Nos. 19-416 & 19-453

IN THE

Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioner,
v.

JOHN DOE I, ET AL.,
Respondents.

CARGILL, INC.,
Petitioner,
v.

JOHN DOE I, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

The First Congress intended the Alien Tort Statute (ATS), 28 U.S.C. § 1350, to "ensur[e] foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018). Where a U.S. national commits or abets human rights violations, the United States is obligated to provide a remedy. The questions presented are:

1. Whether a requirement that the tortious conduct or injury occur in the United States would be inconsistent with the Framers' purpose.

2. Whether a finding that U.S. corporations cannot be sued would be inconsistent with the Framers' purpose.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae EarthRights International submits this brief in support of the Respondents.[1] *Amicus* is a human rights organization concerned with the enforcement of international law. International law is primarily enforced through domestic mechanisms and there is a global consensus that corporations are subject to human rights law. Limiting accountability for human rights violations by excluding abuses committed or abetted by corporations would severely undermine global efforts to protect human rights, contrary to the efforts of *amicus*.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Congress passed the Alien Tort Statute (ATS), 28 U.S.C. § 1350, to provide foreign victims of international-law violations a remedy, where the failure to provide one might provoke foreign nations to hold the United States accountable. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018). The paradigmatic case in which other nations might do so is where a U.S. national is liable for the harm.

Petitioners, two U.S. corporations, ask this Court to toss the statute's purpose aside and engraft two new limits onto its text – that the injury must occur in the United States and that U.S. corporations

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties consent to the filing of this brief.

are immune. Both conflict with the statute's rationale.

Where a U.S. national is responsible for violations of universally-recognized human rights, the United States is responsible too. This is so even if the abuse occurred abroad, and even if the U.S. national is a corporation. This is, in part, why the United States previously argued against a complete bar on extraterritorial claims[2] and against corporate immunity.[3] This Court's prior ATS decisions did not address claims against U.S. nationals, and nothing in those decisions conflicts with the statute's purpose. The Court should decline Petitioners' invitation to eviscerate the ATS's function.

II. This Court held in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), that an ATS claim must "touch and concern" the United States. *Id.* at 124-25. Where the defendant is a U.S. national, the claims manifestly do so. Again, that is at least partly why Congress passed the ATS.

Kiobel did not adopt wholesale the extraterritoriality framework in *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 266-68 (2010). It directed courts to evaluate whether ATS claims "touch and concern" U.S. territory with sufficient force to

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[2] Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, at 4-6, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, No. 10-1491 (2011) ("Supp. U.S. *Kiobel* Br.").

[3] Brief for the United States as *Amicus Curiae* Supporting Petitioners at 12, *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2011) (No. 10-1491) ("U.S. *Kiobel* Br."); Brief for the United States as *Amicus Curiae* Supporting Neither Party, at 6, 8, *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386 (2018) (No. 16-499) ("U.S. *Jesner* Br.").

"displace" the presumption against extraterritoriality, rather than look to the statute's "focus." *Kiobel*, 569 U.S. at 124-25. Nothing in *RJR Nabisco, Inc. v. European Cmty*, 136 S. Ct. 2090 (2016), a non-ATS case, purported to change the test in ATS cases. And this Court subsequently confirmed in *Jesner* that the "touch and concern" test governs in ATS cases. 138 S. Ct. at 1406.

Even if *Morrison*'s "focus" test applied, however, claims against U.S. nationals are within the ATS's "focus." The focus of the ATS is ensuring redress for international law violations where the failure to do so could lead other nations to hold the U.S. responsible. The claims here, against U.S. defendants, are precisely the sort where the U.S. would be deemed responsible for failing to provide redress, and thus are at the core of the statute's focus.

III. Petitioners' claim that victims of human rights abuses cannot sue U.S. corporations – no matter how horrific the abuse or extensive the U.S. corporation's participation – should be rejected. This Court has previously found liability against a corporation for a claim arising under international law. *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983).

Corporate personhood is a bedrock tenet of American law. Although corporations are a legal fiction, our law grants them rights, including constitutional rights. *E.g. Citizens United v. Federal Election Com'n,* 558 U.S. 310 (2010). But with legal personhood also comes legal obligations. In particular, corporate liability for torts has been part of our common law tradition since before the Founding, and

would have been familiar to the ATS's drafters. This rule should not be abrogated to afford U.S. corporations special immunity for the worst kinds of torts, violations of universally recognized human rights that render the perpetrator "an enemy of all mankind," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)), like child slavery or genocide, especially since the U.S. remains responsible for these acts of its corporate citizens.

The ATS's text supports corporate liability. It does not limit the class of defendants. 28 U.S.C. § 1350. And by creating a common law "tort" action, the text incorporates ordinary tort principles, like corporate liability.

If the text leaves any doubt, ordinary federal common-law rules, not international law, determine whether corporations can be sued. ATS jurisdiction requires only a "violation" of international law. *Id*. So while the violation must be prohibited by the law of nations, there need not be an international law "cause of action" for that violation; *federal common law* provides the cause of action. *Sosa*, 542 U.S. at 724. Because U.S. corporations are creatures of U.S. law, and international law leaves the question of its enforcement to domestic law, federal common law applies to allow corporate civil liability for torts.

