS's purpose of "promot[ing] harmony in international relations." *Id.* at 1406. 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).

Two related aspects of ATS litigation create risks of international friction. Both inform the appropriate standards for extraterritoriality and domestic corporate liability.

First, the extraterritorial application of the ATS disrupts the ability and responsibility of other sovereigns to redress wrongful acts committed in 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 Brief of the Netherlands and the United Kingdom at 6, *Kiobel*, 569 U.S. 108 (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 occurring in its territory. Indeed, Côte d'Ivoire is already exercising that mandate. News reports confirm that in 2019, the government launched an effort 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), https://tinyurl.com/yxc4scfe.

Second, ATS suits frequently impugn foreign sovereigns by accusing private actors—often U.S. companies or, before *Jesner*, global corporations doing business in developing countries—of aiding and abetting the wrongful acts of a foreign government. Following *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 Affs., 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." Brief for the United States as Amicus Curiae in Support of Petitioners at 5, *Am. 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.[2]

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[2] See, *e.g.*, *Doe* v. *Exxon Mobil Corp.*, 391 F. Supp. 3d 76, 77-78 (D.D.C. 2019) (alleging torture, sexual assault, killing, and other abuse by members of the Indonesian military who worked as security personnel for Exxon); *Doe* v. *Cisco Sys., 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*

Decisions like the one below authorize 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. This Court has repeatedly cautioned against the judiciary's participation in such ATS suits, but the lower courts' continued approval—and plaintiffs' continued filing—of these claims suggests that bright-line limiting rules are needed.

B. The Presumption Against Extraterritoriality Bars ATS Claims Unless The Conduct That Occurred In The United States Is Itself A "Tort * * * Committed In Violation Of The Law Of Nations"

Members of this Court have already articulated an administrable, bright-line rule on extraterritoriality that will enable lower courts to reliably effectuate the ATS's goals of promoting international harmony and minimizing intrusion on the political branches. We urge the Court to

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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. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 542, 548 (S.D.N.Y. 2004) (seeking to hold "a slew of multinational corporations that did 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 U.S. corporation Unocal, among others, for alleged human rights abuses committed "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).

adopt the elaboration of the touch-and-concern test articulated by Justices Alito and Thomas in *Kiobel*: an ATS claim touches and concerns the United States only where the wrongful conduct that occurred in the United States is itself a "tort * * * committed in violation of the law of nations." 28 U.S.C. §1350; see *Kiobel*, 569 U.S. at 126 (Alito, J., concurring). This approach accords with the Court's precedents on the presumption against extraterritoriality and the limited role of the judiciary in ATS suits. And it is far more workable than the sprawling, multi-factor tests that a number of courts currently apply.

First, a "domestic violation" rule is the rule most faithful to the Court's broader extraterritoriality doctrine. The Court held in *Morrison* that "a cause of action falls outside the scope of the presumption [against extraterritoriality]—and thus is not barred by the presumption—only if the event or relationship that was 'the "focus" of congressional concern' under the relevant statute takes place in the United States." *Kiobel*, 569 U.S. at 126 (Alito, J., concurring) (quoting *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010)). Under *Sosa*, the "focus" of the ATS is the tort committed in violation of the law of nations. *Id.* Thus, an ATS suit should 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." *Id.* at 127 (Alito, J., concurring).

Post-*Kiobel* developments accord with this conclusion. Although *Morrison* involved securities law, not the ATS, the Court has confirmed that *Kiobel* and *Morrison* applied the same "two-step framework for analyzing extraterritoriality issues." *RJR Nabisco, Inc.* v. *Eur. Cmty.*, 136 S. Ct. 2090, 2101 (2016). At the first step of the extraterritoriality analysis, the court asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* If not, the court asks at the second

step whether the case involves a permissible "domestic application of the statute," which involves looking to the statute's "focus." *Id.* "[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." *Id.*

Applied to the ATS, that two-step framework leads naturally to a "domestic violation" rule. The Court has already addressed the first step of the extraterritoriality analysis in *Kiobel*, holding that the ATS does not provide "the requisite clear indication of extraterritoriality." 569 U.S. at 119. Proceeding to step two, the Court must identify the "focus" of the ATS. For the reasons explained in Justice Alito's concurrence—principally, the ATS's text—it is clear that the ATS's focus is "tort[s] * * * committed in violation of the law of nations." 28 U.S.C. §1350. The ATS therefore applies only if the conduct that constitutes an actionable tort occurred in U.S. territory. In practice, that will almost always mean that the ATS does not apply unless the alleged injury also occurred in U.S. territory. Cf. Nestlé Brief 15-23.

