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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and structure of key federal statutes like the Alien Tort Statute. Accordingly, CAC has a strong interest in ensuring that the Alien Tort Statute is understood, in accordance with its text and Congress's plan in passing it, to allow federal district courts to hear suits against American corporations for violations of international law.

SUMMARY OF ARGUMENT

This case involves two American corporations, Petitioners Nestlé USA, Inc. and Cargill, Inc., that allegedly aided and abetted in the perpetration of child slavery by cocoa farmers in the Ivory Coast in violation of international law. Respondents are former child slaves who were forced to labor on cocoa plantations. They brought suit against the U.S. corporations under the Alien Tort Statute (ATS), which allows federal district courts to hear suits for torts "committed in

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

violation of the law of nations," 28 U.S.C. § 1350. Petitioners argue that the cases against them cannot proceed simply because they are corporations. *See* Nestlé Pet'r Br. 4; Cargill Pet'r Br. 40-41. But this argument cannot be squared with the text of the ATS or with Congress's plan in passing the statute, which was to provide a federal forum to redress violations of international law, ensuring a remedy for the "handful of heinous actions" that violate "international law norms that are 'specific, universal, and obligatory,'" *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)). Petitioners' argument is also contrary to fundamental principles of corporate personhood, which allow corporations to be sued for wrongdoing. Finally, there are specific, universal, and obligatory norms of international law forbidding the enslavement of individuals—particularly children—and there is no corporate exemption from these international norms.

First, the ATS confers on federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Significantly, that language "does not distinguish among classes of defendants," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), and it permits suits against domestic corporations and other artificial entities. To create an exception to the ATS barring all suits against domestic corporations—entities that, like other private actors, are bound by the international norms held by all civilized nations, such as prohibitions against piracy, genocide, and slavery—would require rewriting the ATS.

The ATS was the Framers' considered response to the systematic failure of the dysfunctional Articles of Confederation government to enforce the law of

nations, a failure that, all too often, drew the new nation into international conflicts. The ATS provided a federal remedy, reflecting that "the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80*, at 444 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction," *Sosa*, 542 U.S. at 730, as "the law of nations . . . is a part of the law of the land," *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

Second, permitting those victimized by corporations that violate international law to sue under the ATS is consistent with longstanding principles of corporate personhood, which recognize that "[t]he great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men," *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830). "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties . . . cannot be wielded to deprive others of acknowledged rights." *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 327 (1854).

Since the Founding, it has been well established that corporations can be brought to account for violating the rights of individuals. *See* Kent Greenfield, *In*

Defense of Corporate Persons, 30 Const. Comment. 309, 315 (2015) (observing that an "aspect of corporate personhood is to create a mechanism in law to hold corporations accountable"). Reading domestic corporations out of the class of defendants suable in federal court under the ATS does violence to these foundational principles. Under the rule Petitioners propose, "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149-50 (2d Cir. 2010) (Leval, J., concurring), *aff'd on other grounds*, 569 U.S. 108 (2013).

Finally, there are specific, universal, and obligatory norms of international law forbidding the enslavement of individuals—particularly children. There is no corporate exemption from these international norms, and U.S. corporations that violate these norms must be held accountable in federal court.

To be sure, this Court has set a high bar for suits under the ATS. *See, e.g.*, *Kiobel*, 569 U.S. at 124-25 (requiring that ATS suits "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application"); *Sosa*, 542 U.S. at 732 (holding that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"). And this Court held in *Jesner v. Arab Bank, PLC* that "*foreign* corporations may not be defendants in suits brought under the ATS." 138 S. Ct. 1386, 1407 (2018) (emphasis added). But the Court's reasoning in *Jesner*—that

hauling foreign corporations into U.S. courts would threaten rather than secure peaceful diplomatic relations, *see id.*—is inapposite here. Indeed, holding Americans, including American corporations, accountable for violations of international law directly furthers the ATS's objective: "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen," *id.* at 1397. Thus, a case cannot be dismissed under the ATS solely on the ground that the defendant is a domestic corporation, and the judgments of the court below should be affirmed.