This Court's holding as a prudential matter that *foreign* corporations cannot be sued due to specific foreign policy concerns, *Jesner*, 138 S. Ct. at 1406-07, should not be extended to exclude suits against domestic corporations. "Sometimes, it's in the interest of a corporation's shareholders for

management to violate . . . norms of customary international law." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1018 (7th Cir. 2011). But it is never in the United States' interest for a U.S. corporation to do so, since the United States itself can be held responsible. In short, Petitioners would immunize U.S. corporations in the last situation in which they should be given a free pass.

ARGUMENT

I. Fidelity to the ATS's purpose – ensuring redress for international law violations implicating U.S. responsibility – disposes of both questions presented.

Petitioners' proposals that this Court preclude any ATS claim that does not involve tortious conduct or an injury in the United States and any claim against a U.S. corporation are both at odds with the Framers' purposes.

The ATS's overriding purpose is "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Jesner*, 138 S. Ct. at 1406 (citing U.S. *Jesner* Br. at 7); *accord id.* at 1397; Brief of Respondents at 15, *Nestlé U.S.A., Inc. v. John Doe I*, No. 19-416 ("Resp. *Nestlé* Br."). Before the ATS, "the inability . . . to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems." *Jesner*, 138 S. Ct. at 1396. Concern about "the inadequate vindication of the law of nations" thus led the First Congress to enact the ATS. *Sosa*, 542 U.S. at 717.

Each nation is responsible for its own nationals' acts. Separately, states are also responsible for acts committed on their territory. Respondents' allegations here implicate both of these independent fonts of state responsibility. And neither of the limits Petitioners propose absolve the United States of its responsibility.

The U.S. is responsible for its nationals' acts even where injury occurs outside the United States or the national is a U.S. corporation. Addressing claims against U.S. nationals is "important work" that the ATS was designed to perform. *Jesner*, 138 S. Ct. at 1416 (Gorsuch, J., concurring).

Claims against U.S. nationals thus "touch and concern" the United States because the United States is internationally responsible these torts. As Justice Gorsuch explained in *Jesner*, "[t]he law of nations required countries to ensure foreign citizens could obtain redress for wrongs committed by domestic defendants." *Id.* at 1417 (Gorsuch, J., concurring). A leading treatise of the Founding period stated that nations "'ought not to suffer'" their subjects to harm the subjects of another state. *Id.* at 1416 n.3 (quoting E. de Vattel, 1 The Law of Nations, bk. II, §76, p. 145 (1760). "Instead, the nation 'ought to oblige [its] guilty [subject] to repair the damage'"; a nation that "'refuses to cause a reparation to be made… or to [otherwise] punish the guilty, . . . renders [it]self in some measure an accomplice in the injury, and becomes responsible for it.'" *Id*. (quoting, Vattel, 1 The Law of Nations, bk. II, §77, at 145). Blackstone concurred: a sovereign that failed to provide redress for its citizen's acts would itself be considered an abettor. 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 67-68 (1791).

This was so even where U.S. nationals violated the law of nations abroad. Resp. *Nestlé* Br. at 18-20; "Breach of Neutrality," 1 Op. Atty. Gen. 57, 59 (1795) (concluding that "there can be no doubt" that victims of an attack on a British colony would have an ATS claim against U.S. nationals who participated).

And this rule of responsibility remains in force today, including for human rights violations. Supp. U.S. *Kiobel* Br. at 6-8. "Nations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad." *Kiobel*, 569 U.S. at 136 (Breyer, J., concurring).

U.S. responsibility is implicated under two customary international law principles. First, nations may not "recognize as lawful" a "serious breach" of peremptory norms of international law. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Report of the International Law Commission on the Work of its 53rd Session*, art. 41, UN Doc A/56/10(SUPP) (2001). ("ILC Articles").[4] A peremptory norm is a fundamental principle permitting no derogation, not even by treaty. *See id.* cmt. to art. 40, ¶ 2 at 112. This prohibition bars not only formal recognition, but also acts that *imply* recognition. *Id.* cmt. to art. 41, ¶ 5, at 114.

The prohibition of slavery is unquestionably a peremptory norm, *see, e.g.*, *id.* cmt. to art. 26, ¶ 5, at 85, and an obligation *erga omnes* – a principle of such

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[4] The Draft Articles are commonly recognized as customary international law. *See, e.g.*, Fernando Lusa Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 THE INT'L & COMP. L. Q. 535, 536 (2014).

universal concern to the international community that all states have a legal interest in its enforcement. *Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)*, Judgment, I.C.J. Rep. 1970 (Feb. 5), p. 32 ¶¶ 33-34. *See also* Resp. *Nestlé* Br. at 12-13 & n.6. Allowing corporations to abet child slave labor would breach the United States' obligations under international law.