The application of a "domestic violation" rule would bar the claims here. In the decision below, the Ninth Circuit held that allegations of routine, lawful activity from U.S. corporate headquarters, such as operational and financial decision-making, can support an inference (and thus a claim) for "aiding and abetting" human rights abuses that occurred abroad and were perpetrated by foreign actors. Nestlé Pet. App. 42a-44a.[3] Specifically, the

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[3] The predicate question is whether the ATS provides for aiding-and-abetting liability. In *Sosa*, 542 U.S. at 732 n.20, 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).

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 that, the panel concluded that "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States," and thus were sufficient to satisfy the touch-and-concern test. *Id.* at 44a. But the court identified no act in violation of international law—the "focus" of the ATS when it was enacted—that occurred in the United States.

Second, a "domestic violation" rule is the approach most consistent with this Court's limiting instructions in *Sosa*, *Kiobel*, and *Jesner*.

Each of those cases stressed that courts should approach the scope of the ATS with "great caution," particularly in light of the potential foreign policy consequences. One of the dangers that arises in the creation of a private civil remedy is that it can be used by private actors for their own ends. *Sosa*, for instance, observed that "[t]he creation of a private right of action" entails not just the decision "whether underlying primary conduct should be allowed or not," but also the "decision to permit enforcement without the check imposed by prosecutorial discretion." 542 U.S. at 727. That concern is greatly magnified in the ATS context, where a private cause of action permits plaintiffs to become "diplomatic force[s] in their own right." Slaughter & Bosco, *supra*, at 102, 107. ATS plaintiffs are not accountable to the public, and so far they have shown little regard for the foreign policy costs of their actions. See *Jesner*, 138 S. Ct. at 1406-1407.

A "domestic violation" rule strikes the appropriate balance between advancing the purposes of the ATS and

avoiding its perils. By providing a remedy for international law violations that occur on U.S. soil, this rule allows recovery in the sorts of cases the First Congress had in mind when it passed the ATS. See *Kiobel*, 569 U.S. at 120, 123-124. At the same time, by closing the door to extraterritorial violations of the law of the nations, the rule avoids the foreign-linked cases that are most likely to breed international friction. Of course, if foreign countries wish to open their courts to adjudicate similar cases that arise on their soil, they remain free to do so.

Sosa, *Kiobel*, and *Jesner* also emphasize the related problems that ATS suits raise for the separation of powers. By design, the Constitution entrusts only the executive and legislative branches with the conduct of foreign relations. Since decisions in that field are necessarily "delicate" and "complex," they "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Chi. & S. Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948); see *Jesner*, 138 S. Ct. at 1402-1403. ATS suits stand in tension with that division of responsibilities. Not only does the judiciary's act of creating new causes of action or expanding its own jurisdictional grasp threaten to usurp legislative responsibilities, see, *e.g.*, *id.* at 1402-1403; *Sosa*, 542 U.S. at 727, but those acts can also shape international law and foreign relations, see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 432-433 (1964). Once the cause of action has been recognized, moreover, it is all too easy for private actors to wrench responsibility for the conduct of U.S. foreign policy away from the political branches, where the Constitution placed it.

A "domestic violation" rule respects the separation-of-powers principle that foreign affairs are matters for the political branches alone. It minimizes the risk that private plaintiffs will commandeer U.S. foreign policy for ends that are inconsistent with the purposes of the ATS. And

it further ensures that the ATS cases allowed to proceed—violations of international law that occur on U.S. soil—are those least likely to affect foreign affairs.

Finally, as the case law in Part I reflects, a straightforward application of the "focus" test is far more administrable than a far-ranging, multi-factor standard. Accordingly, this Court should clarify that a "domestic violation" rule is the proper understanding of the touch-and-concern test.

C. Domestic Corporations Are Not Proper ATS Defendants

In *Jesner*, this Court held that ATS liability does not extend to foreign corporations. 138 S. Ct. at 1407. Because the defendant in *Jesner* was a foreign corporation, the Court had no occasion to decide the status of domestic corporate defendants. But the reasoning of *Jesner* forecloses ATS suits against all corporations, wherever headquartered.

First, *Jesner* reaffirmed that courts may not create or extend a private right of action where "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1402 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1858 (2017)). This separation-of-powers principle applies with particular force in the ATS context, given that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403. And the principle "extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." *Id.* at 1402-1403.