ARGUMENT

I. THE ALIEN TORT STATUTE BROADLY PERMITS SUITS FOR VIOLATIONS OF THE LAW OF NATIONS AND DOES NOT IMMUNIZE DOMESTIC CORPORATE DEFENDANTS.

A. The Text and History of the Alien Tort Statute Demonstrate That Domestic Corporations May Be Sued Under the Statute.

The ATS confers on federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As its text makes clear, and as this Court has recognized, the ATS broadly permits suits for violations of the law of nations and does not immunize domestic corporations from suit. *Argentine Republic*, 488 U.S. at 438 (recognizing that the ATS "does not distinguish among classes of defendants"). Significantly, the statute explicitly identifies the plaintiff who may sue ("an alien") and the cause of action that may be brought ("a tort

only, committed in violation of the law of nations or a treaty of the United States"), but it does not limit the class of defendants suable under the ATS. "That silence as to defendants cannot be presumed to be inadvertent." *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting).

Because nothing in the text of the ATS expressly limits its scope to individuals, artificial entities—including domestic corporations—can be sued for tortious acts that violate "specific, universal, and obligatory" international norms. *See Kiobel*, 569 U.S. at 117 (quoting *Sosa*, 542 U.S. at 732); *cf. Mohamad v. Palestinian Auth.*, 566 U.S. 449, 451-52 (2012) (holding that the Torture Victim Protection Act, which authorizes suit against an "individual," "encompasses only natural persons" and "does not impose liability against organizations"). To exclude domestic corporations from the scope of the ATS would require rewriting its terms.

The ATS's broad text is consistent with Congress's plan in passing the statute. As this Court recognized in *Jesner*, "[t]he principal objective of the [ATS], when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." 138 S. Ct. at 1397. The Constitution's Framers, many of whom served in the First Congress, wrote the ATS because they were gravely "[c]oncern[ed] that state courts might deny justice to aliens, thereby evoking a belligerent response from the alien's country of origin," and they wanted "to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring).

Indeed, under the dysfunctional government of the Articles of Confederation, the law of nations was a dead letter in the United States, potentially imperiling the new nation in conflicts with foreign nations. "The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Sosa*, 542 U.S. at 716 (quoting J. Madison, *Journal of the Constitutional Convention* 60 (E. Scott ed., 1893)). James Madison lamented that the Articles "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist No. 42*, at 233.

In 1781, the Continental Congress "implored the States to vindicate rights under the law of nations." *Sosa*, 542 U.S. at 716. Congress urged state legislatures to "provide expeditious, exemplary and adequate punishment" for (1) "the violation of safe conducts or passports," (2) "the commission of acts of hostility against such as are in amity, league or truce with the United States," (3) "the infractions of the immunities of ambassadors and other public ministers"; and (4) "infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress* 1774-1789, at 1136-37 (Gaillard Hunt ed., 1912). This list was not designed to be comprehensive, but instead to include "only those offences against the law of nations which are most obvious." *Id.* at 1137. The resolution also recommended that states authorize "suits to be instituted for damages by the party injured." *Id.* But the states responded by doing "too little, too late," *Jesner*, 138 S. Ct. at 1417 (Gorsuch, J., concurring in part and concurring in the judgment), and "concern over the inadequate vindication of

the law of nations persisted through the time of the Constitutional Convention," *Sosa*, 542 U.S. at 717.

Throughout this period, the failure to enforce international law led to a number of "notorious episodes involving violations of the law of nations." *Kiobel*, 569 U.S. at 120. Incidents, such as the Marbois affair of 1784, in which a Frenchman in the United States assaulted Francis Barbe Marbois, the Secretary of the French Foreign Legion, leading the French government to demand redress, *see id.*, convinced the Framers that the federal judiciary needed to have the power to enforce federal treaties as well as the law of nations.

During the debates about whether Pennsylvania should ratify the Constitution, James Wilson insisted that we "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 490 (Jonathan Elliot ed., 1836). Likewise, Alexander Hamilton argued that "[a]s the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *The Federalist No. 80*, at 444. "So great a proportion of the cases in which foreigners are parties involve national questions that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Id.* at 445.