Second, the United States is obligated to prevent and punish its nationals' acts that cause harm abroad. In the seminal *Trail Smelter* arbitration, the United States sought damages from Canada for harms from smoke from a privately-owned Canadian smelter. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1917 (Trail Smelter Arb. Trib. 1941). The arbitral tribunal held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury" in another. *Id.* at 1965. Thus, a state breaches its obligations when it fails to prevent and punish international law violations by private actors, *see, e.g.*, Timo Koivurova, *Due Diligence*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 2010, ¶ 31; and to provide a remedy. *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 711, Reporters' Note 2 (Am. Law Inst. 1987). *Accord id.* § 601 cmt. a, d (applying "the general principles of international law relating to the responsibility of states for injury" abroad, under which states are responsible for the acts of "individuals or … corporations under its jurisdiction," including for "not preventing or terminating an illegal activity, or for not punishing the person responsible for it").

These obligations apply with particular force here, because the United States has ratified treaties requiring parties to prevent child labor and trafficking. *See, e.g.* Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour arts. 1, 7(1), Jun. 17, 1999, 2133 ILO 161 (requiring "effective measures" to prohibit and eliminate "the worst forms of child labour," and "all necessary measures to ensure the effective implementation and enforcement of the provisions . . . *including the provision and application of penal sanctions, or as appropriate, other sanctions*" (emphasis added)). The United States is liable to any other treaty party. ILC Articles, art. 48(1)(a).

International law does not absolve the U.S. of responsibility simply because the actor is a U.S. corporation. U.S. *Jesner* Br. at 6, 17. As *Trail Smelter* and Restatement § 601 cmt. d show, corporate acts can give rise to state responsibility. Thus, fidelity to Congress' intent compels the conclusion that ATS actions are available against U.S. corporations causing harm abroad.

If the United States fails to provide a remedy for serious human rights violations by a U.S. national, it would be responsible to *all* other nations. Universally recognized human rights norms are *erga omnes* obligations, Restatement § 702 cmt. o; every nation has an interest in every others' respect for fundamental rights. *Jesner*, 138 S.Ct at 1400 (Kennedy, J.). And violators of at least some of these norms, including slavery, have become *hostis*

humanis generis, the enemy of all mankind. *Sosa*, 542 U.S. at 732 (citing *Filártiga*, 630 F.2d at 890); *accord* Restatement § 404 Reporters' Note 1. Accordingly, all states may seek a remedy. Restatement § 702 cmt. o; ILC Articles, art. 48(1)(a). Here, any state could invoke the United States' responsibility for its failure to prevent its corporations from using child slave labor.

While Congress may not have intended to "make the United States a uniquely hospitable forum for the enforcement of international norms," *Kiobel*, 569 U.S. at 123, it clearly did not intend to make the U.S. a uniquely *inhospitable* forum for such claims against U.S. nationals. A U.S. corporation can be sued in its home forum for any other common law tort, regardless of where the injury occurred. The exceptions Petitioners seek to ordinary tort principles conflict with the ATS's text and purpose.

Courts ordinarily have the obligation to hear a properly presented case, even where the controversy may potentially implicate foreign affairs. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp, Int'l*, 493 U.S. 400, 409 (1990). Regardless, while *Kiobel*'s "touch and concern" test and *Jesner*'s bar on claims against foreign corporations were designed to *prevent* international discord, disallowing claims against U.S. corporations that abet abuse abroad would *foster* such discord. International law clearly allows U.S. courts to adjudicate claims against their own nationals. *See e.g.*, Restatement § 402(2). And if the U.S. were to preclude a remedy against U.S. nationals who committed abuse abroad, "this country [might] be perceived as harboring the perpetrator."

Supp. U.S. *Kiobel* Br. at 4.[5]

When U.S. nationals engage in egregious violations of international law, it is their acts, not any litigation concerning those acts, that risks the foreign-relations tensions the First Congress sought to prevent. Allowing claims "where the absence of such a remedy might provoke foreign nations to hold the United States accountable" – as Congress, intended – "promote[s] harmony in international relations." *Jesner*, 138 S. Ct. at 1406.

II. The ATS may apply to injuries abroad.

A. *Kiobel*'s "touch and concern" test governs the extraterritoriality analysis in the unique context of an ATS case, and does not incorporate *Morrison*'s "focus" test.

Petitioners and the United States treat *RJR Nabisco* as establishing that the *Morrison* "focus" test governs the extraterritoriality analysis in ATS cases, but it does not. In *Kiobel*, and then after *RJR Nabisco* in *Jesner*, this Court held that the "touch and concern" test applies in the unique context of the ATS.

Kiobel held that the "principles underlying" the presumption against extraterritoriality apply to the ATS, but acknowledged that it would be unusual to apply the presumption to a jurisdictional statute like

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[5] The United States raised this concern in asking the Court to preserve cases like *Filártiga*, involving claims against U.S. *residents*, *id.*, but this risk is far worse when the defendant is a U.S. national. Since Petitioners *are* U.S. nationals, the Court need not decide whether they *must* be.

the ATS. 569 U.S. at 116-17. This Court "typically appl[ies] the presumption to discern whether an Act of Congress regulating conduct applies abroad," while the ATS is "strictly jurisdictional" and "does not directly regulate conduct or afford relief." *Id.* at 116 (internal quotation marks omitted). But the "*principles* underlying the canon … similarly constrain courts considering causes of action that may be brought under the ATS." *Id.* (emphasis added). Because the ATS does not regulate conduct, however, the extraterritoriality question is different: "the question is not what Congress has done but instead what courts may do." *Id.*