Nothing suggests that this separation-of-powers principle should apply any differently to U.S. corporations than to foreign corporations. *Jesner* based its holding on *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001), which

prohibited a certain category of damages against *all* private corporations (domestic and foreign). And, as in *Jesner*, "[n]either the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context." 138 S. Ct. at 1403.

Second, *Jesner* held that in cases that risk "triggering * * * serious foreign policy consequences," judicial caution dictates that the courts defer to the political branches to decide whether a private right of action is appropriate. *Id.* at 1407 (quoting *Kiobel*, 569 U.S. at 124).

Once again, that reasoning supports barring ATS suits against U.S. corporations. ATS suits against U.S. corporations, just like ATS suits against their foreign counterparts, do not promote harmony in international relations. Far from it. Because such suits almost inevitably involve conduct abroad, and because the ATS textually applies only to actions by "alien[s]," foreign sovereigns have complained about ATS suits regardless of the corporate defendant's nationality. See Part II.A, *supra*. Furthermore, if the Court were to distinguish between ATS liability for foreign and domestic corporations, it would allow plaintiffs to skirt *Jesner*'s holding simply by suing the U.S. parent companies, affiliates, or subsidiaries of foreign corporations. Such an outcome would resurrect the foreign policy problems that *Jesner* sought to resolve.

Jesner thus presents a clear roadmap for how the Court should decide this case. *Sosa* held that courts can decline to create a cause of action under the ATS at either of two steps: first, because the contemplated cause of action does not reflect a "specific, universal, and obligatory" norm of international law, or, second, because it would be an inappropriate exercise of judicial discretion to create the cause of action. *Jesner*, 138 S. Ct. at 1399 (plurality op.) (quoting *Sosa*, 542 U.S. at 732). Although the Court could decide the issue of domestic corporate liability at

either "*Sosa* step one" or "*Sosa* step two," *Jesner* demonstrates that "step two" provides the cleaner path. The separation-of-powers and foreign relations concerns that controlled in *Jesner* are equally dispositive here.

III. Clear Limitations On ATS Liability Will Blunt The Sprawling Litigation That Continues To Burden Courts And Litigants

Amici's concerns are not abstract. In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations for business activities in a wide range of industry sectors and 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 22 (U.S. Chamber Inst. 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 decide these cases, and even threshold questions can often take a decade or more to resolve. This case, which has been pending at the pleading stage for 15 years, is typical of practice under the Ninth Circuit's amorphous standard. The *Bauman* case against Daimler was pending for 10 years before this Court finally reversed the Ninth Circuit's expansive jurisdictional holding; Chevron and Rio Tinto each defended themselves in independent ATS cases for 13 years before securing dismissal; and a case against Cisco has been pending for nine years and is now awaiting this Court's disposition here. The Ninth Circuit is not the only court that has adopted an open-ended jurisdictional rule that can take a decade or more to resolve. ATS claims filed against Exxon in the

D.C. District Court in June 2001 were not fully dismissed until June 2019—18 years later.

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). That, in turn, imposes unjustified settlement pressure on companies. Indeed, imposing pressure is often the point. See, *e.g.*, *Peiqing Cong* v. *ConocoPhillips Co.*, 250 F. Supp. 3d 229, 235 (S.D. Tex. 2016) (describing an ATS case based on "factually-devoid pleadings and untenable legal theories," having "nothing to do with the United States," as "a strike suit"); *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"). One court observed critically how "hyperactive lawyers" sometimes search for sympathetic plaintiffs and then, with barely any client involvement, file ATS suits in the hopes of coercing a quick settlement. *Peiqing Cong*, 250 F. Supp. 3d at 231. Such *in terrorem* tactics are easy to employ when courts do not properly apply the touch-and-concern test and allow ATS suits to proceed against U.S. corporations.

If the Court does not articulate clear limits on the touch-and-concern test and bar suits against U.S. corporations, the decision below could affect 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). Here, the panel's holding that routine U.S.-based business decisions clear the touch-and-concern hurdle leaves no room for U.S. defendants to safely invoke the extraterritorial bar. According to the panel below, even allegations of corporate oversight measures such as inspections of overseas operations could

plead sufficient domestic conduct to survive a motion to dismiss. 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 a 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.[4]

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Properly construed, the ATS should promote international harmony by providing a forum for aliens to seek redress for international torts committed by individuals within our borders. Yet today, that well-meaning statute

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[4] 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 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.

foments tension with foreign allies and usurps the role of our political branches by casting U.S. courts as the world's mediators for human rights violations committed abroad. This case presents a timely opportunity to rein in two expansive theories of liability in order to recalibrate the ATS to its original scope and purpose.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted.

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