In 1789, the First Congress made good on the Framers' promises to ensure proper enforcement of the law of nations in federal court. To redress past abuses

and prevent new violations of the law of nations from arising, the First Congress enacted the ATS, expecting it to "have practical effect the moment it became law." *Sosa*, 542 U.S. at 724. "The First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations," *id.*, including "'three principal offenses against the law of nations' [that] had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Kiobel*, 569 U.S. at 119 (quoting *Sosa*, 542 U.S. at 723); *id.* at 133-34 (Breyer, J., concurring) ("[T]he statute's language, history, and purposes suggest that the statute was to be a weapon in the 'war' against those modern pirates who, by their conduct, have 'declar[ed] war against all mankind.'" (quoting 4 William Blackstone, *Commentaries on the Laws of England* *71)).

Significantly, because "the Union [would] undoubtedly be answerable to foreign powers for the conduct of *its members*," *Federalist No. 80*, at 444 (emphasis added), the First Congress made sure the ATS allowed suits against all Americans, including both natural persons and corporate entities. *See United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826) ("The mischief intended to be reached by the statute is the same, whether it respects *private* or *corporate* persons."). After all, a stringent limitation on this federal remedy—denying suit against domestic corporations and thus allowing them to violate the law of nations with impunity, no matter the particular violation of international law alleged—would, as explained further below, have undercut the ATS's raison d'être and resulted in the very evils the ATS sought to prevent.

Indeed, liability for domestic corporations under the ATS finds strong support in this Court's early case law, which enforced the international prohibition of

piracy—one of the paradigmatic violations that the ATS aimed to redress—against ships in *in rem* admiralty proceedings, condemning ships run by companies that had engaged in piracy. Reasoning that pirates are "common enemies of all mankind," this Court held that a "piratical aggression by an armed vessel sailing . . . may be justly subjected to the penalty of confiscation for such a gross breach of the law of nations." *The Mariana Flora,* 24 U.S. (11 Wheat.) 1, 40-41 (1825). Liability attached to the ship itself, and thus the shipping company that operated it, regardless of the owner's claim of innocence. As Justice Story explained, "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *The Malek Adhel*, 43 U.S. (2 How.) at 233; *see Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships. Of course the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders." (citations omitted)).

B. *Jesner* Does Not Foreclose Domestic Corporate Liability Under the Alien Tort Statute.

To be sure, this Court held in *Jesner v. Arab Bank, PLC* that "*foreign* corporations may not be defendants in suits brought under the ATS," 138 S. Ct. at 1407 (emphasis added), but Petitioners are wrong to suggest that *Jesner* compels a similar conclusion for *domestic* corporations. *See* Nestlé Pet'r Br. 4; Cargill Pet'r Br. 40-41. In fact, in reaching its decision, this

Court emphasized the "unique problems" created by "foreign corporate defendants." *Jesner*, 138 S. Ct. at 1407. First, the Court reasoned that if foreign plaintiffs could haul foreign corporations into U.S. court for violations of international law, that would create "the very foreign-relations tensions the First Congress sought to avoid." *Id.* Indeed, the Court noted in *Jesner* that "[f]or 13 years, this litigation [against Arab Bank] has 'caused significant diplomatic tensions,'" *id.* at 1406 (citation omitted), as "Jordan considers the instant litigation to be a 'grave affront' to its sovereignty," *id.* at 1407 (citation omitted). The Court explained that this sort of confrontation of foreign corporations in U.S. court was "the opposite of what the First Congress had in mind," *id.* at 1411 (Alito, J., concurring in part and concurring in the judgment). *See id.* at 1406 ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy . . . where the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring." (internal citation omitted)).

Second, the Court reasoned that if U.S. courts could hold foreign corporations liable for international law violations, then, "conversely, . . . courts in other countries should be able to hold United States corporations liable." *Id.* at 1407. Accordingly, the Court concluded that "any imposition of corporate liability on *foreign* corporations for violations of international law must be determined in the first instance by the political branches of the Government," *id.* at 1408 (emphasis added), and that the ATS itself did not constitute such a determination. *See id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment)

("[W]e should not meddle in disputes *between foreign citizens* over international norms." (emphasis added)).