Kiobel is clear that the key extraterritoriality question in the ATS context is whether the "*claims* touch and concern" the United States with "sufficient force to displace the presumption." *Id.* at 124-25 (emphasis added). In creating this standard, the Supreme Court referenced the portion of *Morrison* that discussed the use of a "focus test," after finding a statute has not overcome the presumption, in order to determine whether a particular case constitutes a permissible domestic application of a statute, but the Court notably *did not* adopt that same "focus" test for ATS claims. *See id.* at 125 (citing *Morrison*, 561 U.S. at 247, 266-73). Indeed, although Justice Alito's concurrence argued for the "focus" standard, *id.* at 126-27 (Alito, J., concurring), the majority instead crafted the new "touch and concern" standard, which appears nowhere in *Morrison*. Both the "touch and concern" test and the "focus" test reflect extraterritoriality principles, but the former is

narrowly tailored to the specific circumstances of assessing claims under the non-conduct-regulating ATS.[6]

Accordingly, although the extraterritoriality analyses in *Morrison* and *Kiobel* start with the same question – whether the statute clearly indicates extraterritorial application – if it does not, they differ at the next step. *Morrison*'s second step is "to determine whether the [case] involved a permissible domestic application" of the statute, even if some conduct occurred abroad. *RJR Nabisco*, 136 S. Ct. at 2100 (discussing *Morrison,* 561 U.S. at 266). This requires determining the statute's "focus." *WesternGeco LLC v. ION Geophysical Corp.,* 138 S. Ct. 2129, 2137 (2018) (quoting *RJR Nabisco*, 136 S. Ct. at 2101). *See also infra* Section II.B. By contrast, under *Kiobel,* courts consider whether the presumption is "displace[ed]" by determining whether *the claims* sufficiently "touch and concern" the United States, even where they involve extraterritorial conduct. 569 U.S. at 124-25. *Accord Jesner*, 138 S. Ct. at 1398, 1406. The Court crafted a different standard for the distinct ATS context.

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[6] Declining to import the focus test makes sense given this difference. As the United States acknowledges here, "the fact that the ATS is a jurisdictional statute that neither creates causes of action nor establishes standards of conduct makes it difficult to conduct the focus inquiry contemplated in *WesternGeco* and this courts other extraterritoriality precedents." Brief for the United States as *Amicus Curiae* Supporting Petitioners ("United States Br.") at 26-27 (internal quotations omitted). The *Kiobel* standard is better suited to the ATS context.

Petitioners – and the United States – nonetheless suggest this Court's discussion of the "focus" inquiry in *RJR Nabisco,* a non-ATS case, changed the test in ATS cases. Brief for Petitioner Cargill, Inc. in 19-453, *Cargill, Inc. v. John Doe I* ("Cargill Br.") at 22; Brief of Petitioner Nestlé, Inc. in 19-416, *Nestlé Inc. v. John Doe I* ("Nestlé Br.") at 19-20; United States Br. at 26. But *RJR Nabisco* did no such thing. It did not overrule *Kiobel*'s holding, nor modify its "touch and concern" test. Indeed, the Court had no occasion to do so; *RJR Nabisco* addressed the specific question of whether RICO applies extraterritorially; the Court was not applying the ATS. 136 S. Ct. at 2096.

More importantly, since *RJR Nabisco*, this Court has reaffirmed that the "touch and concern" test governs ATS cases. *Jesner,* 138 S. Ct. at 1398, 1406. *Jesner* – an ATS case, unlike *RJR Nabisco* – reiterated the *Kiobel* "touch and concern" standard and made no mention of the distinct "focus" test.

B. Even if the "focus" inquiry applied, the claims against U.S. nationals are at the heart of the ATS's focus.

Allowing these claims to proceed is also consistent with the "focus" of the ATS – which includes ensuring a federal forum for redress of international law violations, where the failure to do so might implicate U.S. responsibilities under international law – and thus with the *Morrison* framework.

The *Morrison* test inquires as to the "focus of congressional concern." 561 U.S. at 266. "The focus of

a statute is 'the object of its solicitude,' which can include the conduct 'it seeks to regulate,' as well as the parties and interests it 'seeks to protect' or vindicate." *WesternGeco*, 138 S. Ct. at 2137 (quoting *Morrison,* 561 U.S. at 267) (additional quotation marks and alterations omitted). The Court in *WesternGeco* looked to the "overriding purpose of" and the "question posed by" the relevant statute to determine its focus. 138 S. Ct. at 2137 (internal quotation marks omitted).

Determining the "focus" of the ATS thus requires consideration of Congress's objectives in enacting the statute, as well as the parties and interests it sought to protect. The ATS's "principal objective" is to provide a federal forum to non-citizens for law of nations violations, where, in the absence of a remedy, the United States could be deemed responsible and risk international discord. *Jesner,* 138 S. Ct. at 1397. *See also supra* Section I.

The need to provide such a forum is particularly acute where "wrongs [are] committed by domestic defendants," as the failure to provide a remedy would be inconsistent with the United States' duties under international law. *Jesner,* 138 S. Ct. at 1417 (Gorsuch, J., concurring). *See Sosa,* 542 U.S. at 717; *supra* Section I. Petitioners' U.S. nationality alone is therefore sufficient. There is *also* relevant U.S. conduct here. Resp. *Nestlé* Br. at 6-8; Brief of Respondent in 19-453, *Cargill, Inc. v. John Doe I* at 4-6. But since neither domestic conduct nor a domestic injury is required for the United States to be held responsible for a U.S. national's acts, the statute's

focus requires neither when the claim involves a U.S. defendant. *Contra* Cargill Br. at 18; Nestlé Br. at 21; United States Br. at 27.[7] Petitioners' formulations of the "focus" of the ATS ignore Petitioners' U.S. nationality and fail to reflect Congress' fundamental purpose.

Thus, given the ATS's purpose and *Kiobel*'s "touch and concern" language, it is evident that while domestic conduct constituting an international law violation or domestic injury would be *sufficient*, it is not *necessary*. In *Kiobel*, only two Justices would have required "domestic conduct . . . sufficient to violate an international norm," 569 U.S. at 127 (Alito, J. concurring); no Justice endorsed a domestic injury requirement.

As the United States explained in *Jesner*, the "claim-specific ['touch and concern'] inquiry necessarily takes place against the backdrop of the ATS's function of providing redress in situations where the international community might consider the United States accountable." U.S. *Jesner* Br. at 26.[8]

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[7] Indeed, *Sosa* noted that this Court would "consider" a requirement that the claimant have exhausted foreign remedies, 542 U.S. at 733 n.21, which only makes sense if a claim could be premised on foreign conduct.

[8] In *Kiobel*, the Government argued that no "categorical rule" should "foreclose[]" ATS claims involving "conduct occurring in a foreign country," that allowing suits "in the circumstances presented in *Filartiga* [where the defendant is a U.S. resident] is consistent with [U.S.] foreign relations interests … including the promotion of respect for human rights," and that "there is no reason …to question" *Filartiga*. U.S. Supp. *Kiobel* Br. at 4-5. *See also id.* at 13. Inexplicably, the U.S. now advances a domestic conduct requirement that would foreclose such cases. United

This case, involving not only U.S. nationals, but also U.S. conduct, is a paradigmatic example of the type of scenario the First Congress had in mind when it enacted the ATS. Allowing these claims to proceed is accordingly consistent with the "focus" of the ATS.

III. U.S. corporations are not immune from suit.

The ATS's text indicates that corporate defendants can be sued. It limits the class of *plaintiffs*, (aliens only), but not defendants, and it recognizes tort actions, which have always included claims against corporations. Resp. *Nestlé* Br. at 37-40; U.S. *Jesner* Br. at 12-15.[9]

This Court's prior opinions in *Sosa* and *Kiobel* indicate that the ATS allows corporations to be sued. As Respondents note, *Sosa*'s footnote 20 distinguished between state actors and private actors, but equated corporations and natural persons. 542 U.S. at 732, n.20. *See* Resp. *Nestlé* Br. at 44; *see also Doe v. Exxon Mobil Corp.,* 654 F.3d 11, 50-51 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); U.S. *Kiobel* Br. at 18 (noting the "distinction between state actors and non-state actors" is "well recognized in international law," while "a distinction between natural and juridical persons… finds no basis

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States Br. at 8-9, 31. This is contrary to the United States' previously stated foreign policy interests and the First Congress's objectives.

[9] Although the Government argued in *Kiobel* and *Jesner* that the ATS encompasses claims against corporations, it now argues it should not. *Compare* U.S. *Kiobel* Br. at 12-31 *and* U.S. *Jesner* Br. at 8-17 *with* United States Br. at 10-21. Its prior position is more persuasive.

in … international law").

Kiobel's holding that "mere corporate presence" was insufficient to displace the presumption against extraterritoriality also presumes that, under other circumstances, corporations are amenable to suit. *See* 569 U.S. at 125. Noting this, the Second Circuit cast doubt on its prior decision in *Kiobel*, the only Circuit decision holding corporations are immune. *See In re Arab Bank, PLC Alien Tort Statute Litig.,* 808 F.3d 144, 155 (2d Cir. 2015) (citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010)).

Regardless, corporate liability is a necessary corollary of the fact that ATS causes of action are provided by federal common law.

A. Federal common law governs the issue of whether corporations can be sued under the ATS.

If there is any question as to whether corporations can be sued, the Court must look to federal common law. This conclusion is compelled by the statute's text, *Sosa*'s holding that an ATS claim is a common law cause of action, the historic practice of federal courts applying federal common law to effectuate federal claims, the ATS's original purpose of ensuring that these claims be heard in federal court, and the structure of international law, which leaves the means of enforcement to domestic law.

All of this points to a single conclusion: while customary international law defines the content of the right whose violation gives rise to ATS jurisdiction, federal common law determines whether corporations may be held liable.

1. The text of the ATS requires that federal common law governs corporate liability.

The statute's plain language refutes the contention that international law governs. The text does not require that the cause of action "arise under" the law of nations; "its express terms," require "nothing more than a *violation* of the law of nations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring); *accord In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). The text does not require that international law define who can be a proper defendant, only that the infringed-upon *right* be recognized under international law.