The Court's rationale in *Jesner* is inapposite in cases against U.S. corporations. Whereas foreign corporate liability could lead to "diplomatic strife," *id.* at 1408 (Alito, J., concurring in part and concurring in the judgment), because it would involve hauling a foreign corporation into U.S. court, domestic corporate liability serves the very purpose for which the ATS was enacted. As this Court recognized in *Jesner*, "[t]he ATS was intended 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." *Id.* at 1406. Those are the exact circumstances that exist here: foreign plaintiffs are seeking to hold American corporations accountable for their alleged violations of the law of nations. If these corporations cannot be held accountable in U.S. court, there is a real risk that foreign nations or individuals will try to hold the United States accountable instead. *See Federalist No. 80*, at 444 ("[T]he Union will undoubtedly be answerable to foreign powers for the conduct of its members."). In other words, such a decision would disregard the broad text of the ATS, and it would also likely produce "the very foreign-relations tensions the First Congress sought to avoid" in passing the ATS, *Jesner*, 138 S. Ct. at 1407.

As Justice Gorsuch explained in *Jesner*, it would have been "one thing . . . for courts to punish *foreign* parties for conduct that could not be attributed to the United States and thereby *risk* reprisals against this country," *id.* at 1419 (Gorsuch, J., concurring in part and concurring in the judgment). The Court thus concluded that the ATS did not provide for foreign

corporate liability. *Id.* at 1412 (Alito, J., concurring in part and concurring in the judgment) ("Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those 'serious consequences in international affairs' that the ATS was enacted to avoid." (quoting *Sosa*, 542 U.S. at 715)). But "[i]t is altogether another thing" to recognize that the ATS creates a cause of action "to ensure *our* citizens abide by the law of nations and *avoid* reprisals against this country." *Id.* at 1419 (Gorsuch, J., concurring in part and concurring in the judgment). Indeed, the First Congress passed the ATS to ensure, at a minimum, that Americans, including U.S. corporations, may be held accountable for violations of international law. *Id.* at 1406. Petitioners are therefore wrong to suggest that *Jesner*'s reasoning compels the conclusion that domestic corporations are not amenable to ATS suits. *See* Nestlé Pet'r Br. 4; Cargill Pet'r Br. 40-41.

Moreover, the reciprocity concerns that influenced the Court's decision in *Jesner* are not present here. A U.S. corporation need not fear being hauled into court in a foreign country in retaliation for the United States' imposition of domestic corporate liability under the ATS. In fact, far from risking such negative consequences, the likely reciprocal effect of imposing domestic corporate liability under the ATS would be to prompt other countries to hold their own corporations and citizens accountable for violations of international law, a development that would benefit the global community.

Thus, domestic corporate liability under the ATS is consistent with both the text and history of the Act, as well as with this Court's decision in *Jesner*. It is also compelled by longstanding principles of corporate personhood, which permit corporations to be sued for

tortious conduct. The next Section discusses these principles.

II. THE ALIEN TORT STATUTE ALLOWS FOR CORPORATE LIABILITY CONSISTENT WITH LONGSTANDING PRINCIPLES OF CORPORATE PERSONHOOD.

Reading the ATS as written is also consistent with basic principles of corporate personhood that ensure corporate accountability. When Congress enacted the ATS, it was understood that corporations could sue to vindicate their legal rights and that they could be sued and held accountable for violating the rights of others. "[F]rom the earliest times to the present, corporations have been held liable for torts." *Chestnut Hill & Spring House Tpk. Co. v. Rutter,* 4 Serg. & Rawle 6, 17 (Pa. 1818). This was not an American invention, but a reflection of English common law principles that the Founders brought with them to the United States. *See, e.g.*, 1 William Blackstone, *Commentaries on the Laws of England* *463 (1765) (explaining that corporations may "sue or be sued . . . and do all other acts as natural persons may"); *see Phila., Wilimington, & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858) ("At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety."). Relying on these principles, courts refused to permit corporations to "do wrong without being amenable to justice," relying on the corporate form "to hold them responsible." *Chestnut Hill*, 4 Serg. & Rawle at 16. Courts considered it "unjust to society, as well as unreasonable in itself, to suffer [corporations] to escape the consequences of direct injuries inflicted upon citizens by

their agents in the prosecution of their business." *Whiteman v. Wilmington & Susquehanna R.R. Co.,* 2 Del. 514, 521 (1839).