The statute's use of the word "tort," a domestic law concept, also requires that domestic tort principles control. Resp. *Nestlé* Br. at 43-44.

Once there is jurisdiction over a tort suit for the violation of a particular international norm, domestic tort law, including corporate liability, applies.

2. *Sosa* and international law direct courts to apply federal common law.

While the jurisdictional question – whether the plaintiff has suffered a "violation[] of [an] international law norm" – is a question of international law, the scope of liability is a question of federal common law. *Sosa*, 542 U.S. at 724, 732. Federal common law "provide[s] [the] cause of action." *Id.* at 724. This conclusion flows from the eighteenth-

century understanding of international law that violations by private parties were "admitting of a judicial remedy" – *i.e.*, subject to domestic enforcement. *See id.* at 714-24; *accord id.* at 729 (noting that under ATS, "federal courts may derive some *substantive* law in a *common law way*" (emphasis added)).

Thus, *Sosa* rejected the view that international law itself must provide a private cause of action, which would have nullified the ATS. *Id.* at 714, 724, 729-32. *Kiobel* reaffirmed that an ATS cause of action is not "provided by" international law; it is "a cause of action *under U.S. law* to *enforce* a norm of international law." 569 U.S. at 119 (emphasis added). For this reason, a Second Circuit panel noted that *Kiobel* suggests that, in requiring an international norm of corporate liability, the Second Circuit in *Kiobel* "relie[d] in part on a misreading of *Sosa*" and that international law governs "only the conduct proscribed, leaving domestic law to govern" whether corporations can be sued. *In re Arab Bank*, 808 F.3d at 155.

Sosa referred to "the creation of a federal remedy." 542 U.S. at 738. Thus, it properly distinguished the question of whether a person has suffered a violation of an international right from the means to enforce a right: the remedial cause of action a state chooses to provide. That is, *Sosa* requires a claim "to be based on a well-established international-law standard of conduct, not a well-established international-law standard of liability." U.S. *Jesner*

Br. at 6.[10] International law provides the right and domestic law provides the cause of action – the remedy to enforce that right.

"[D]efining a cause of action" includes "specifying who may be liable." *Kiobel*, 569 U.S. at 117. Whether a corporation can be held liable is not an element of the international right whose violation triggers jurisdiction. The question arises only after the plaintiff establishes jurisdiction. *See e.g.* U.S. *Kiobel* Br. at 19. And since under *Sosa*, the cause of action is found in federal common law, *Sosa* contemplated an ordinary common law tort claim to remedy violations of universally recognized human rights norms. Accordingly, corporate liability is defined by the federal common law as part of the cause of action. *Exxon Mobil*, 654 F.3d at 50-51.

Even if courts must *first* look to international law, the applicable rule would still come from federal common law, because international law directs courts to domestic law. Corporations are creatures of domestic law, not international law. And international law generally does not address the scope of *civil* liability for violations, but instead leaves such matters to domestic law. This was true at the Founding. Blackstone noted that when violations of international law are "committed by private subjects," they "are then the objects of the municipal law."

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[10] *See Flomo*, 643 F.3d at 1019 (distinguishing a customary international law principle from "the means of enforcing it, which is a matter of procedure or remedy"); *Exxon Mobil*, 654 F.3d at 41-42 (holding that because international law "creates no civil remedies and no private right of action [] federal courts must determine the nature of any [ATS] remedy … by reference to federal common law").

William Blackstone, *An Analysis of the Laws of England* 125 (6th ed. 1771); *accord* 1 James Kent, *Commentaries on American Law* *181-82 (1826) ("The law of nations is likewise enforced by the sanctions of municipal law . . . .").

That international law provides norms of conduct defining the right rather than providing the claim remains true today. U.S. *Jesner* Br. at 17-18 ("[I]nternational law . . . establishes substantive standards of conduct but generally leaves [to] each nation … the means of enforcement.") Indeed, ATS cases have long recognized that international human rights law leaves the manner of enforcement, including the remedies available, to states' discretion.[11] Because the question of whether a corporation may be held liable in tort for international law violations is left to states, federal common law applies to this issue, and the ATS recognizes corporate liability. *E.g. Flomo*, 643 F.3d at 1019–20; *Exxon Mobil*, 654 F.3d at 41–43, 50; *Kiobel*, 621 F.3d at 174–76 (Leval, J., concurring). Applying domestic law to this issue therefore, is exactly what international law expects; Petitioners' contrary view cannot be reconciled with the manner in which international law contemplates its own enforcement.

Sosa's footnote 20 *supports* corporate liability because it drew no distinction between liability for natural persons and corporations. *Supra* § III. That footnote did not address liability and does not suggest

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[11] *E.g., Kadić v. Karadžić,* 70 F.3d 232, 246 (2d Cir. 1995); *Exxon Mobil*, 654 F.3d at 51; *Flomo*, 643 F.3d at 1020; *Marcos*, 25 F.3d at 1475; *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring); Resp. Nestlé Br. at 42-43.

that customary international law governs whether a corporation can be held liable. It recognized that whether a given international norm of *conduct*, like that barring torture, requires state action is a question of international law. 542 U.S. at 732, n.20; Resp. *Nestlé* Br. at 44. Where international law requires state action, it is an element of the substantive offense. Thus, looking to international law to determine whether the jurisdiction-triggering norm requires state action accords with the distinction between the *right* violated (defined by international law) and the scope of the remedial *cause of action* (provided by domestic law). By contrast, requiring international law to provide for corporate liability would conflict with that distinction.

Accordingly, once the jurisdictional threshold has been met – a violation of a *right* protected by the law of nations – there is a federal common law cause of action and federal common law governs corporate liability.

3. Courts generally look to federal liability rules to effectuate federal causes of action.

Federal courts regularly apply general liability rules to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (fashioning a "uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law").

A statute that "covers a field formerly governed by the common law" must be interpreted "consistently with the common law." *Samantar v. Yousuf*, 560 U.S.

305, 320 (2010). Surely then, a statute like the ATS – which does *not* displace the common law, but instead creates jurisdiction to hear *common law claims* – must be too.

4. Congress' purpose of providing a *federal* forum suggests that who can be sued must be determined by common law rules.

In passing the ATS, Congress sought to provide a federal forum to redress torts that implicate the United States. *Supra* Section I. State courts already had jurisdiction over such suits. *Sosa*, 542 U.S. at 722; *Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring). But Congress feared that state courts might not give aliens a fair hearing and would reach divergent conclusions about the law of nations' content; it therefore provided an alternative, *federal* forum. *Tel-Oren*, 726 F.2d at 783-84, 790-91 (Edwards, J., concurring); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 235-36 (1996). Thus, the First Congress wanted to make federal courts *accessible* to foreigners bringing these sorts of tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 21 (1985).

Given these aims, the First Congress would have expected federal courts to hear claims against corporations, or at least to resolve the question by reference to the common law – just as state courts would. Any other approach could exclude from federal court certain suits involving law of nations violations

even though those same suits would be heard in state court, precisely what the statute meant to avoid. *Tel-Oren*, 726 F.2d at 790-91 (Edwards, J., concurring).

B. Federal common law provides for corporate liability.

Under ordinary common law principles, and under international law, corporations are liable on an equal footing with natural persons. The Court should adopt the usual rule of corporate liability rather than creating a special immunity for U.S. corporations that participate in violations of universally recognized human rights. Indeed, when a norm that meets *Sosa*'s threshold test is violated, liability for domestic corporations rather than corporate immunity better effectuates Congress' aim to discharge U.S. obligations. *Supra* Section I.

The common law subjects corporations to the same civil liability as natural persons; this is inherent in the whole notion of corporate personality. *See generally United States v. Bestfoods*, 524 U.S. 51, 62-65 (1998) (applying ordinary common law principles to CERCLA and finding corporations can be held liable). To abrogate a common law principle, Congress must "speak directly" to the question. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Indeed, "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of" this rule. *Bestfoods*, 524 U.S. at 63.

While it is not necessary to consult international law, it supports corporate liability. *Exxon Mobil*, 654 F.3d at 51-54. The International Court of Justice has recognized corporate personality under international law. In *Barcelona Traction*, the

ICJ noted that international law understood that corporations are institutions "created by States" within their domestic jurisdiction, and that the court therefore needed to look to general principles of law to answer questions about corporate separateness. 1970 I.C.J. at 33-34, 37, 39. *See also Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Preliminary Objection Judgment, 2007 I.C.J. 582, 605 (May 24) (holding corporation has "distinct legal personality" under international law if it has that status under relevant nation's domestic law). Just as international law generally looks to domestic law for its means of local enforcement, international law looks to domestic law for rules of corporate personality.

This Court, citing *Barcelona Traction*, approved liability against a corporation for a claim "aris[ing] under international law." *First Nat'l City Bank*, 462 U.S. at 623. There, the Court upheld a counterclaim against a Cuban government corporation for the illegal expropriation of property, under principles "common to both international law and federal common law." *Id.* The "understanding of corporate personhood [reflected in *FNCB* and *Barcelona Traction*] is directly contrary to the conclusion of the [Second Circuit panel] majority in *Kiobel*." *Exxon Mobil*, 654 F.3d at 54.

Corporate liability under the ATS is consistent with international law. There is no act that would violate international law if committed by an individual, but would not if committed by a corporation. U.S. *Kiobel* Br. at 20-21. An abuse that is of concern to all nations is not any less so because a corporation is responsible. Indeed, given states'

obligation to prevent and punish violations of international law by its nationals, *supra* Section I, international law not would allow a state to create a legal entity under domestic law, endow it with personality and rights, and then exempt it from responsibility.

Since the rule that corporations can be held liable in tort is clear in both domestic and international law, it should be applied under the ATS.