At the Founding, as Chief Justice John Marshall recognized, a corporation was considered "an artificial being, invisible, intangible, and existing only in the contemplation of the law" endowed with "immortality and . . . individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). The capacity to sue and be sued was viewed as a critical part of corporate personhood, as treatise writers and courts recognized. *Id.* at 667 (Story, J.) ("[I]t possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties."); *Riddle v. Proprietors of Merrimack River Locks and Canals*, 7 Mass. 169, 187 (1810) ("It is one of these maxims, that a man specially injured by the breach of duty in another, shall have his remedy by action. . . . [W]hy should a corporation, receiving its corporate powers and obliged by its corporate duties with its own consent, be an exception, when it has, or must be supposed to have, an equivalent for its consent?"); 1 Stewart Kyd, *Treatise on the Law of Corporations* 13 (1793) (discussing capacity of corporations to "su[e] and be[] sued").

As these cases and early treatises reflect, from the Founding on, the "common understanding" was that "corporations were 'persons' in the general enjoyment of the capacity to sue and be sued." *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003). Accordingly, "for acts done by the agents of a corporation, in the course of its business and of their employment,

the corporation is responsible in the same manner and to the same extent as an individual is responsible under similar circumstances." *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 109 (1893). "As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives." *Phila., Wilmington, & Balt. R.R. Co.*, 62 U.S. (21 How.) at 210. Under these principles, "[c]orporations are liable for every wrong they commit." *Nat'l Bank v. Graham*, 100 U.S. 699, 702 (1879).

In a trio of important cases, this Court considered whether corporations were citizens entitled to sue or be sued under the diversity jurisdiction conferred on federal courts by the Judiciary Act of 1789. *See Hertz Corp. v. Friend*, 559 U.S. 77, 84-85 (2010) (surveying the line of cases). The upshot of these cases was that "for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation" and hence could sue or be sued in federal court consistent with basic principles of corporate personhood. *Id.* at 85.

Initially, in *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809), this Court held that a corporation, being an "invisible, intangible, and artificial being," is "certainly not a citizen." *Id.* at 86. But it held that corporations could sue or be sued in diversity cases based on "the character of the individuals who compose the corporation," *id.* at 92, reasoning that "the term citizen ought to be understood . . . to describe the real persons who come into court . . . under the corporate name." *Id.* at 91. *Deveaux*'s rule, which recognized that corporations could sue or be sued in diversity but required courts to engage in time-consuming inquiries into the citizenship of the shareholders of the

corporation, was widely criticized and proved short-lived.

In *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497 (1844), this Court overruled *Deveaux*, holding that "a corporation created by and doing business in a particular state" is "a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." *Id.* at 558. Drawing heavily on *Dartmouth College*'s discussion of corporate personhood, *Letson* made clear that a corporation was a "citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued." *Id.*

In *Marshall v. Baltimore & Ohio Railroad Co.*, this Court reaffirmed *Letson*'s rule that corporations should be treated as citizens of the state of their incorporation, permitting them to sue or be sued in diversity cases consistent with basic principles of corporate personhood. "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name." *Marshall*, 57 (16 How.) at 327. This rule, the Court explained, was necessary to ensure that individuals could go to federal court to hold out-of-state corporations accountable for legal wrongs they commit. "If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable." *Id.* at 328.