C. The ATS's history and purposes support corporate liability.

"[T]he historical background against which the ATS was enacted," *Kiobel*, 569 U.S. at 119, reinforces the presumption that Congress intended to incorporate the common-law principle of corporate liability for domestic corporations. As detailed above, the ATS was enacted to vindicate the laws of nations where the United States could be considered responsible if it did not provide a remedy. It thus expresses a Congressional policy of using tort law to redress international wrongs. When applied to domestic corporations, the same corporate liability rule that ordinarily applies in tort cases furthers Congress' goals in passing the statute.[12]

First, ATS liability rules must reflect the underlying violations' universal condemnation. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984). A holding that ordinary corporate tort liability does not apply to genocide or child

[12] The federal common law rule must implement the policies underlying the statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (applying *Textile Workers* to the ATS).

slavery would "operate[] in opposition to the objective of international law to protect [fundamental] rights." *Kiobel I*, 621 F.3d at 150 (Leval, J., concurring). "[T]he credibility of our nation's commitment to the protection of human rights," would suffer "serious[] damage,"[13] if, for example, a modern day American Tesch & Stabenow – which supplied poison gas to the death chambers of Auschwitz, *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1–8, 1946) – could participate in and benefit from atrocities and not be held to account by the victims.

Second, to avoid U.S. responsibility, the Framers sought to create a tort remedy that would effectuate tort law's twin aims – compensation and deterrence – but both are undermined by corporate immunity. Resp. *Nestlé* Br. at 40-41. Where a corporation is involved in abuse, the corporation, not its agents, reaps the profits. Thus, there is no reason to believe that the agents have the wherewithal to provide redress. *Flomo*, 643 F.3d at 1018-19. Congress had "[no] good reason" to allow suits "only against a potentially judgment-proof individual actor while barring recovery against the corporation on whose behalf he was acting." U.S. *Jesner* Br. at 17. And since it is sometimes in a corporation's interests to violate international law, *Flomo*, 643 F.3d at 1018, a rule that only a corporation's agents are potentially liable would under-deter abuse.

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[13] Memorandum for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (No. 79-6090) (2d Cir. 1980) at 22-23, *available at*: 1980 WL 340146.

Third, Congress passed the ATS in part because it preferred claims involving international law to be heard in federal rather than state court. *See supra* Section III.A.4. ATS plaintiffs typically have and plead state-based common law tort claims. Precluding corporate liability under the ATS would disadvantage aliens' claims arising under the law of nations *vis-a-vis* their state law claims – thus "treat[ing] torts in violation of the law of nations *less favorably* than other torts," contrary to the Framers' understanding. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 HASTINGS INT'L & COMP. L. REV. 99, 110 (2004) (emphasis in original).[14]

D. This Court should not create a new immunity for corporations.

Precedent, statutory text, the common law nature of an ATS claim and the statute's history and purposes all converge on the straightforward conclusion that domestic corporations can be sued for human rights abuses under the ATS just like for any other tort. Petitioners nonetheless urge this Court to ignore all of this in the name of "caution." Nestlé Br. at 40. But there is nothing "cautious" about creating a new immunity by overriding the familiar guideposts of statutory interpretation and the centuries-old principle of corporate liability. Indeed, to do so would likely violate the United States' international

[14] *Sosa* adopted this brief's argument that ATS claims were part of the common law and required no implementing legislation. 542 U.S. at 714.

obligations – the very obligations the ATS was passed to fulfill.

Refusing to recognize corporate liability would also lead to absurd results. The ability to sue the corporation is inherent in the notion of limited shareholder liability; limited liability ordinarily immunizes the shareholders precisely *because* the corporation may be sued. If corporations were not legal persons that could be sued, they could not be considered legal persons separate from their shareholders. They would simply be an aggregation of agents (the directors, officers and employees) acting on the shareholders' behalf. Thus, if corporations cannot be sued, the *shareholders* would be liable on an agency theory for everything that employees of the company do, without need to pierce any veil.

To find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* – that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, and yet not subject the corporation to liability. Neither federal common law nor international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are two sides of the same coin, and both derive from principles of domestic law common to all legal systems.

Petitioners' proposed immunity "offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate .

. . businesses [would] be free to" participate in all sorts of human rights abuses. *Kiobel I*, 621 F.3d at 150 (Leval, J., concurring). Petitioners want the benefits of corporate personhood, while evading the responsibilities. But they cannot pick and choose only the aspects of corporate personality they like. *See Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) (holding that one who chooses incorporation "does not have the choice of disregarding the corporate entity in order to avoid the obligations which [a] statute lays upon it for the protection of the public"). "The business entity cannot be left free to break the law. . . . [It] may not with impunity obtain the fruits of violations which are committed knowingly by [its] agents." *United States v. A&P Trucking Co.*, 358 U.S. 121, 126 (1958).

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Under the ATS, the violation of a universally recognized right gives rise to a federal common-law tort cause of action. The corporate liability that applies to ordinary torts should not be relaxed for abuses that transgress humanity's most fundamental norms.

CONCLUSION

The ATS's text and purpose show that U.S. nationals may be sued, even where the abuses occur abroad. This includes U.S. corporations; centuries-old common-law principles subject corporations to the same tort liability as natural persons. Nothing in law or logic warrants a special immunity for U.S. corporations involved in the worst kinds of torts. And providing such immunity would implicate United States responsibility under international

law, exactly what Congress sought to avoid.

Respectfully submitted,

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