In short, it has been the law for centuries that corporations are liable for the torts committed by corporate actors. Under these long-established principles, corporations are liable under the ATS for torts committed in violation of the law of nations to the same extent individuals are. Corporate liability ensures that entities that flout the law can be held to account; as this Court recognized in its piracy cases, such liability is the "only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *The Malek Adhel,* 43 U.S. (2 How.) at 233. It has never been the law that an injured plaintiff may only proceed against an individual corporate actor, as that would be "mischievous in its consequences" for a "company may do great injury," by means of those "who have no property to answer the damages recovered against them." *Chestnut Hill*, 4 Serg. & Rawle at 17. When corporate actors commit "arbitrary exercises of power in the nature of torts, . . . the corporation may be held to a pecuniary responsibility for them to the party injured." *Salt Lake City v. Hollister*, 118 U.S. 256, 261 (1886). Rewriting the ATS to afford domestic corporations an absolute immunity from suit for violating the law of nations—even where, as alleged here, the corporations have flouted long-established, obligatory, and definite international norms held by all civilized nations—would imperil this fundamental principle.

III. THERE IS NO CORPORATE EXCEPTION TO FUNDAMENTAL INTERNATIONAL NORMS.

Rather than follow the text and history of the ATS and fundamental principles of corporate liability, Petitioners seek to establish a general corporate exception to the federal remedy provided by the ATS. *See* Nestlé Pet'r Br. 4; Cargill Pet'r Br. 40-41. They argue that

there "is no 'specific, universal, and obligatory' norm of imposing corporate liability in international law" and that domestic corporations therefore cannot be held liable for international law violations under the ATS. Cargill Pet'r Br. 43 (quoting *Jesner*, 138 S. Ct. at 1399 (plurality op.)); *see also* Nestlé Pet'r Br. 36 ("There is at best 'weak support' for corporate liability in international law." (quoting *Jesner*, 138 S. Ct. at 1400-01)). These arguments are wrong.

To start, international law establishes legal rules, but it leaves implementation of those rules to each nation. "International law . . . consists primarily of a sparse body of norms, adopting widely agreed principles prohibiting conduct universally agreed to be heinous and inhumane. Having established these norms of prohibited conduct, international law says little or nothing about how those norms should be enforced." *Kiobel*, 621 F.3d at 152 (Leval, J., concurring); *Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals.").

While some nations do not provide for civil liability to redress violations of international law, ours does. By adopting the ATS, our law provides a federal forum to hold civilly liable those, including domestic corporations, whose tortious acts violate specific, universal, and obligatory international norms. *See Mexican Boundary-Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250, 252 (1907) (explaining that statutes, including the ATS, "provide[d] a right of action and a forum" after citizens of Mexico had been injured by a corporation's violation of a treaty between the United States and Mexico). As this Court's decision in *Kiobel* made clear, the question in ATS cases "is not whether a

federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law." *Kiobel*, 569 U.S. at 119; *see id.* at 115 (observing that federal courts, under the ATS, "may 'recognize private claims . . . under federal common law'" (quoting *Sosa*, 542 U.S. at 732)); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 265 (2d Cir. 2007) (Katzmann, J., concurring) ("[A]ll [ATS] litigation is in fact based on federal common law . . . ."). Consistent with longstanding principles of corporate liability, domestic corporations may be held liable to the same extent as individuals under the ATS.

To be sure, under the first step in *Sosa*, an alleged violation under the ATS must be of a norm that is "specific, universal, and obligatory," *Kiobel*, 569 U.S. at 117 (quoting Sosa, 542 U.S. at 732), and a plurality of this Court in *Jesner* suggested that the international community's "decision to limit the authority of . . . international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law," 138 S. Ct. at 1401.

But "*Sosa*'s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter." *Id.* at 1420 (Sotomayor, J., dissenting). There is no rule of international law that exempts corporations from liability in a particular country's courts for violations of the law of nations. And there are specific, universal, and obligatory norms of international law forbidding the enslavement of individuals—especially children. Thus, a corporation that aids and abets the violation of that norm—no less than an individual who does—is an "enemy of all mankind." *Sosa*, 542 U.S. at 732 (quoting

Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

CONCLUSION

For the foregoing reasons, the judgments of the court below should be affirmed.

Respectfully submitted,

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